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Criminal Justice and the Challenge of Family Ties

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CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES

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This article asks two basic questions: when does, and when should, the state use the criminal justice apparatus to accommodate family ties, responsibilities, and interests? We address these questions by first revealing a variety of laws that together form a string of “family ties benefits” pervading the criminal justice system. Notwithstanding our recognition of the important role family plays in securing the conditions for human flourishing, we then explain the basis for erecting a “Spartan” presumption against these family ties benefits within a criminal justice system. We delineate the scope and rationale for the presumption and under what circumstances it might be overcome. When the presumption is overcome, we urge distributing the benefit on terms that are neutral to family status, and instead focus on functions served by established relationships of care-giving responsibility.

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INTRODUCTION

Few people envied David Kaczynski. In 1996, he found some old writings by his brother Ted that were similar in tone and content to a manifesto submitted to newspapers in 1995 by a feared terrorist, known to law enforcement agents as the Unabomber. David was then faced with an agonizing choice about whether to disclose his discovery to federal investigators. He ultimately revealed Ted's name, believing that he had assurances from federal authorities that they would not pursue the death penalty against his brother, whom David believed to be mentally ill. When Attorney General Janet Reno decided, nonetheless, to pursue a capital case, David was devastated.¹ Later, Ted Kaczynski pled guilty to charges that carried a life sentence.² Subsequently, David Kaczynski became an anti-death penalty advocate.³

David Kaczynski is perhaps the best-known example in recent years of a family member who provided law enforcement officials with the critical information that led to the arrest of a loved one.⁴ Unsurprisingly, many family members confronted with a dilemma like David Kaczynski's make an entirely different choice.

1. See David Johnston & Janny Scott, *Prisoner of Rage: The Tortured Genius of Theodore Kaczynski*, N.Y. TIMES, May 26, 1996, at 1; Serge F. Kavaleski, *His Brother's Keeper*, WASH. POST, July 21, 2001, at W10.

2. See David W. Chen, *The Unabomber Case: The Survivors; Sadness Now Mixes with Relief and Regret*, N.Y. TIMES, Jan. 23, 1996, at A18.

3. See David Kaczynski, Editorial, *Death Penalty Turnaround*, L.A. TIMES, Apr. 12, 2005, at B13.

4. Indeed, recently, the Suffolk County District Attorney asked parents in the community to turn in their children whom they knew to be involved in crime. See John R. Ellement, *Man Tells Police His Son Shot Teen—In Self-Defense*, BOSTON GLOBE, Jan. 19, 2006, at B7 (quoting Suffolk District Attorney Daniel F. Conley as saying, "I would urge parents, though it is difficult, to turn in their children if they have in fact committed a violent crime"); cf. Kevin Rothstein & Jessica Fargen, *Kin Turn in Suspect for School Shooting*, BOSTON HERALD, Dec. 6, 2005, at 6 ("They definitely did the right thing. The police can't handle the situation alone," Police Commissioner Kathleen O'Toole said of the arrest. "It takes community and it takes responsibility.").

Consider the Sheinbein family, for example. In 1997, a high school senior named Samuel Sheinbein was charged with murder after police found the burned and dismembered body of an acquaintance in the garage of a vacant house in Maryland.⁵ But Sheinbein was never brought to trial in Maryland because he fled to Israel within days of the murder, and Israel subsequently refused to extradite him.⁶

So how was a seventeen-year-old able to get to Israel so quickly? Prosecutors alleged that after learning that his son was a murder suspect, Samuel's father, Sol Sheinbein, brought Samuel, who was then hiding in New York, his passport, some clothing, and a ticket to Israel. Sol also drove his son to the airport,⁷ and then flew to Israel a few days after his son, where he continues to live and work.⁸ Prosecutors in Maryland subsequently filed a misdemeanor charge against him for obstructing a police investigation. But because of the nature of the charge and his status as an Israeli citizen, Sol could not be extradited either.⁹

After Samuel Sheinbein pled guilty before an Israeli court and was sentenced to spend twenty-four years in prison,¹⁰ Sol gave his first interview to an Israeli newspaper. In defending his actions, Sol, a practicing lawyer, stated: "I did some simple soul-searching and I came to the conclusion that with all due respect to the law, I am first of all a father and only after that a citizen."¹¹ Samuel Sheinbein's mother, in an earlier statement, claimed that "any parents would go and would do what we are doing."¹²

5. See Manuel Perez-Rivas & Maria Good, *Md. Teen Sought in Dismemberment Slaying; Warrant Charges Student with Murder After Burned Body is Found in Vacant House*, WASH. POST, Sept. 23, 1997, at D1.

6. See Barton Gellman & Steve Vogel, *Israel Bars Return of Md. Teen, May Hold Murder Trial There; Father, Brother Accused of Helping Aspen Hill Youth Flee*, WASH. POST, Sept. 30, 1997, at A1. Because Samuel's father had been born in Israel, the Israeli authorities considered Samuel to be an Israeli citizen. See *id.* Samuel's lawyer admitted that her client had deliberately fled to Israel because he preferred to be tried and incarcerated there rather than in the United States. See *Montgomery Co. Seeks U.S. Help in Slaying Suspect's Extradition; Teen Fled to Israel, Wants to be Tried There*, BALT. SUN, Oct. 1, 1997, at 2B.

7. See Katharine Shaver & Lee Hockstader, *Charge Filed Against Sol Sheinbein for Helping His Son Flee to Israel*, WASH. POST, Aug. 28, 1998, at C1. Sheinbein also apparently agreed to tell the police if he learned of his son's location, but drove to New York to help his son flee to Israel rather than disclosing that information. See Andrea F. Siegal, *Silver Spring Man Fights to Keep Law License; Accused of Helping Son Flee Md. Murder Charges*, BALTIMORE SUN, Sept. 11, 2002, at 2B.

8. See Barton Gellman & Karl Vick, *Parents Allege Sheinbein Was Being Robbed*, WASH. POST, Oct. 1, 1997, at B1; see also Katharine Shaver, *Patent Office Bars Wanted Lawyer; Ex-Md. Resident Helped Son Flee After '97 Killing*, WASH. POST, June 24, 2005, at B4 (indicating that Sol Sheinbein continued to work on behalf of Israeli clients despite issuance of Maryland arrest warrant in 1998 and disbarment in 2002, filing sixty-four patent applications in the United States since 2001).

9. See Shaver, *supra* note 8, at B4.

10. See Lee Hockstader & Craig Whitlock, *Sheinbein Sentenced to 24 Years: Israeli Court Accepts Recommendation of Plea Agreement; Teenager Can Apply for Parole at 33*, WASH. POST, Oct. 25, 1999, at B1.

11. Ramit Plushnick-Masti, *A Family's Shame: Sheinbein's Parents Describe Their Pain, Bafflement*, WASH. POST, Nov. 5, 1999, at B1.

12. Lee Hockstader, *Judge Says Israel Can Extradite Sheinbein: Appeal of Ruling May Take Months*, WASH. POST, Sept. 7, 1998, at A1. Remarkably, two judges on Maryland's highest court

The choices David Kaczynski and Sol Sheinbein made arise virtually every day in every jurisdiction, where family members have the opportunity to facilitate or obstruct enforcement of the criminal law. Indeed the media recently reported stories about fugitives whose family members created alibis (including reporting the death of the fugitive) for them;¹³ criminals who perpetrated their frauds with the assistance of family members;¹⁴ and white-collar criminals whose spouses offered testimony or other evidence in exchange for a reduction of the criminal liability they themselves faced.¹⁵

The conflict between duties as citizens and loyalties as family members has long been explored in literature—most prominently in *Antigone*, Sophocles's play about a young woman's decision to defy the ruler Creon in favor of affording her brother Polynices a proper burial. Nonetheless, it is a relatively uncharted area in legal scholarship.¹⁶ This is especially so with respect to how this classic tension manifests itself within the criminal justice system.¹⁷

The goal of this article is to expose some of the various challenges the American criminal justice system faces when it decides upon the proper treatment of family ties and responsibilities.¹⁸ We find that the

agreed. Judge Eldridge, who dissented from the majority's opinion disbaring Sol Sheinbein from the practice of law in Maryland, suggested that Sheinbein had done no more than "forum shop" for the most advantageous jurisdiction in which to have his son tried. See *Att'y Grievance Comm'n v. Sheinbein*, 812 A.2d 981, 1007–09 (Md. 2002) (Eldridge, J., dissenting, joined by Judge Raker).

13. See, e.g., *Long Thought Dead, Suspect Turns up Alive*, ST. PETERSBURG TIMES, Sept. 25, 2005 (describing role that the son of a man, suspected of murder, played in helping the world think his father was dead); *Reported as Dead, a Suspect in 1964 Killings Is Found Alive*, N.Y. TIMES, Sept. 25, 2005, at A26.

14. See Carrie Johnson, *Prosecutors Making Fraud Cases Relative: Government Targets Family of Accused*, WASH. POST, Nov. 27, 2003, at A1 (discussing the Adelphia case where prosecutors indicted the founder of the company and his two sons); Press Release, Securities and Exchange Commission, SEC Charges Adelphia and Rigas Family with Massive Financial Fraud (July 24, 2002), available at <http://www.sec.gov/news/press/2002-110.htm>.

15. See Kurt Eichenwald, *Ex-Chief Financial Officer of Enron and Wife Plead Guilty*, N.Y. TIMES, Jan. 15, 2004, at C9 (noting that Lea Fastow, Mr. Fastow's wife, who was a former assistant treasurer at Enron, entered a separate guilty plea to a single tax felony stemming from efforts she made to hide income that came from one of her husband's secret dealings with an Enron colleague).

16. A few legal scholars have addressed *Antigone's* plight, e.g., Martha Grace Duncan, "A Strange Liking": *Our Admiration of Criminals*, 1991 U. ILL. L. REV. 1, 17–18; Mark S. Howenstein, *The Tragedy of Law, and the Law of Tragedy in Sophocles' Antigone*, 24 LEGAL STUD. F. 493 (2000), but none, so far as we know, has systematically looked at the intersection of the criminal justice system and the role of family ties the way this article does.

17. The analogy to *Antigone* is admittedly imperfect. First, Creon was also *Antigone's* uncle and arguably a paternal surrogate because her father Oedipus had been expelled from Thebes. Consequently, one could view the conflict *Antigone* faces as intrafamilial, as well as a duel between the family and state. Second, we are more sympathetic to *Antigone's* plight because the edict she was flouting was unreasonable and oppressive, and an especial affront to the social norms of Greek times, which required proper burial for the dead lest their souls wander forever after. See Duncan, *supra* note 16, at 18. Thus, *Antigone's* defiance of Creon may be viewed as rebellion against an unjust law, whereas Sheinbein's father, for example, cannot fairly protest the justice of the relevant law prohibiting murder.

18. We refrain from taking positions on the definitional makeup of the family on account of our normative position that the criminal law should generally be drafted in terms that are neutral to the status of a family member. To the extent recognition of care-giving relationships is warranted, as we

state does not always impinge upon family members in the course of investigating or prosecuting all the crimes about which it knows. Indeed, sometimes the law defers to the decision of family members to prioritize their duties to family over their duties as citizens. We characterize state policies that seem to defer to or promote family interests as “family ties benefits.”¹⁹

At the core of this article stand two basic questions: when does, and when should, the state use the criminal justice apparatus to accommodate, protect, or benefit family interests? The article answers these descriptive and normative questions separately. Throughout Part I, we provide an overview of the multiple sites in which family life intersects with the criminal justice system. We trace these intersections from the initial decision by family members to engage in criminal activity through the entirety of the eventual intervention by the criminal justice system. For example, we focus on efforts by some states to shield from prosecution family members who harbor fugitives or conceal relevant information from law enforcement officials. We also explore how jurisdictions offer evidentiary privileges and other exemptions affecting evidence-gathering that constrain the state from intruding into familial relationships. We then turn to matters of pretrial release, sentencing, and prison administration, where many jurisdictions expressly permit consideration of family ties when making decisions in these areas. In closing Part I, we specify which aspects of these intersections between criminal law and the family are properly characterized as family ties benefits, and which ones are likely not.

Part II then takes a normative turn and offers a framework for assessing family ties benefits within the criminal justice system: we assess the costs that they are likely to exact from society and explore why they should generally be rejected absent a compelling state interest. We begin with an appreciation of the important role families play in securing the conditions for human flourishing.²⁰ We also note the ambivalent relationship the state has with the family: on the one hand, the state depends on the family to prepare individuals for their role as citizens; on the other hand, the state must compete with the family for the loyalty of individual

explain in Part III, the law should instead use terms that are sensitive to care-giving functions instead of traditional family-based status.

19. When we say the state extends a benefit because of family ties, we are using that term in an expansive manner, for what we are really referring to are situations where the state extends a privilege to (or forbears requiring something from) a family member *on account of his being a family member* with someone else. (We tend not to use the word “privilege” to help avoid confusion; evidentiary privileges are just one example of these family ties benefits.) Some might think these benefits merely “respect” family ties rather than benefit them, but we think that because these benefits have real consequences (as opposed to simply conveying attitudes of respect), it is better to characterize them as actual benefits.

20. Here, we develop an account drawing on several sources, including Linda McClain’s work. See, e.g., LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* (2006); Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1624–27 (2001).

members. That discussion serves as a springboard for our critique of family ties benefits in the realm of criminal justice.²¹

Part II articulates four distinct normative concerns that may arise when extending special accommodations to families in the criminal justice system.²² First, the historical context in which the family's relationship to the criminal law has evolved reveals that many family ties benefits often served (and in some cases, continue to serve) to perpetuate patriarchy, gender hierarchy, or domestic domination. Our second concern is that accommodations to families might impede the realization of criminal justice understood as the effective and accurate prosecution of the guilty and the exoneration of the innocent.²³ Our third reservation stems from the way that family ties preferences can disrupt norms of equality that should otherwise prevail in an attractive regime of liberal governance. On this view, criminal investigations and prosecutions should treat citizens' interests with equal concern, and without fear or favor. The extension of special privileges to persons simply because of their family situation bears an onus of justification, especially since the policy that extends such privileges will have a negative and discriminatory effect on those without family ties—some of whom never made actual choices to avoid family ties. Fourth, we note that some family ties benefits can have the undesirable effect of incentivizing more criminal activity—and more successful criminal activity at that. To the extent the law effectively signals messages to the public, some family ties benefits encourage family members to keep their criminal enterprises in the family. For example, if sentencing policies serve to create a class of persons that are immune from incarceration or that receive heavy discounts in their prison terms, then those persons will be the most sought after to serve in criminal enterprises—or they themselves might seek out criminal activity.

We think these four considerations, taken together, suffice to create a "Spartan presumption" against family ties benefits in the criminal justice system.²⁴ Of course, erecting a presumption does not entail eliminat-

21. For examples of scholarship advocating such benefits, see Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133 (1999); Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993) [hereinafter Raeder, *Gender and Sentencing*]; Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045 (1995).

22. We recognize that not each family ties benefit will implicate all of these concerns. We therefore begin with only a presumption against family ties benefits, rather than wholesale hostility.

23. When we use the term inaccuracy, we are using that term to refer to the idea that justice is not being accurately realized (in terms of effective prosecution of the guilty and exoneration of the innocent). In this sense, inaccuracy might also indicate an unjustified leniency (or harshness), which is a matter that can also be seen when considered in the context of equality issues.

24. We utilize the term "Spartan" presumption quite ironically, aware that the Spartan regime placed undue emphasis on loyalty to the state over loyalty to the individual or the family unit. See, e.g., William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 245 n.45 (1998) (describing ancient Sparta as a place "where family life, education, and public resources were all directed toward the cultivation of military virtues"); Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 632 ("Who . . . can ever forget the

ing accommodations of family ties; instead, we propose that such benefits undergo a set of searching inquiries. First, to what extent does the family ties benefit in question contribute to patriarchy, inaccuracy, inequality, or heightened risk of crime—the normative costs often associated with family ties benefits? Second, assuming the benefit implicates one or more of these concerns, to what extent does the benefit vindicate a compelling state interest that justifies the use of the benefit in the criminal justice system? Finally, are other less troubling means—means that can be crafted in terms that are neutral to family status—available to protect the interest underlying the benefit? To be sure, this kind of scrutiny will not resolve all questions: we will inevitably have disputes about the strength of competing claims. But it will do some important work in helping us think more clearly about the problem before us, and, in close cases, will alert us to some of the potentially hidden costs of family ties benefits.²⁵

In Part III, we apply the normative framework developed in Part II to assess some of the benefits we identified in Part I. Some we find good reason for eliminating or curtailing substantially—evidentiary privileges, exemptions from prosecutions, and sentencing discounts in most cases. In other instances, we argue that the Spartan presumption is rebutted because the normative costs of the benefits are relatively low and an overriding interest justifies the use of the benefit. And in some cases—child-sensitive arrest practices, in particular—the normative costs are so low or nonexistent that even without an overriding interest, the presumption can be rebutted. Finally, in many cases, we suggest there are policies neutral to family status that can be used to achieve the underlying goal of facilitating care giving without encroaching on the core values of the criminal justice system—and we demonstrate how those could work in particular instances. Part IV concludes with some reflections relevant for future theoretical and empirical work in this area.

I. AN OVERVIEW OF FAMILY TIES AND CRIMINAL JUSTICE

Issues related to a defendant's family ties arise throughout the life cycle of both the actual crime and any subsequent intervention by the criminal justice system. The Sections below explore many of these points of intersection and highlight the more salient ones for our project.

Spartan mother who berates the messenger for first telling her that her five sons have died before indicating that the Spartans indeed had won the battle?"').

25. For the most part, our discussion centers on legal policy issues, which are in many cases, more appropriately developed by legislatures. However, our argument does address the issue of new intrafamilial privileges, as well as the use of some common law defenses, which are typically addressed in the courts in the first instance.

A. *The Commission of a Crime*

Sadly, the most obvious intersection of a family relationship and criminal activity occurs in the selection of a victim. The Bureau of Justice Statistics recently reported that “[f]amily violence accounted for 11 percent of all reported and unreported violence between 1998 and 2002.”²⁶ Forty-nine percent of these crimes involved a spouse attacking a spouse, and eleven percent involved a parent attacking a child.²⁷ In 2002, approximately twenty-two percent of all murders committed that year involved the murder of a family member.²⁸

On the other hand, a defendant’s family responsibilities may also provide the motive for criminal activity. Like Victor Hugo’s Jean Valjean,²⁹ accused thieves may claim that they stole food or money in order to sustain their family.³⁰ Mercy killers might claim that they killed solely to end a loved one’s suffering and not to derive any personal benefit.³¹ A parent might kill to avenge a crime committed against a child.³²

Family members of the primary defendant have multiple decisions to make in relation to the commission of a crime. First, they can decide whether to become involved in the crime itself—before, during, or after its commission. Second, whether they ultimately become involved or not, once they have knowledge of the crime they have to decide whether to help law enforcement authorities, either by disclosing information about the crime in the first instance or cooperating with law enforcement officials once a formal investigation is underway.

The story of David Kaczynski is just one of the better-known examples of family members grappling with the dilemma of whether to turn a family member over to the authorities.³³ In California, a police sergeant

26. BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS 1 (2005).

27. *Id.*

28. *Id.*

29. See VICTOR HUGO, *LES MISÉRABLES* (Lee Fahnestock & Norman MacAfee trans., 1987).

30. See, e.g., *Thief Says She Hit Bank for Her Kids*, CHI. TRIB., Mar. 22, 1992, at 3 (describing the case of a woman who robbed a bank in order to be able to fulfill outstanding child support obligations and thus win the right to see her children again); *Thief Sentenced to Read ‘Les Miserables,’* UNITED PRESS INT’L, June 9, 1998 (discussing a judge’s decision to require a man who stole a turkey to feed his family to read *LES MISÉRABLES* as part of his sentence).

31. See, e.g., *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987) (upholding the conviction of a man who claimed that he killed his father in his hospital bed in order to end his suffering).

32. See, e.g., *People v. Nesler*, 941 P.2d 87 (Cal. 1997) (addressing problems in sanity phase of trial of a mother who shot to death the man who had sexually molested her young son).

33. For similar examples of a brother making the same decision as David Kaczynski, see *Cantu v. State*, 939 S.W.2d 627, 631 (Tex. Crim. App. 1997); Elise Ackerman & Marianne Lavelle, *Thicker Than Blood*, U.S. NEWS & WORLD REP., Dec. 1, 1997, at 30, 32 (describing the case of Joe Cantu, who turned his younger brother in to the police after hearing his brother laughing about the fact that he had just participated in the gang rape and murder of two young girls); Linda Grace-Kobas, *Death Penalty Offers Families No Closure, Law School Speakers Say*, CORNELL CHRON., Mar. 20, 2003, available at http://www.news.cornell.edu/Chronicle/03/3.20.03/death_penalty_forum.html (describing case of Bill Babbitt, who told the police that he believed his brother Manny had killed an elderly woman and then was horrified when Manny, a paranoid schizophrenic, was eventually executed for the crime); Serge F. Kovalski, *His Brother’s Keeper*, WASH. POST, July 21, 2001, at W10.

was suspended for helping his son evade arrest after committing a series of bank robberies.³⁴ In Louisiana, a sheriff's deputy advised his son that warrants had been issued for his arrest on child pornography charges and helped him flee the jurisdiction.³⁵ In Minnesota, a mother arrived home just after her son had shot and killed an acquaintance in her kitchen. Instead of calling the police, the mother helped dump the body in an alley and clean up the bloody crime scene.³⁶ These conflicts of loyalty trigger significant media and public interest in the decisions made by the family members;³⁷ importantly, those who cooperate with law enforcement are often subjected to being called a "snitch," and are regarded as people who violate "the taboo against turning on one's family."³⁸

34. See Beth Shuster, *Veteran LAPD Officer Aided Fugitive Son, Panel Finds*, L.A. TIMES, Mar. 27, 1996, at B3. The sergeant ultimately received a thirty-three-day suspension. See also Andrew Blankstein, *Member of Robbery Ring Convicted*, L.A. TIMES, Apr. 25, 1997, at B4.

35. See Mandy M. Goodnight, *Vernon Deputy Sentenced to Jail*, ALEXANDRIA DAILY TOWN TALK (Alexandria, La.), May 24, 2003, at 4A. The deputy was convicted of assorted criminal charges related to his assistance and sentenced to spend one year in prison.

36. See David Chanen, *Woman Charged As Accomplice to Her Son's in Shooting Death*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Dec. 15, 1998, at 5B. For other examples, see Ackerman & Lavelle, *supra* note 33, at 30 (describing how the brother of Thomas Capano, a well-known political figure in Delaware, helped him dump the body of his former mistress into the ocean); M. Hernandez, *Woman Sentenced for Role in Killing*, VENTURA COUNTY STAR, Apr. 26, 2005, at 2 (describing how a mother, who had witnessed her son stab a man to death, helped her son flee to Mexico to avoid arrest); Ed Pope, *Police Charge Father in Fugitive Insurance Fraud Case*, SAN JOSE MERCURY NEWS, Mar. 2, 2000 (describing how a father destroyed evidence to prevent police from locating his daughter, who was charged with participating in a \$10 million insurance fraud scheme).

37. See William Booth, *Kaczynski's Brother Expresses Sadness, Relief in Aftermath of Plea; Accuser Still Feels Powerful Sibling Connection*, WASH. POST, Jan. 24, 1998, at A3; Don Oldenburg, *What If He Were Your Brother? When David Kaczynski Fingered the Unabomber Suspect, He Became the Star in a Morality Play*, WASH. POST, Apr. 11, 1996, at C1.

38. See Oldenburg, *supra* note 37 (describing comments by G. Gordon Liddy). We were unable to locate any rigorous empirical work attempting to answer the question of what most Americans would do if they learned a family member had committed a serious crime. *USA Today* conducted a telephone poll of 305 adults in 1990 that was prompted by the Charles Stuart case in Boston, in which Stuart murdered his pregnant wife and famously accused a black man of committing the crime. Stuart became a suspect only after his brother went to the police. Eight percent said they would not turn in a family member accused of murder; 79% said that they would. See Tom Squitieri & John Larrabee, *Poll: 79% Say They'd Turn in Kin Who Killed*, USA TODAY, Jan. 15, 1990, at 3A. The newspaper acknowledged two problems with the survey: first, the outcome might well have been affected by the outrageous facts of the Stuart case itself. See *id.* (quoting criminologist James Fox, who stated that "[t]hese poll results would have been very different if the survey had been done last year. . . . It's not what they would do, but what they would have liked the Stuarts to do"). Second, "experts" acknowledged that the results might "reflect the 'socially desirable response' rather than the real-life action" that people would take if actually confronted with the situation. *Id.* We suspect that relatives' decision making would vary on two vectors: the severity of the crime and the degree of closeness of the relative (whether closeness is measured in emotional closeness or bloodline closeness). It probably would be hard, for example, to turn in a child for all but the most heinous crimes, and it would be comparatively less heart wrenching to turn in a distant cousin even if a more serious crime was involved.

B. The Prosecution: Investigation, Charging Decisions, and Pretrial Release

1. The Investigation

After the investigation of a crime has commenced, prosecutors have to decide whether to interview family members and whether to subpoena them to testify before the grand jury. One of the more well-known recent examples of a prosecutor subpoenaing a family member to testify before the grand jury involved Marcia Lewis, Monica Lewinsky's mother. Kenneth Starr, the prosecutor, plainly had reason to believe that Lewis might possess relevant information; she was known to have a very close relationship with her daughter and was believed to have discussed Starr's investigation with her.³⁹ Nevertheless, his decision to subpoena Lewis was controversial.⁴⁰ Lewinsky's lawyer called Starr's decision "disgraceful"; Lewis's own lawyer argued that "no mother should ever be forced by federal prosecutors to testify against their child."⁴¹

Two aspects of the Lewis controversy merit emphasis. First, several commentators asserted during Kenneth Starr's investigation that it was extremely unusual to subpoena family members during a criminal investigation.⁴² Based on one of the authors' seven years of experience as an Assistant United States Attorney⁴³ and on a recent informal survey of prosecutors across the country, these assertions are inaccurate. Prosecutors regularly interview as many family members as feasible and, if appropriate, subpoena them to testify before the grand jury. Indeed, it would be irresponsible to ignore family members, who often are in possession of extremely relevant information. Because of their proximity to and relationship with a defendant, family members often become confidants of the defendant and might even have been in a position to witness the crime. Moreover, requiring a family member to testify before the grand jury can be a very effective tool for previewing any testimony a family member might offer on a defendant's behalf at the criminal trial and for "locking in" that testimony. For example, if a defendant's

39. See Jeff Leen, *Mother Has Supporting Role in Lewinsky's Capital Drama*, WASH. POST, Feb. 4, 1998, at A1; see also Judy Keen & Kevin Johnson, *For Mom, Spotlight Could Burn*, USA TODAY, Feb. 11, 1998, at 4A (suggesting that prosecutors were in possession of a taped phone call showing that Lewinsky had talked to her mother about how to impede the sexual harassment suit pending against President Clinton).

40. See, e.g., Naftali Bendavid, *Lewinsky's Mother Testifies: Starr's Subpoena Stirs Up Ethical and Legal Debates*, CHI. TRIB., Feb. 11, 1998, at 1; Art Buchwald, *Save Moms from Starr*, NEWSDAY, Feb. 18, 1998, at A40; Lawrence Goodman, *Lawyers Rap Handling of Mom*, N.Y. DAILY NEWS, Feb. 14, 1998, at 2; Stuart Taylor, Jr., *Must A Parent Testify?*, NEWSWEEK, Feb. 23, 1998, at 33.

41. See Richard T. Cooper, David Willman & Cecilia Balli, *Lewinsky's Mother Leaves Distraught After Testimony*, L.A. TIMES, Feb. 12, 1998, at A16. One commentator went so far as to argue that Starr's subpoena "could endanger the institution of parenthood as we know it." Buchwald, *supra* note 40.

42. See, e.g., Bendavid, *supra* note 40, at 28 (citing statements by attorneys Bruce Yannett and Jeffrey Jacobovitz suggesting that Starr's decision to subpoena Lewinsky's mother was an aberration).

43. The prosecutor was Professor Collins.

mother testified before the grand jury that she had no idea of her son's whereabouts at the time the murder in question was committed, her grand jury testimony would be a powerful impeachment tool if she attempted to provide an alibi defense for her son at trial.

Second, the Lewinsky controversy highlights the ongoing dispute regarding the scope of testimonial privileges that should be extended to family members, an issue that will be discussed in greater detail in Part I.C.

2. *Charging Decisions*

Some of the most difficult decisions for law enforcement arise in relation to the charging decision. If a family member has cooperated with the primary defendant in some way, should that family member be prosecuted? Prosecutors have grappled with that question in several recent high-profile corporate crime cases, such as those involving the Enron, Adelphia, and ImClone corporations.⁴⁴

The prosecution decision is typically an easy one if the family member is involved in the crime as a principal in the classic sense of the term.⁴⁵ The difficult decisions for prosecutors lie at the margins of criminal involvement, when a family member has acted as an accessory, particularly as an accessory after the fact.⁴⁶ Typical charging options in this scenario would be obstruction of justice or hindering prosecution, harboring a fugitive, or accessory after the fact for states that retain that charging option.

a. Exemptions for Family Members Harboring Fugitives

Remarkably, in fourteen states, the prosecution of family members for harboring fugitives is not an option, regardless of the nature of the

44. In the Enron case, for example, Enron chief financial officer Andy Fastow and his wife Lea were both indicted in connection with the fraud. See Carrie Johnson, *Prosecutors Making Fraud Cases Relative: Government Targets Family of Accused*, WASH. POST, Nov. 27, 2003, at A1. In the Adelphia case, prosecutors indicted the founder of the company and his two adult sons. *Id.* Similarly in ImClone, executive Sam Waksal pled guilty to fraud charges "in an attempt to spare his daughter and his [eighty-year-old] father from being charged with insider trading." *Id.* Johnson also cites the case of Aldrich Ames, whose deal to plead guilty to espionage charges included a promise of leniency for his wife. *Id.*

45. A principal in the first degree, of course, would be the family member who physically commits the offense. Joshua Dressler defines a "principal in the second degree" as "one who is guilty of an offense 'by reason of having [intentionally assisted] . . . in the commission thereof in the presence, either actual or constructive, of the principal in the first degree.'" JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 464 (3d ed. 2001).

46. Dressler describes an accessory after the fact as "one who, with knowledge of another's guilt, intentionally assists the felon to avoid arrest, trial, or conviction." *Id.* at 465. Although most states have eliminated the various common law categories of principal and accomplice liability, many states still treat accessories after the fact as a separate category of offender, and often worthy of a less severe degree of punishment. *Id.* at 432-33.

crime or the extent of the family member's involvement.⁴⁷ These states typically exempt spouses, parents, grandparents, children, grandchildren, and siblings from prosecution for providing assistance to an offender after the commission of a crime "with the intent that the offender avoids or escapes detection, arrest, trial, or punishment."⁴⁸ An additional four states reduce liability for an immediate family member but do not exempt them from prosecution entirely.⁴⁹

Florida's statutory exemption for family members is one interesting example. It forbids prosecution of spouses, parents, grandparents, children, or grandchildren for helping an "offender avoid[] or escape[] detection, arrest, trial, or punishment," with one important exception.⁵⁰ The exemption does not apply if the primary offender is alleged to have committed child abuse or neglect or the murder of a child under the age of eighteen, "unless the court finds that the person [claiming the exemption] is a victim of domestic violence."⁵¹

These statutes are significantly broader than the exemption that existed at common law, which forbade only the prosecution of a wife as an accessory, but not the prosecution of a husband for aiding his felon wife or the prosecution of other family members.⁵² Despite the popularity of the broader exemptions among many states, the Model Penal Code drafters rejected the inclusion of a family member exemption in its accessory provision, "in part on the ground that this is a factor that can be

47. The states that provide exemptions for family members are Florida, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Nevada, New Mexico, North Carolina, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. See FLA. STAT. ANN. § 777.03 (West 2004); 720 ILL. COMP. STAT. ANN. 5/31-5 (West 2005); IND. CODE ANN. § 35-44-3-2 (West 2005); IOWA CODE ANN. § 703.3 (West 2004); KY. REV. STAT. ANN. § 520.110 (West 2004); MASS. GEN. LAWS ANN. ch. 274, § 4 (West 2005); NEV. REV. STAT. ANN. § 195.030 (West 2004); N.M. STAT. ANN. § 30-22-4 (West 2005); N.C. GEN. STAT. ANN. § 14-259 (West 2004); R.I. GEN. LAWS ANN. § 11-1-4 (West 2004); VT. STAT. ANN. tit. 13, § 5 (West 2004); VA. CODE ANN. § 18.2-19 (West 2004); W. VA. CODE ANN. § 61-11-6 (West 2005); WIS. STAT. ANN. § 946.47 (West 2004).

48. See FLA. STAT. ANN. § 777.03. Iowa is more restrictive in that it only exempts spouses from criminal liability. See IOWA CODE ANN. § 703.3. Illinois and North Carolina do not include grandparents or grandchildren within their exemptions. See 720 ILL. COMP. STAT. ANN. 5/31-5; N.C. GEN. STAT. ANN. § 14-259. Indiana does not include grandparents, grandchildren, or siblings. See IND. CODE ANN. § 35-44-3-2.

49. These states are Arkansas, New Jersey, Washington, and Wyoming. See 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). Washington, for example, typically treats rendering criminal assistance to a murder suspect as a Class C felony, but only as a gross misdemeanor if committed by an immediate family member. See WASH. REV. CODE ANN. § 9A.76.070.

50. See FLA. STAT. ANN. § 777.03(1)(a).

51. See *id.* § 777.03(1)(b).

52. See WILLIAM BLACKSTONE, 4 COMMENTARIES *38-39 ("So strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent; if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves the wife, who have any of them committed a felony, the receivers become accessories *ex post facto*. But a female covert can not become an accessory by the receipt or concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord."); Leo Gerard Smith, Note, *Family Member Exemption for Accessory After the Fact*, 20 J. FAM. L. 105, 107-09 (1981) (discussing common law exemption for wives).

taken into account at sentencing.”⁵³ The drafters also noted that “exemption rules create trial difficulties if the government bears the burden of proving that none of the specified relations exists.”⁵⁴

No federal law currently provides a family member with an exemption from prosecution.⁵⁵ Some federal courts, however, have at least expressed sympathy to the pleas of family members charged with aiding an accused relative. For example, in *United States v. Oley*,⁵⁶ although upholding the right of the government to charge a wife with harboring her fugitive husband, the court remarked that “[i]t would undoubtedly be difficult to obtain a conviction charging wives with harboring their husbands” and that “it might be regarded as inhuman and unnatural on the part of a wife to surrender her husband to the authorities and contrary to the instincts of human beings to do so.”⁵⁷

Some states have grappled with the constitutionality of the family exemption. For example, in upholding Florida’s statute against an equal protection challenge, a Florida appeals court emphasized “society’s interest in safeguarding the family unit from unnecessary fractional pressures” and applauded the legislature’s decision to “confer[] immunity so that these individuals need never choose between love of family and obedience to the law.”⁵⁸ The New Mexico Supreme Court similarly upheld its state statute against a constitutional challenge, but did not engage in any sustained analysis and instead simply stated that the statute’s classifications were reasonable and thus consistent with the Equal Protection Clause.⁵⁹

More recently, the Ninth Circuit concluded, as a matter of federal law, that it was indeed constitutional to prosecute a spouse for hiding her husband and his assets.⁶⁰ In *United States v. Hill*,⁶¹ Patricia Hill claimed that her prosecution on charges of harboring a fugitive and accessory after the fact for helping her husband evade child support obligations to his first wife was unconstitutional because the government sought to “criminalize conduct in which she is entitled to engage under the First and Fifth Amendments to the Constitution,” specifically “her rights of association, marriage, privacy, and due process.”⁶² Although the court noted that “basing a harboring or accessory conviction on normal and expected

53. MODEL PENAL CODE § 242.3 cmt. at 237 (1980).

54. *Id.*

55. See Smith, *supra* note 52, at 123–24 (discussing the treatment of family member exemptions in the federal system).

56. 21 F. Supp. 281, 282 (E.D.N.Y. 1937).

57. *Id.*; see also *Haupt v. United States*, 330 U.S. 631 (1947). In *Haupt*, the defendant was charged with treason for aiding his saboteur son during World War II, but the Supreme Court noted that the possibility the defendant’s acts were motivated by “parental solicitude” rather than “adherence to the German cause” was certainly a relevant factor for the jury’s consideration. *Id.* at 641.

58. *State v. C.H.*, 421 So. 2d 62, 65 (Fla. Dist. Ct. App. 1982).

59. See *State v. Lucero*, 541 P.2d 430, 434 (N.M. 1975).

60. *United States v. Hill*, 279 F.3d 731, 733–34 (9th Cir. 2002).

61. See *id.*

62. *Id.* at 736.

spousal conduct might well violate *Griswold*,” it concluded that Hill’s conduct in this case crossed the line past “normal spousal conduct” and into the realm of the intentional frustration of law enforcement.⁶³

b. Familial Status Defenses in Law and Practice

Another important way in which the criminal justice system uses family ties to mitigate or eliminate criminal responsibility is when a defendant has selected a family member as his victim. Some of the most striking examples of the criminal justice system’s recognition of family relationships occur in relation to crimes committed against women and children by a family member. A general hesitance to intervene in family life, even to protect a family’s most vulnerable members, is a deeply ingrained historical tradition in this country.⁶⁴ In recent years, we have of course seen some progress in criminal justice policy,⁶⁵ such as the repeal of marital rape exemptions in many states,⁶⁶ the increased law enforcement attention and funding devoted to spousal battering,⁶⁷ and the widespread adoption of mandatory child abuse reporting statutes.⁶⁸ But the general tradition of noninterference in crime involving intrafamily violence is hardly a historical relic. As a result, we can look at the way various criminal justice systems carve out exceptional treatment (in the form of liability or sentencing) for offenders who commit crimes against family

63. *Id.* at 737.

64. See, e.g., Jane C. Murphy, *Rules, Responsibility, and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1165 (1999) (“One of the most deeply embedded principles in American family law is the principle of family autonomy, which limits the state’s intervention in the affairs of the intact family.”); Carl F. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835–39 (1985) (discussing the “legal tradition of noninterference in the family”); Elizabeth S. Scott & Robert F. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406 (1995) (noting that academic commentators have begun to argue that “the latitude given to parents in rearing their children is . . . excessive, allowing some parents to inflict unmonitored and unsanctioned harm on their children” and that “the tradition of legal protection of parental rights has deep historical roots”); see also discussion *infra* Part II.B.1. But see Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880–1920*, 77 U. COLO. L. REV. 101, 101 (2006) (revising the “feminist understanding of the legal history of public responses to intimate homicide by showing that, in both the eastern and the western United States, men accused of killing their intimates often received stern punishment, including the death penalty, whereas women charged with similar crimes were treated leniently” for the period under review).

65. See generally Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001).

66. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1485 (2002–2003) (stating that since the mid-1970s, marital immunity for sexual offenses was eliminated in twenty-four states and the District of Columbia).

67. See generally EVE S. BUZAWA & CARL G. BUZAWA, *DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE* (2d ed. 1996) (describing reform efforts in police and prosecutors’ offices); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 7 (2006) (critically appraising the “use of protection orders to prohibit the cohabitation and contact of intimate partners” where domestic violence has occurred).

68. See ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 173 (1987) (noting that “no other piece of modern social legislation has been so quickly adopted by all the states”).

members—what might be called the “law on the books”—and at the same time examine the “law in the streets,” the way various practices in the criminal justice system also contribute to differential treatment of those who commit crimes against family members.

For laws on the books that treat family members differently, consider the classic context in which a defendant tries to reduce his responsibility for an intentional killing by claiming provocation in response to learning of a wife's infidelity.⁶⁹ Indeed, under the “modern” version of the provocation doctrine, defendants often can reduce their liability for an intentional killing from murder to manslaughter when “the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order.”⁷⁰ Other apparent sanctuaries from the reach of criminal law persist in the realm of crimes committed against spouses: some states extend preferential treatment to a sexual offender who victimizes a spouse.⁷¹

Family ties recognition is even more pronounced in the context of crimes committed against children. A notable example of this kind of family ties benefit is the acceptance of the “parental discipline defense” in child abuse prosecutions. Although the contours of the defense vary somewhat between states, in general the defense exempts parents from prosecutions for assault if the corporal punishment was used to “benefit” the child and if the nature of the punishment used was objectively reasonable.⁷² This defense is raised in both fatal and nonfatal cases of child abuse.⁷³ Deana Pollard recently conducted a comprehensive examination of child corporal punishment in the United States and concluded that every state still uses some variant of “a justification-based defense that operates to defend parents from liability for even severe physical violence and injury to minors,” as long as the parent was “engag[ed] in ‘discipline’” at the time of the conduct in question.⁷⁴ The use of this special defense for parents persists even though twenty-seven states and the District of Columbia ban spanking in schools and thirty-nine states ban

69. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 72 (1992); Laurie Taylor, *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1692–96 (1986).

70. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1332 (1997) (footnotes omitted).

71. See Anderson, *supra* note 66, at 1486. Professor Anderson argues that the benefits fall into three categories: “those that exempt spouses from sexual offenses other than forcible rape, those that maintain separate spousal sexual offense statutes, and those that impose extra requirements for the prosecution of marital rape.” *Id.*

72. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 641 (2003).

73. *Id.* at 621.

74. *Id.* at 634–35. Professor Pollard's article contains an excellent discussion of different approaches states take in evaluating parental claims that the injuries they inflicted upon their children should not be considered child abuse because they were simply disciplining their children. *Id.* at 635–46. She also notes that, despite mounting evidence about the dangers posed by spanking, ninety percent of American parents still hit their children. *Id.* at 577.

spanking in day care centers.⁷⁵ The Model Penal Code also recognizes a variant of this defense, stating that "the use of force against another is justifiable if: (1) the actor is the parent . . . and (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct"⁷⁶

In addition to the parental discipline defense, familial status is recognized in the context of sex offenders who victimize their own children. These sex offenders benefit from three kinds of statutory disparities: incest loopholes, sentencing loopholes, and sex offender registration loopholes.⁷⁷ In other words, they benefit from statutory schemes that treat them differently (and more leniently) than would be the case if the misconduct had been perpetrated against nonfamilial victims.⁷⁸ For example, sexual offenses against one's own children can be prosecuted under incest statutes, instead of general sexual abuse statutes or rape statutes. The benefit of incest convictions is that they "typically carry far less significant penalties."⁷⁹ According to a recent survey, "twenty-six states retain some preferential treatment for incest offenders as compared to other sexual offenders."⁸⁰

Additionally, parents receive further preferential statutory treatment through exemption from sexual offender registration requirements. In the last dozen years or so, every state has enacted some form of scheme in which convicted sex offenders must register with the state. Nonetheless, under some of these statutes, parental offenders receive preferential treatment. In a fascinating recent article, Rose Corrigan focuses on the implementation of Megan's Law in the state of New Jersey.⁸¹ New Jersey uses something called a "Registrant Risk Assessment Scale" to determine a defendant's risk of reoffending. Defendants deemed to have higher risk levels are subject to more extensive community notification requirements.⁸² One of the scale's criteria is "victim selection." Offenders who victimize strangers are given the highest possible score under this criteria, while offenders who victimize "household/family" members are given the lowest possible score and deemed to

75. See *id.* at 586.

76. See MODEL PENAL CODE § 3.08 (1985); see also Pollard, *supra* note 72, at 641 (discussing the Model Penal Code's adoption of a parental discipline defense).

77. 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. (forthcoming Oct. 2007) (manuscript at 18, on file with the University of Illinois Law Review) (citing state statutes of incest loopholes).

78. See *id.*; see also Leonore M.J. Simon, *Therapeutic Jurisprudence: Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 493-95 (1999) (discussing preferential treatment given to family sex offenders in the State of Washington).

79. See Collins, *supra* note 77 (manuscript at 13) (citing incest loopholes in state statutes).

80. See *id.* (manuscript at 14-16) (citing state statutes with incest "preferences"). Parents can also receive further preferential statutory treatment through exemption from sexual offender registration requirements. *Id.*

81. See Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267 (2006).

82. *Id.* at 285-86.

be low-risk offenders.⁸³ Corrigan argues that New Jersey's view of "incest as a crime rarely committed and seldom repeated means that in many jurisdictions, acquaintances and intimates are, by definition, incapable of being 'predators' for the purposes of registration and notification."⁸⁴ Further, "[i]ndividuals convicted of incest are excluded from the state's online sex offender database."⁸⁵

As to the law in the streets, we see how practices of investigation and prosecution permit the scourge of domestic violence (chiefly against women) to continue, though admittedly not at the same levels of indifference as a generation ago.⁸⁶ Notwithstanding important changes in many jurisdictions,⁸⁷ this violence occurs in the context of a recent history where many police officers and prosecutors expressly devised and implemented policies of noninterference in "private" family life.⁸⁸

In practice, parents also continue to benefit from pervasive preferences that render their effective prosecution more unlikely: for instance, prosecutors may face substantial difficulties in securing convictions against parents on homicide charges in child abuse cases because juries are disinclined to think that parents are capable of wanting to hurt their children.⁸⁹ Moreover, prosecutors often face a public backlash when they seek to prosecute parents on account of a child dying due to parental negligence, even though no objections are raised to prosecuting unrelated caregivers in comparable circumstances.⁹⁰ Naturally, this backlash

83. See *id.* at 291. Corrigan reports that the manual accompanying the scale explains this classification as justified because "intrafamilial offenders have[e] the lowest base rate of reoffense." *Id.* (citation and internal quotation marks omitted).

84. *Id.* at 299.

85. *Id.* Corrigan notes this exclusion was supported by rape care advocates in order to promote victim confidentiality. Even if the exclusion does protect victims, however, it clearly gives offenders the obvious benefit of avoiding identification as a sex offender to friends, employers, and other members of the community. This is particularly problematic in light of research suggesting that many incest offenders cross-offend, in that they also abuse victims outside their immediate families. This research is discussed in Collins, *supra* note 77, (manuscript at 33-34).

86. See Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004).

87. See Wayne Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 345-46 (2003) (discussing "increased statutory authority for police to execute warrantless arrests in the home; the enactment of mandatory arrest laws for domestic abuse; and most recently "no drop" policies, which remove the discretionary authority of prosecutors (and victims) to forgo abuse prosecutions").

88. See *id.* at 343-45.

89. See Ruth Teichroeb, *Cases Among Toughest to Prosecute; Juries Don't Want to Believe a Parent Could Kill a Child*, SEATTLE POST-INTELLIGENCER, Nov. 1, 2002, at A1 (reporting that "prosecutors across Washington say child homicides are among the toughest cases to prove beyond a reasonable doubt" and that "when young children die because of parental neglect, the chance of convicting a parent is so small prosecutors rarely file any charges").

90. For example, in 2002, a Virginia father of thirteen children accidentally left his youngest child, a twenty-one-month-old girl, in the family van when the family returned home from running an errand. A neighbor found the child dead in the van seven hours later. Despite the fact that the father had not checked on his toddler daughter even once during that time frame, his prosecution by the Commonwealth of Virginia for involuntary manslaughter immediately ignited a firestorm of controversy. One law professor, for example, condemned the decision as "send[ing] a chilling message of prosecutorial over-reach and abuse" and compared the "logic" behind the prosecution to "the Vietnam war technique of destroying a village to save it." Jonathan Turley, *A Tragedy, Not a Crime*,

may inhibit some prosecutors, especially politically accountable ones, from prosecuting parents who harm their children.⁹¹ This preferential treatment for parents persists even though young children in particular face far greater risk of danger from their relatives at home than they do from strangers in public places.⁹²

3. Pretrial Release

Family ties issues also arise in the context of pretrial release. Before a suspect is tried for his crime, the state must first decide whether to detain or release him.⁹³ If it releases him, the state must determine which conditions it will impose to ensure that the defendant appears at trial. If it detains the alleged offender, the state must determine what kind of access to the outside world it will allow so that the defendant can prepare his case.

Determinations of pretrial release take different forms in different jurisdictions, but they usually share at least one feature in common: they specifically look at a suspect's family ties and responsibilities when considering whether to release the suspect, and under what conditions. For instance, the 1966 Bail Reform Act (BRA) gave federal judges guidance regarding decisions about pretrial release, expressly articulating that courts should examine the accused's family ties.⁹⁴ Many states followed suit.⁹⁵

WASH. POST, June 9, 2002, at B8. For an in-depth discussion of the prosecution of negligent parents, see Jennifer Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807 (2006).

91. See 1 NATIONAL INSTITUTE OF JUSTICE AND THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUSTICE SYSTEM PROCESSING OF CHILD ABUSE AND NEGLECT CASES: FINAL REPORT 15 (1996) (reporting results of comprehensive study of child abuse cases in mid-1990s and stating that "every professional interviewed stressed the difficulty in prosecuting cases because the general public, and thus jurors, are extremely reluctant to believe physical and child abuse allegations"); Jan Chapman & Barbara Smith, *Response of Social Service and Criminal Justice Agencies to Child Sexual Abuse Complaints*, 10 RESPONSE 7, 13 (1987) (reporting the findings of a study of 388 cases from the mid-1980s, all of which were classified as "founded," meaning a social worker had believed the allegations to be true, that determined "parents were less likely to be prosecuted and, if prosecuted, they often received little or no incarceration and surprisingly short periods of incarceration").

92. See BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (July 2000) (reporting that for sexual assault victims under the age of six, forty-nine percent were sexually victimized by a family member, and only three percent were assaulted by a stranger); see also BUREAU OF JUSTICE STATISTICS, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 17 (Mar. 1996) (stating that "in 1974 over 70% of the murders of infants were carried out by a family member"). This figure dropped substantially if the homicide victim was a teenager.

93. For an overview of pretrial release patterns, see MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 760-95 (2003).

94. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (codified as amended at 18 U.S.C. 3142 (g)(3)(A) (2000)).

95. See, e.g., ALA. R. CRIM. P. 7.2(a)(1) (2006) (requiring court to consider a range of factors in determining pretrial release, including "the age, background and family ties, relationships and circumstances of the defendant"); FLA. STAT. ANN. § 903.046(2) (West 2001) (mandating court to consider "[t]he defendant's family ties[and] length of residence in the community"); *Watson v. State*, 158

Additionally, some states delineate pretrial release conditions that are tied to family responsibilities and effects. For example, in Illinois, the statute governing bail bonds informs judges that they should consider imposition of conditions that require defendants to support his or her dependents.⁹⁶ If the victim of the crime is a member of the household, then, depending on the precise circumstances, the court may impose conditions that require the defendant to vacate the home, refrain from contact,⁹⁷ or make payments of temporary support.⁹⁸

C. *The Determination of Guilt: Pleas and Trials*

1. *Pleas*

If multiple members of one family are prosecuted, one way in which family ties become particularly relevant is if the government decides to include as part of a plea bargain an offer “of adverse or lenient treatment for someone *other* than the accused.”⁹⁹ Such “wired” or linked plea agreements are certainly not uncommon and are routinely upheld by courts.¹⁰⁰ Two well-known examples involved promises of leniency to a spouse in order to induce the primary defendant to plead guilty. Jonathan Pollard, convicted of engaging in espionage on behalf of Israel, unsuccessfully attacked the validity of his life sentence on the ground that his plea had been rendered involuntary because the government “wired” his plea to that of his wife’s.¹⁰¹ More recently, Andrew Fastow, the former chief financial officer of Enron, faced tremendous pressure to plead guilty because of the government’s decision to target his wife; simultaneous jail sentences for the couple would have left their two young sons without a parent in the home.¹⁰² Lea Fastow was ultimately sentenced to

S.W.3d 647, 648 (Tex. Crim. App. 2005) (noting that the Court of Criminal Appeals has determined that a court in setting bail should consider, among other things, the “defendant’s: work record, family ties, . . . length of residency”).

96. 725 ILL. COMP. STAT. 5/110-10(b)(10) (2002).

97. See Suk, *supra* note 67, at 2 (describing use of protection orders as a form of “state-imposed de facto divorce that subjects the practical and substantive continuation of intimate relationships to criminal sanction”).

98. 725 ILL. COMP. STAT. 5/110-10 (c). We foreshadow here our points developed in Part I.F and in Part III that the consideration of family ties in the context of pretrial release may be a factor the government uses not necessarily as a benefit to family interests, but as a proxy for an accused’s likelihood to stay in the community rather than flee. In such circumstances, alternative means may be available, such as greater use of tracking devices, which only indirectly benefit members of families. In the case of the *kinds of conditions* imposed on pretrial release, however, it is hard to view the conditions imposed as something other than intended to promote family interests.

99. Bordenkircher v. Hayes, 434 U.S. 357, 364 n.8 (1978).

100. See, e.g., Bruce A. Green, “Package” Plea Bargaining and the Prosecutor’s Duty of Good Faith, CRIM. L. BULL., Nov.–Dec. 1989, at 507, 512 n.15, 513 n.20 (collecting cases). For more recent decisions upholding the use of wired plea agreements, see *United States v. Vest*, 125 F.3d 676, 679 (8th Cir. 1997); *United States v. Marquez*, 909 F.2d 738, 742–43 (2d Cir. 1990).

101. *United States v. Pollard*, 959 F.2d 1011, 1015 (D.C. Cir. 1992).

102. See Mary Flood & Tim Fowler, *Fastow May Have to Plea Bargain to Protect His Wife*, HOUSTON CHRON., Sept. 3, 2002, at 1A. The government was very aggressive in pressuring Andrew

a year in prison; her husband will not serve his longer sentence until after his wife is released and his cooperation in the trial against other Enron executives is completed.¹⁰³

2. *Trials and Testimonial Privileges*

One way in which family ties permeate the trial process is through limitations on the government's ability to present all relevant evidence. Testimonial privileges are widely recognized exceptions to the common law principle that "the public has a right to every man's evidence."¹⁰⁴ Because the public has a compelling interest in the efficient and correct administration of its criminal justice system, even the few privileges recognized by the law are not to be "expansively construed," since they "are in derogation of the search for truth."¹⁰⁵ Nevertheless, the law recognizes a small class of relationships held to be inviolable by prosecutors and subpoenas, allowing witnesses with relevant and probative evidence to claim a privilege not to divulge the information they know even though it could be useful in the administration of justice.¹⁰⁶ As a general rule, federal courts are cautious before creating new mechanisms to allow people to refuse to help the justice system. State systems, by contrast, tend to be a bit more generous, recognizing clergyman-parishioner and doctor-patient privileges, as well as journalist-source and accountant-client privileges rejected under Federal Rule of Evidence 501.¹⁰⁷

The testimonial privileges immediately relevant to our analysis here are the spousal privileges and other claims of intrafamilial privilege as applied in the criminal justice context; we focus here on a spousal or parent-child privilege but, *mutatis mutandis*, the analysis could be applied to other intrafamilial privileges between brothers and sisters, nephews and uncles, and the like.

Fastow by taking a number of actions that directly impacted his wife, from freezing the couple's financial accounts to ultimately indicting her. See Mary Flood & Tom Fowler, *Charges Grow for Ex-Enron Execs: Fastow's Wife, 6 Others Surrender to Federal Authorities*, HOUSTON CHRON., May 2, 2003, at 1A. One of Lea Fastow's attorneys argued that the charges were "a transparent effort to put pressure on Andrew Fastow." William McQuillen, *Enron's Crime Family?*, CHI. SUN-TIMES, May 2, 2003, at 59.

103. See Mary Flood, *Lea Fastow Requests Early Release: Legal Team Says Sentence Should be Time Served*, HOUSTON CHRON., Feb. 17, 2005, at D1; see also Alexei Barrionuevo, *Fastow of Enron Has His Moment in the Sun, and Some Banks Pay Dearly*, N.Y. TIMES, Nov. 10, 2006, at C1.

104. 8 JOHN H. WIGMORE, EVIDENCE § 2192 (John T. McNaughton ed., rev. ed. 1961). See generally *United States v. Bryan*, 339 U.S. 323, 331 (1950).

105. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

106. The law has several sources for testimonial privileges. Most commonly, the common law is the root of them. The attorney-client privilege, for example, is one of the oldest recognized privileges in the common law—and every court recognizes it to some extent. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The Fifth Amendment is another source of a testimonial privilege in that it gives persons a privilege against self-incrimination. See U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself.").

107. See generally 2 SCOTT N. STONE & ROBERT K. TAYLOR, TESTIMONIAL PRIVILEGES § 3 (2d ed. 1995) (explaining the accountant-client privilege and where and when it applies); *id.* § 6 (addressing the clergy-penitent privilege); *id.* § 7 (doctor-patient privilege); *id.* § 8 (journalist-source privilege).

a. Spousal Privileges

In the common law there are two categories of spousal privileges, and all states and federal courts have adopted one or both of them in some form: the *spousal immunity* and the *marital-communication* privileges. The *spousal immunity* (sometimes called the adverse testimony privilege) operates in criminal cases and generally protects spouses from testifying as witnesses against their spouse-defendants during a valid marriage.¹⁰⁸ Different jurisdictions apply the immunity in different ways: some insist on complete disqualification of spouses; some allow a spouse-witness to testify if he or she wishes; some allow a spouse-defendant to prevent the spouse-witness from giving adverse testimony; and others allow a spouse-defendant to consent to adverse spousal testimony.¹⁰⁹

The immunity evolved from the old English common law rule of complete disqualification, where, in the first instance, a wife was not allowed to testify against her husband.¹¹⁰ Eventually the disqualification rule became gender neutral—and was finally abolished in England in 1853.¹¹¹ The United States also recognized a disqualification rule in the federal courts until the Supreme Court refined the immunity in *Funk v. United States*,¹¹² which found spouses competent to testify at one another's trials—particularly *for* rather than *adverse* to one another.

The Supreme Court had once recognized very broad spousal privileges for the federal courts in *Hawkins v. United States*.¹¹³ There, the Court held that the privilege was a “rule which bars the testimony of one spouse against the other unless both consent.”¹¹⁴ To justify such a powerful privilege, the Court argued that “the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences.”¹¹⁵ But in *Trammel v. United States*, the Supreme Court reversed course and concluded as a matter of federal law that “[w]hen one spouse is willing to testify against the other in a criminal proceeding . . . their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.”¹¹⁶ Accordingly, the Court modified the spousal immunity in fed-

108. See, e.g., Regan, *supra* note 21, at 2119.

109. To see which states have adopted this privilege and which version, see 2 STONE & TAYLOR, *supra* note 107, § 5.02, nn.4, 8, 12, 13.

110. “[I]t hath been resolved by the Justices that a wife cannot be produced either against or for her husband.” 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628); see also 8 WIGMORE, *supra* note 104, § 2227. Some have contested this story and have argued that the immunity has its roots in “petit treason,” the crime of violence against a head of household. See *id.*

111. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1564 (1985) [hereinafter *Developments in the Law*].

112. 290 U.S. 371, 380–82 (1933).

113. 358 U.S. 74 (1958).

114. *Id.* at 78.

115. *Id.* at 79.

116. 445 U.S. 40, 52 (1980). This is false. Prosecutors can threaten spouses and offer them fairly substantial incentives to testify against their loved ones, even if the relationship is otherwise strong.

eral courts, allowing it to be waived by the spouse-witness. Many states have followed a similar pattern of having once allowed the spouse-defendant to prevent the spouse-witness from adversely testifying and "liberalizing" to allow spouse-witnesses to testify if they wish (even if it is only to reduce their own potential sentences!).

Unlike spousal immunity, the *spousal-communication privilege* survives dissolution of a marriage and prevents a spouse from divulging any kind of confidential communication in a civil or criminal case; it is waivable only by the communicant.¹¹⁷ The privilege is limited to communications (not acts) that transpire during a valid marriage—and it is deemed waived if the communications are disclosed to third parties. The spousal-communications privilege, with its roots in the common law, was recognized by the Supreme Court in *Wolfle v. United States*,¹¹⁸ and *Blau v. United States*,¹¹⁹ and remains largely unmodified and undisturbed. Purportedly, the privilege ensures free and frank communication between spouses; for without such protection, marriages would lack open conversation.¹²⁰

b. Intrafamilial Privileges

In contrast to the spousal privileges, federal courts tend not to provide any similar protection for a parent-child, brother-sister, or other intrafamilial relationships—irrespective of whether what is at stake is testimonial immunity or a confidential communication privilege. A parent-child privilege is the one most often claimed (and discussed in the secondary literature)¹²¹—and most often flatly rejected by courts,¹²² with a few

117. To see which states have adopted this privilege and in what way, see 2 STONE & TAYLOR, *supra* note 107, § 5.09.

118. 291 U.S. 7, 14–15 (1934).

119. 340 U.S. 332, 333–34 (1951).

120. Cf. FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN*, (Ernst Behler ed., Gary Handaerk trans., Stanford Univ. Press 1995) (1878) ("Marriage as a long conversation. In entering into a marriage we should put the question to ourselves: Do you believe that you will enjoy conversing with this woman all the way into old age? Everything else in marriage is transitory, but most of the time together is spent in conversation.").

121. See, e.g., Maureen P. O'Sullivan, *An Examination of the State and Federal Courts' Treatment of the Parent-Child Privilege*, 39 CATH. LAW. 201 (1999); Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85 (2003); Ameer A. Shah, *The Parent-Child Testimonial Privilege—Has the Time for It Finally Arrived?*, 47 CLEV. ST. L. REV. 41 (1999); Erica Smith-Klocek, *A Halachic Perspective on the Parent-Child Privilege*, 39 CATH. LAW. 105 (1999); Shonah P. Jefferson, Note, *The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics*, 16 GA. ST. U. L. REV. 429 (1999); Kimberly L. Schilling, Note, *Intrafamilial Communications: An Analysis of the Parent-Child Privilege*, 37 FAM. & CONCILIATION CTS. REV. 99 (1999).

122. See, e.g., *United States v. Dunford*, 148 F.3d 385 (4th Cir. 1998) (no recognition of privilege when the defendant father was charged with gun crimes and abusing children with those guns; protection of this family unit not warranted); *In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997) (no confidential communication privilege in child-parent relationship because the overwhelming majority of states and federal courts reject the privilege); *In re Erato*, 2 F.3d 11 (2d Cir. 1993) (no recognition of the mother's asserted right not to testify against her adult son, particularly when she benefited from her son's illegal activity); *In re Doe*, 842 F.2d 244 (10th Cir. 1988) (no parent-child privilege recognized); *United States*

exceptions.¹²³ Although *Jaffee v. Redmond*¹²⁴ opened the door for federal courts to fashion new privileges when the Supreme Court recognized a claim of a psychotherapist/social worker-patient privilege under Rule 501, federal courts generally continue to reject the assertion of intrafamilial privileges.¹²⁵

The story is somewhat more complicated at the state level. A majority of states reject intrafamilial privileges beyond spousal relations.¹²⁶ However, Idaho,¹²⁷ Connecticut,¹²⁸ Massachusetts,¹²⁹ and Minnesota¹³⁰ all have some limited form of parent-child privilege conferred by statute; additionally, New York courts have judicially carved a limited parent-child testimonial privilege.¹³¹ Moreover, Virginia and Texas appellate court judges have written strong dissents arguing for state recognition of a parent-child privilege.¹³²

Each of the jurisdictions that recognize the privilege gives the parent-child privilege different contours. The Idaho law seems to give the

v. Ismail, 756 F.2d 1253 (6th Cir. 1985) (children have no right not to testify against parents and can be forced to do so); *In re Santarelli*, 740 F.2d 816 (11th Cir. 1984) (no federal support for a family privilege); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (no "family" privilege so a five-year-old had to testify against his mother).

123. See *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983) (recognizing a parent-child privilege); see also cases cited *infra* note 132.

124. 518 U.S. 1 (1996).

125. See, e.g., *In re Grand Jury*, 103 F.3d 1140.

126. See generally Kelly Korell, *Testimonial Privilege for Confidential Communications Between Relatives Other than Husband and Wife—State Cases*, 62 A.L.R. 5th 629 (1998).

127. IDAHO CODE ANN. § 9-203(7) (2004) ("Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party."). The privilege does not apply in all cases, including cases involving allegations of child abuse.

128. CONN. GEN. STAT. ANN. § 46b-138a (West 2004) ("In any juvenile proceeding in superior court, the accused child shall be a competent witness, and at his or her option may testify or refuse to testify in such proceedings. The parent or guardian of such child shall be a competent witness but may elect or refuse to testify for or against the accused child except that a parent or guardian who has received personal violence from the child may, upon the child's trial for offenses arising from such personal violence, be compelled to testify in the same manner as any other witness.").

129. MASS. GEN. LAWS. ANN. ch. 233, § 20 (West 2005) ("An unemancipated, minor child, living with a parent, shall not testify before a grand jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent's family and who does not reside in the said parent's household.").

130. MINN. STAT. § 595.02.1(j) (2004) ("A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. . . . This exception may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication or by failure of the child or parent to object when the contents of a communication are demanded."). The statutory privilege in Minnesota does not apply in all circumstances, including cases involving allegations of child abuse or the termination of parental rights.

131. See *In re A & M* (People v. Doe), 403 N.Y.S.2d 375 (N.Y. App. Div. 1978) (common law recognition of a parent-child privilege through the constitutional right to family privacy); *People v. Fitzgerald*, 422 N.Y.S.2d 309, 312 (N.Y. App. Div. 1979) (extending the parent-child privilege to an older child; holding that the privilege is not limited to minors); *In re Ryan*, 474 N.Y.S.2d 931, 931 (N.Y. Fam. Ct. 1984) (recognizing a grandmother as a parent for parent-child privilege purposes). But see *People v. Hilligas*, 670 N.Y.S.2d 744, 747 (N.Y. Sup. Ct. 1998) (rejecting *Fitzgerald* for independently living adults).

132. See *Diehl v. Texas*, 698 S.W.2d 712, 717 (Tex. App. 1985) (Levy, J., dissenting); *Belmer v. Virginia*, 553 S.E.2d 123, 129 (Va. Ct. App. 2001) (Elder, J., dissenting).

privilege to parents so they do not have to testify against their children, but it does not give symmetrical treatment to children who do not want to testify against their parents.¹³³ Connecticut limits its grant of the privilege to “juvenile proceeding[s] in Superior Court.”¹³⁴ Massachusetts limits its parent-child privilege to “unemancipated, minor child[ren], living with a parent,” ruling out application of the privilege to older children.¹³⁵ Like Idaho’s law, Massachusetts’s is asymmetric, but in just the opposite way: in Massachusetts parents can be forced to testify against their children, just not the other way around.¹³⁶ Minnesota, although supporting a symmetrical privilege, limits its grant of privilege to cases involving “minor” children, subject to waiver by parent or child.¹³⁷ In short, there is little uniformity in the states about whether the privilege exists—and where it does, exactly how and when it applies. Most states that recognize the privilege, however, recognize an exception for when there is a dispute between parent and child, a possibility of parental abuse or neglect, or a crime of violence within the household.

D. Sentencing

Consideration of family ties often arises in the sentencing context because, according to a 1999 study, over half of all state and federal prisoners have children; indeed, more than a million minor children have at least one parent incarcerated.¹³⁸ This Section explores ways in which family ties are connected to the judicial consideration of a particular sentence.

1. Federal Practice Pre-Booker

Prior to the Supreme Court’s ruling in *Booker v. United States*, which rendered the federal sentencing guidelines “effectively advisory,”¹³⁹ “family ties and responsibilities”¹⁴⁰ were, generally speaking, ac-

133. See IDAHO CODE ANN. § 9-203(7).

134. See CONN. GEN. STAT. § 46b-138a (2004).

135. See MASS. GEN. LAWS ch. 233, § 20 (2005).

136. Compare IDAHO CODE ANN. § 9-203(7), with MASS. GEN. LAWS ch. 233, § 20.

137. See MINN. STAT. § 595.02.1(j) (2004).

138. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN NCJ 182335, at 1 tbl.1 (reporting figures for 1999, “an estimated 721,500 State and Federal prisoners were parents to 1,498,800 children under age 18”), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.

139. *United States v. Booker*, 543 U.S. 220, 246 (2005). In his remedial opinion, Justice Breyer highlighted the provision in 18 U.S.C. § 3661, which says that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” *Id.* at 252.

140. Family ties may be thought to be distinct from family responsibilities, in that one could have strong family ties (a devoted son or brother) without necessarily incurring significant family responsibilities.

corded little significance in the federal sentencing regime.¹⁴¹ The United States Sentencing Commission (USSC) regarded family ties and responsibilities as a “discouraged” factor, and thus departures from the guidelines on the basis of “family ties and responsibilities” were permissible only if the court found that the negative effects on the defendant’s family were “present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.”¹⁴² That is not to say that courts categorically refused departures when there was evidence of “extraordinary” family ties and responsibilities;¹⁴³ indeed many federal courts extended such departures, even across a wide range of crimes.¹⁴⁴

To the extent that there is pattern underlying the pre-*Booker* federal cases involving downward departures for family ties, it is discernible by asking whether the defendant provided an irreplaceable (or at least critical) role as caregiver to family dependents, and if so, whether the downward departure contemplated by the judge would suffice to “cure” the harm that would otherwise be visited upon the family member.¹⁴⁵ Thus, the more severe the criminal offense level of a particular offender, the less likely it would be that a departure based on family responsibilities would be granted—because, as the Commission said in its commentary on the relevant provision,¹⁴⁶ the departure should be capable of resolving the problem of the irreplaceable caregiver.¹⁴⁷ Thus, applying this

141. See, e.g., *United States v. Menyweather*, 431 F.3d 692, 699 (9th Cir. 2005) (“family circumstance is a discouraged factor under the Guidelines”); U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2000) (“family ties and responsibilities and community ties are not ordinarily relevant” in deciding if a departure is warranted); see also *United States v. Aguirre*, 214 F.3d 1122, 1127 (9th Cir. 2000) (referring to family circumstance as a “discouraged” factor). See generally Melissa E. Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va. L. Rev. (forthcoming 2008) (canvassing family circumstances departures in federal courts).

142. *Koon v. United States*, 518 U.S. 81, 96 (1996).

143. See *United States v. Harrington*, 82 F.3d 83, 90 (5th Cir. 1996) (Guidelines permit consideration of extraordinary family effects for purposes of downward departure but finding “nothing extraordinary” in this case); *United States v. Rivera*, 994 F.2d 942, 953 (1st Cir. 1993); *United States v. Gaskill*, 991 F.2d 82, 85 (3d Cir. 1993) (“In our opinions, we have concluded that section 5H1.6 does not prohibit departures, but restricts them to cases where the circumstances are extraordinary.”); *United States v. Cacho*, 951 F.2d 308, 311 (11th Cir. 1992) (same); *United States v. Pena*, 930 F.2d 1486, 1494–95 (10th Cir. 1991).

144. *United States v. Haversat*, 22 F.3d 790, 797 (8th Cir. 1994) (price fixing); *United States v. Sclamo*, 997 F.2d 970, 974 (1st Cir. 1993) (drug distribution); *United States v. Johnson*, 964 F.2d 124, 125 (2d Cir. 1992) (bribery and theft); *United States v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991) (drug offenses); *Pena*, 930 F.2d 1486 (drug distribution); see also *Gaskill*, 991 F.2d at 86 (fraud case indicating that the sentencing court could depart on remand).

145. See ROGER W. HAINES, JR., FRANK O. BOWMAN III, & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK* 1445 (2006) (addressing whether “the departure effectively will address the loss of caretaking or financial support”); *United States v. Leon*, 341 F.3d 928, 931 (9th Cir. 2003); see also *United States v. Roselli*, 366 F.3d 58, 68–69 (1st Cir. 2004) (looking at whether “there are feasible alternatives of care that are relatively comparable” to the defendant’s).

146. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1(B) (2006).

147. The implication is that if the departure simply reduces rather than eliminates the difficulty, the departure should not be awarded. Thus, courts have been reluctant, given the state of the law, to confer departures to minimize all the disruptions typically caused by incarceration of a family member. See, e.g., *United States v. Wright*, 218 F.3d 812, 815–16 (7th Cir. 2000) (“Today we conclude that a

notion, many appellate courts upheld downward departures when a Guideline sentence would otherwise leave a young child without a custodial parent.¹⁴⁸ That said, the fact that a defendant was an "irreplaceable caregiver" was not always a necessary or a sufficient explanation for federal court practice. Some courts authorized departures when a defendant was not the sole caretaker because the court recognized the extraordinary nature of the family situation and wanted to minimize disruption to the children's lives.¹⁴⁹ Other courts refused to extend departures even when the defendant was an irreplaceable caregiver.¹⁵⁰

When departures based on family ties were awarded, they had the capacity to cause wide disparities between otherwise similarly situated offenders. For example, in *United States v. Johnson*, two defendants were convicted of participating in the same crime and warranted the same offense level.¹⁵¹ Nevertheless, Johnson, the defendant with caretaking responsibility of four children, received a significant departure from the Guidelines based on family responsibilities and was sentenced to six months' home detention and three years of supervised release; meanwhile the other defendant, Purvis, who was without children and who was also found to have played a more minor role in the scheme, received twenty-seven months in prison and two years of additional super-

downward departure for extraordinary family circumstances cannot be justified when, even after reduction, the sentence is so long that release will come too late to promote the child's welfare." This state of affairs leads some judges to believe that the law they must apply here to be quite "cruel." *United States v. Jurado-Lopez*, 338 F. Supp. 2d 246, 254 n.17 (D. Mass. 2004) (Gertner, J.) (excoriating case law prohibiting departures for ordinary family responsibilities as "cruel"). Commentators often agree. See Raeder, *Gender and Sentencing*, *supra* note 21, at 960; Myrna Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT'G REP. 251 (2001); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 169 (1996) (Section 5H1.6 "is so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep").

148. *United States v. Aguirre*, 214 F.3d 1122, 1127 (9th Cir. 2000) (four-level departure upheld "based on the fact that there is an 8 year-old son who's lost a father and would be losing a mother for a substantial period of time"). However, in cases where another parent (aside from the defendant) was available, courts routinely rejected the downward departure by the trial court. See, e.g., *United States v. Miller*, 991 F.2d 552, 553 (9th Cir. 1993). But see *United States v. Chestna*, 962 F.2d 103, 107 (1st Cir. 1992) (although defendant was single with four small children, this was not "an unusual family circumstance"); *United States v. Mogel*, 956 F.2d 1555, 1565 (11th Cir. 1992) (declining to view a single mother of two minor children as warranting extraordinary family circumstances); *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991) (stating that "the imprisonment of a single parent was not extraordinary," even where the woman had five minor children).

149. *United States v. Spero*, 382 F.3d 803, 805 (8th Cir. 2004) (affirming downward departure for defendant who provided critical care for autistic son and other three children, notwithstanding that defendant had a spouse); *United States v. Jebara*, 313 F. Supp. 2d 912, 919-20 (E.D. Wis. 2004) (splitting defendant's sentence between incarceration and home confinement due to judge's view that a short-term disruption to the defendant's children would be tolerable but not a long-term one).

150. See, e.g., *United States v. Sweeting*, 213 F.3d 95, 104 (3d Cir. 2000) (invalidating a Section 5H1.6 downward departure for a single mother of five children (one afflicted with some neurological disorders)). *Sweeting* might be distinguished on account of the defendant's substantial criminal history and the severity of the penalty under the guidelines, which in this case, exceeded five years.

151. *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992).

vised release.¹⁵² This case dramatizes the disparity because the offenders were co-defendants in the same case—but the disparity that resulted here is at least as likely to arise across cases as within them. Some courts have recognized that departures motivated by a desire to minimize the harms inflicted on innocent third-party family members confer a windfall benefit on the defendant.¹⁵³ Those courts typically justify their decisions by reference to a cost-benefit analysis under which the costs to the innocent children were weighed against the public benefit of incarcerating the defendant; the reasoning under such analyses, however, is usually conclusory.¹⁵⁴

Finally, although departures on the basis of family responsibilities in the federal context have been discouraged, district court judges retained discretion to sentence within the range prescribed by the Sentencing Guidelines, and in that area of discretion, judges may have quite widely considered the influence of the factor of family ties and responsibilities.¹⁵⁵

2. *Federal Practice in the Post-Booker Landscape*

Delineating the boundaries of what counts as “extraordinary” family ties and responsibilities has become much easier in a post-*Booker* sentencing world. With the Guidelines now advisory, federal courts have a wider berth to steer sentences outside of the ranges established by the U.S. Sentencing Commission.¹⁵⁶ As a result, courts are awarding more downward departures than previously.¹⁵⁷ In the post-*Booker* world, as the Ninth Circuit recently observed, “[c]onsideration of family responsibilities” may now be viewed as part of a defendant’s “history and characteristics,”¹⁵⁸ and judges can assess those traits as reasons to mitigate the length of sentences.¹⁵⁹ Whereas various federal district court judges felt,

152. *Id.* at 126; see also Karin Bornstein, Note, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 135 (1993); Gregory N. Racz, Note, *Exploring Collateral Consequences: Koon v. United States, Third Party Harm, and Departures from Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1480 (1997).

153. *United States v. Menyweather*, 431 F.3d 692, 703–08 (9th Cir. 2005) (Kleinfeld, J., dissenting).

154. *Id.* (criticizing lower court’s departure on grounds of family responsibilities because the sentence failed to adequately reflect seriousness of the offense).

155. See, e.g., *United States v. Duarte*, 901 F.2d 1498 (9th Cir. 1990) (holding that trial court may properly consider defendant’s stable family ties and responsibilities in setting sentence within the prescribed range).

156. See Dan Markel, *Luck or Law? The Constitutional Case Against Indeterminate Sentencing Schemes* 28–38. (unpublished manuscript, on file with U. ILL. L. REV.).

157. See U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf (summarizing results).

158. 18 U.S.C. § 3553(a)(1) (2000).

159. *Menyweather*, 431 F.3d at 700 (noting that, after *Booker*, district court judges “have the discretion to weigh a multitude of mitigating and aggravating factors that existed at the time of mandatory Guidelines sentencing, but were deemed ‘not ordinarily relevant,’ such as age, education and vocational skills, mental and emotional conditions, employment record, and *family ties and responsibilities*” (quoting *United States v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (en banc)).

prior to *Booker*, that the Guidelines were too harsh because they failed to give significant weight to family ties and responsibilities,¹⁶⁰ these judges can now invoke family ties and responsibilities as a basis for departure from the Guidelines with greater frequency and flexibility.¹⁶¹

3. *State Practices*

The flexibility that now exists in the federal sentencing system regarding consideration of family ties and responsibilities also prevails in many states, especially those that endow sentencing judges with wide discretion to determine the length of a sentence. Approximately thirty-two of the nation's jurisdictions have retained an indeterminate sentencing scheme, with the remainder having some form of sentencing guidelines in place.¹⁶² These eighteen sentencing schemes may have voluntary guidelines, presumptive guidelines, or fixed guidelines, depending on the jurisdiction, as well as variations on these themes. By contrast, the other states have "traditional" indeterminate sentencing schemes that extend virtually unfettered discretion to sentencing judges (or, in some cases, sentencing juries) to sentence within the statutory limits set by the legislature, and, in many jurisdictions, leave the option for parole available. The judges (or parole boards) in those indeterminate sentencing states are often at liberty to consider the nature and extent of family ties or re-

(Wardlaw, J., concurring in part and dissenting in part) (emphasis added))). Thus, for example, "[t]he difficulty of providing appropriate care for a child of a single parent may, when balanced against factors such as the nature of the offense, § 3553(a)(1), deterrence to criminal conduct, § 3553(a)(2)(B), and protection of the public, § 3553(a)(2)(C), warrant a sentence outside the Guidelines." *Id.* at 700.

160. *United States v. Jurado-Lopez*, 338 F. Supp. 2d 246, 254 n.17 (D. Mass. 2004) (Gertner, J.) (excoriating case law prohibiting departures for ordinary family responsibilities as "cruel"); LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM'N, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES 8 (2003), available at <http://www.ussc.gov/judsurv/jsfull.pdf> ("More than half of all judges would like to see more emphasis at sentencing placed on an offender's mental condition or the offender's family ties and responsibilities."); cf. STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 154 (1988) (judge explains that "[w]hether there are people who are dependent on him or her [i.e., the defendant], . . . whether there is going to be an injury to others if I incarcerate him: that has a profound effect on me and when I sense that, I am more inclined to be lenient").

161. See, e.g., *United States v. Ranum*, 353 F. Supp. 2d 984, 990–91 (E.D. Wis. 2005) (noting that defendant is "fifty years old, had no prior record, a solid employment history, and is a devoted family man. He has two children, one of whom is still in school. Prior to his recent marriage, he was a single father who did an excellent job of raising two daughters. He also provides care and support for his elderly parents. His father suffers from Alzheimer's disease and is particularly dependent on defendant—defendant is one of the few people he still recognizes. Defendant's mother is also elderly and suffers from depression. I concluded that defendant's absence would have a profoundly adverse impact on both his children and his parents."); *United States v. Jaber*, 362 F. Supp. 2d 365, 383 (D. Mass. 2005) ("Measuring a departure for 'extraordinary family obligations' now in the light of *Booker* and the purposes of sentencing (particularly the likelihood of recidivism), I would find that Momoh qualified for a downward departure on these grounds."). But see Myrna Raeder, *Gender-Related Issues in a Post-Booker World*, 37 MCGEORGE L. REV. 691, 716 (2006) (contending that "many judges are not exercising their *Booker* discretion" and that "a relative handful of judges" are responsible for most of the family ties departures).

162. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1191 (2005).

sponsibilities (along with a wide range of other reasons for leniency) in setting a sentence or releasing an offender.¹⁶³ And for the most part, they are not required to explain that a particular sentence was enhanced or reduced on account of family ties or responsibilities. Iowa's sentencing scheme, for example, simply makes "clear that sentencing is a matter of [a] trial court's broad discretion," and trial courts will be reversed there only for "abuse of that discretion,"¹⁶⁴ though what counts as an abuse of discretion is substantially unpredictable to the outside observer.

The multiplicity of sentencing structures in the states is mirrored by the various approaches states take in setting sentences in relation to the family ties or responsibilities of an offender. In some jurisdictions, the presence or absence of family ties and responsibilities will do little to affect one's sentence.¹⁶⁵ For instance, in Oklahoma's noncapital sentencing proceedings that occur before a jury, a defendant may not introduce evidence solely designed to mitigate the sentence, such as information about family ties and responsibilities.¹⁶⁶ Florida's sentencing scheme is somewhat similar in that it does not articulate any express exception for defendants with family ties and responsibilities; the relevant statute states that sentencing "should be neutral with respect to race, gender, and social and economic status,"¹⁶⁷ but it is unclear whether social status includes familial ties and responsibilities.

By contrast, in Massachusetts, the state legislature authorized the courts to consider an offender's family ties and responsibilities in setting an offender's sentence.¹⁶⁸ Consideration of family ties and responsibili-

163. See, e.g., CAL. PENAL CODE § 3003(b)(4) (West 2007) (including family ties within a list of "suitability factors" that the Parole Board is to consider in awarding parole).

164. *State v. Killpack*, 276 N.W.2d 368, 373 (Iowa 1979); *State v. Warner*, 229 N.W.2d 776, 782-83 (Iowa 1975); see also *State v. McKeever*, 276 N.W.2d 385, 387 (Iowa 1979) ("Punishment must fit the particular person and circumstances under consideration; each decision must be made on an individual basis, and no single factor, including the nature of the offense, will be solely determinative").

165. For example, in Washington, the state guidelines contain "no provision comparable to U.S.S.G. § 5H1.6," which, as discussed above, expressly discourages the consideration of family ties and responsibilities. *State v. Law*, 110 P.3d 717 (Wash. 2005). Rather, the Washington sentencing scheme "explicitly prohibit[s] such considerations" when considering departures. *Id.* at 725. The state simply requires a "substantial and compelling reason[]" to depart from the state guidelines. *Id.* at 733 (Sanders, J., dissenting); see also *People v. Coleman*, No. 231299, 2002 WL 1340891, at *3 (Mich. Ct. App. June 18, 2002) (under the sentencing statute in Michigan, a court may depart from minimum sentence if it finds "substantial and compelling reasons" to do so; defendant's family ties did not constitute a reason to depart downward).

166. *Malone v. State*, 58 P.3d 208, 210 (Okla. Crim. App. 2002) (stating that when jury decides punishment for noncapital offenses "there simply is no provision allowing for mitigating evidence to be presented in the sentencing stage of the trial. This is a limitation enacted by our Legislature, and the limitation is undoubtedly constitutional. . . . [A] criminal trial is not to be based upon so-called 'character' evidence, and the same principle applies to sentencing proceedings").

167. The courts in Florida must also bear in mind that the "primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role." FLA. R. CRIM. P. 3.701.

168. See *Commonwealth v. Langill*, No. ESCR2002-729, 2003 WL 22459077, at *3 (Mass. Super. Ct. Sept. 29, 2003) (enumerating a list of mitigating factors, including family ties and responsibilities, in MASS. GEN. LAWS ch. 211E § 3(d)); *Commonwealth v. Morris*, No. ESCR2002-1227, 2003 WL 22004943, at *6 (Mass. Super. Ct. Aug. 19, 2003) (legislature's intent was for the court to refer to the

ties has also been expressly permitted in Louisiana,¹⁶⁹ Pennsylvania,¹⁷⁰ Utah,¹⁷¹ Wisconsin,¹⁷² Tennessee,¹⁷³ Arizona,¹⁷⁴ and North Carolina.¹⁷⁵ Indeed, in Louisiana, the legislature has said that a court, when deciding to suspend a sentence, should consider whether “[t]he imprisonment of the defendant would entail excessive hardship to himself or his dependents.”¹⁷⁶ Perhaps the most unusual feature of some courts’ family ties jurisprudence is that some judges will consider the absence of family ties to an area as a reason to not extend any leniency in a sentence.¹⁷⁷

nonexclusive list of mitigating factors found in Massachusetts Sentencing Act, which included family ties and responsibilities of offender).

169. *State v. Luke*, 917 So. 3d 1226, 1228 (La. Ct. App. 2005) (stating that, when sentencing an offender, courts should consider, *inter alia*, “age, family ties, marital status” but noting that “[t]here is no requirement that specific matters be given any particular weight at sentencing”); *State v. Douglas*, 914 So. 2d 608, 610 (La. Ct. App. 2005) (“The important elements which should be considered are the defendant’s personal history (age, family ties, marital status, health, employment record), prior criminal record, seriousness of offense and the likelihood of rehabilitation.”); *State v. Fultz*, 591 So. 2d 1308, 1310 (La. Ct. App. 1991) (upholding sentence after trial court considered “defendant’s age, employment, family ties and responsibilities, and criminal history”).

170. Pennsylvania’s sentencing guidelines themselves do not suggest specific mitigating factors, *see* 204 PA. CODE § 303.1 (2006), but the law in Pennsylvania does require consideration of alternatives to incarceration, and the criteria for probation state that courts should, when deciding whether to impose probation instead of incarceration, consider whether “[t]he confinement of the defendant would entail excessive hardship to him or his dependents.” 42 PA CONS. STAT. ANN. § 9722 (2006).

171. Utah has sentencing guidelines that courts are encouraged to use as a starting point. UTAH CODE ANN. § 76-3-201(7)(e) (2002) (“In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.”). Those guidelines state that courts may consider mitigating a sentence when an adult offender has “exceptionally good . . . family relationships . . . [or] imprisonment would entail excessive hardship on offender or dependents.” UTAH SENTENCING COMM’N, 2006 ADULT SENTENCING AND RELEASE GUIDELINES 17 (2006), available at <http://www.sentencing.utah.gov/Guidelines/Adult/GuidelineManual2006.pdf>.

172. Wisconsin has a purely advisory guidelines system in place, and the guidelines provide that courts may mitigate the sentence of a defendant when he has “strong and stable ties to family and community.” *See* WIS. SENTENCING COMM’N, WISCONSIN SENTENCING GUIDELINES NOTES 7 (2003), available at <http://wsc.wi.gov/docview.asp?docid=3297>.

173. *State v. Turner*, No. M2003-02064-CCA-R3-CD, 2004 WL 2775485, at *6 n.2 (Tenn. Crim. App. Dec. 1, 2004) (“[T]his court has stated that . . . work ethic and family contribution are entitled to favorable consideration under Tennessee Code Annotated section 40-35-113(13).”); *see also State v. McKnight*, 900 S.W.2d 36, 55 (Tenn. Crim. App. 1994) (“The defendant would normally be due some favorable consideration based upon his family contributions and work ethic. Because, however, the ‘help’ he provided to young people was improperly motivated, the factor is inapplicable here.”). The sentencing statutes in Tennessee also permit sentence mitigation if the defendant committed the offense in order to “provide necessities for the defendant’s family or the defendant’s self.” TENN. CODE ANN. § 40-35-113(7) (2006).

174. *State v. Johnson*, 640 P.2d 861, 867 (Ariz. 1982) (“[S]entencing judge listened to the mitigating evidence before him and apparently concluded that appellant’s family ties, military record, and good reputation did not offset the seriousness of appellant’s murderous design.”).

175. N.C. GEN. STAT. § 15A-1340.16 (2006). North Carolina’s Sentencing Guidelines permit mitigation of sentences when “[t]he defendant supports the defendant’s family” and when the “defendant has a support system in the community.” *Id.*

176. LA. CODE. CRIM. PROC. ANN. art. 894.1.B(31) (2006).

177. *See, e.g., State v. Baker*, No. 02-1332, 2003 WL 22339644, at *2 (Iowa Ct. App. Oct. 15, 2003) (finding no abuse of discretion where trial court, which was required to state on the record its reasons for sentencing in a particular way, said to defendant, in explaining its imposition of sentence, that “you lack a stable residence; you have no family ties to the area, or [sic] no substantial family ties to the area”).

Finally, we note that sentencing in various states involves the introduction of victim impact evidence.¹⁷⁸ While some jurisdictions allow victim impact evidence to be introduced by any number of persons connected to the victim, some jurisdictions only allow statements by the victim's family members.¹⁷⁹

E. Prison Policies

Our punitive practices surrounding incarceration cannot help but acknowledge family ties because sentences imposed upon wrongdoers will usually affect inmates' families: a son, a daughter, a father, a mother, a brother, or a sister ceases to be regularly present in a family's life. The federal and state governments must make choices about how to deal with family ties and responsibilities. For example, should families of the incarcerated be entitled to special visitation rights? Should the incarcerated get special dispensations (like furloughs) to see family members outside of prison? Should family ties be considered in prison placement decisions? We look at some of these questions in the context of the federal criminal justice system.

1. Federal Prison Visitation Policies

The Federal Bureau of Prisons' policy statement announces that "visits [by family] are an important factor in maintaining the morale of the individual offender and motivating [him] toward positive goals."¹⁸⁰ Indeed, some have gone so far as to argue that family visitation in prison is a "fundamental" right (whether of the prisoner or of the family of the

178. See DOUGLAS E. BELOOF, PAUL G. CASSEL, & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* (2d ed. 2005).

179. See *State v. Muhammad*, 678 A.2d 164, 179–80 (N.J. 1996); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 153–56 (1999) (describing New Jersey statute that allows only a family member of a homicide victim to offer a victim impact statement during a sentencing hearing); see also *Cargle v. State*, 909 P.2d 806, 828 (Okla. Crim. App. 1995) ("[V]ictim impact evidence should be restricted to those unique characteristics which define the individual who has died, the contemporaneous and prospective circumstances surrounding that death, and how those circumstances have financially, emotionally, psychologically, and physically impacted on members of the victim's immediate family." (emphasis added)).

180. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7300.4A(1) (2003); see also DANIEL GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 366 (1964) (interaction with family members promotes rehabilitation); AM. CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 542 (1966) (family members "should be permitted and encouraged to maintain close contact with the inmate"); AM. PRISON ASS'N, A MANUAL OF CORRECTIONAL STANDARDS 342 (1954) (parole success depends on family ties during incarceration); COMM'N ON ACCREDITATION FOR CORRECTIONS, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 88 (1981) (same). The Bureau provides in its bill of rights for inmates that inmates "have the right to visit and correspond with family members and friends." FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.07 § 541.12(5) (1987).

prisoner),¹⁸¹ protected by the Constitution.¹⁸² Courts have not, generally, found such a “right” to exist,¹⁸³ though some courts have shown solicitude for family visitation when privileges are withheld unreasonably.¹⁸⁴ In the final analysis, however, courts rarely intrude on the wide discretion afforded prison administrators in devising visitation policies.¹⁸⁵ That said, most prisons make some provision for family visitation, though such policies routinely give prisoners access to visitors who are not members of the incarcerated’s family as well.¹⁸⁶ Accordingly, although families do not necessarily get privileged status in the realm of visitation policies (because inmates can also be visited by friends and business associates),¹⁸⁷ it is likely that family visitation would be greeted with greater

181. See Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275, 295–98 (1985) (arguing that families have a constitutional right to see their imprisoned family members).

182. This argument is based, in the first instance, on the Supreme Court’s decision in *Moore v. East Cleveland*, 431 U.S. 494 (1977), which held that the state could not prevent an extended family from living together because family relationships are special. *Id.* at 503–06; see also Hardwick, *supra* note 181, at 296. Hardwick also relies on, *inter alia*, *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that parental rights cannot be terminated without procedural due process and a competency hearing); *Franz v. United States*, 707 F.2d 582, 601 (D.C. Cir. 1983) (stating that “it appears impossible to say with any confidence that the concerns that underlie our willingness to accord ‘fundamental’ status to parent-child bonds are any less telling when the relationship in question consists of mere ‘visitation’”); and *In re Rhine*, 456 A.2d 608, 614 (Pa. Super. 1983) (holding that parents who have children in foster care have visitation rights that cannot be infringed without clear and convincing evidence in favor of termination of such right).

183. See, e.g., *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (“Prison inmates have no absolute constitutional right to visitation.”); *Craig v. Hocker*, 405 F. Supp. 656, 674 (D. Nev. 1975) (“So long as there are reasonable alternative means of communication, a prisoner has no First Amendment right to associate with whomever he sees fit.”); see also *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997) (citing and following *Bellamy*); *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977) (leaving visitation regulations to prison administrators); *Harris v. Thigpen*, 727 F. Supp. 1564, 1581 (M.D. Ala. 1990) (citing and following *Newman*); *Thompson v. Bland*, 664 F. Supp. 261, 262 (W.D. Ky. 1986) (same); *White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977) (finding that the incarcerated have no right to visitation).

184. See *Griffen v. Coughlin*, 673 N.E.2d 98, 122–23 (N.Y. 1996) (finding a prison policy that required attendance in a religiously oriented substance abuse program to qualify for the prison’s Family Reunion program to violate the Establishment Clause); *McMurry v. Phelps*, 533 F. Supp. 742, 764 (W.D. La. 1982) (rejecting policy preventing children under fourteen from seeing their jailed parents); *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D.N.H. 1977) (holding that “visitation privileges may be curtailed as a punishment for disciplinary infractions” but “may not be so great as to infringe upon inmates’ First Amendment rights to familial association”).

185. See, e.g., *Block v. Rutherford*, 468 U.S. 576, 586 (1984); *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979); *Doe v. Coughlin*, 518 N.E.2d 536, 538 (N.Y. 1987) (ruling that a prison can exclude inmates with HIV/AIDS from family visitation programs); *In re Dyer*, 20 P.3d 907, 912 (Wash. 2001) (finding that prison authorities have wide discretion to administer an extended visitation policy because “It is not in the best interest of the courts to involve themselves in the ‘day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. Courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.’” (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995))).

186. But see Jeremy Travis, *Families and Children*, FED. PROBATION, June 2005, at 31, 37. (“[M]any prisons narrowly define the family members who are granted visiting privileges.”).

187. See *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (upholding prison regulations that impose two-year visitation bans and regulations that excluded visits by minor nieces and nephews and children as to whom parental rights had been terminated). As the regulations upheld in *Bazzetta* did allow visits between an inmate and her own children, grandchildren, and siblings, the Court did “not imply . . . that any right to intimate association is altogether terminated by incarceration or is always ir-

deference than nonfamily visitors at the prison administration level, given the Federal Bureau of Prisons' general embrace of family ties as especially rehabilitative.¹⁸⁸ It may seem appropriate to furnish families with special opportunities for visitation to ensure family reunification after incarceration and to avoid the termination of parental rights.¹⁸⁹ Indeed, some states *require* reunification services for incarcerated parents.¹⁹⁰

Beyond simple visitation rights are rights to "contact" visitation. "Contact" visitation, because of the inherent safety and security issues at stake, is usually reserved for only a few types of visitors (depending on the security risk of the individual prisoner).¹⁹¹ Family members, of course, are most likely to draw upon the sympathies of the prison administration and prisoners can often gain access to "contact" visitation privileges with their family members.¹⁹²

2. *Federal Prison Furlough Policies*

Family ties are also directly implicated in prison furlough policy. Furloughs are authorized unaccompanied absences from a corrections facility during a term of incarceration and are privileges (not rights); they are explicitly sanctioned by federal law at 18 U.S.C. §§ 3622 and 4082 and are available to eligible inmates based on the severity of the crime and sentence, the inmate's release date, and other factors. According to the federal guidelines, there are many reasons that might justify furloughs, including: needing to appear in court, participation in job training, participation in "educational, social, civic, religious, and recreational activities which will facilitate release transition,"¹⁹³ and participation in the "development of release plans."¹⁹⁴ Moreover, furloughs are often used to

relevant" in evaluating the legitimacy of prison policies. *Id.* at 131. In *Bazzetta*, however, the Court found a legitimate penological interest in excluding certain extended family members from visitation. *Id.* at 126–27.

188. See FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7300.4A(1) (2003).

189. See Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 HAMLINE J. PUB. L. & POL'Y 1, 40–43 (2001); Philip M. Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Issues and Recommendations*, 77 CHILD WELFARE 543, 545–46 (1998); Heidi Rosenberg, *California's Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 GOLDEN GATE U. L. REV. 285, 325–26, 329–30 (2000).

190. See CAL. WELF. & INST. CODE § 361.5(e)(1) (West 2007); N.Y. SOC. SERV. LAW § 384-b(2)(b), 7(f) (McKinney 2007).

191. See, e.g., *Block v. Rutherford*, 468 U.S. 576, 586, 589 (1983) (holding that contact visitation can be constitutionally prohibited for security reasons); accord *Toussaint v. McCarthy*, 801 F.2d 1080, 1114 (9th Cir. 1986) (same); *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984); *Lynott v. Henderson*, 610 F.2d 340, 342 (5th Cir. 1980).

192. For example, Kentucky permits contact visitation of immediate family, and three additional adults that the inmate may specify. If he has no immediate family, the warden may permit him to have more than three nonrelative visitors. KENTUCKY CORRECTIONS, POLICIES AND PROCEDURES—INMATE VISITS 3 (2004), available at <http://www.corrections.ky.gov/NR/rdonlyres/9E137E51-BF40-451E-BF4C-208503BD1958/0/161Visit.pdf>.

193. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.07 (1987).

194. *Id.* § 570.32(a)(2).

facilitate the provision of healthcare, mental health, or dental services not available on site at a correctional institution.

Nevertheless, according to the Federal Bureau of Prisons' Program Statement about furloughs, "[d]ay furloughs are generally used to strengthen family ties."¹⁹⁵ And the policies that govern furloughs make clear that furloughs may be given so that an inmate may be "present during a crisis in the immediate family"¹⁹⁶ and may request a furlough "[t]o reestablish family . . . ties."¹⁹⁷ Families get special consideration in the distribution of furloughs—and, all else being equal, those eligible inmates with families will likely get more furloughs than those without.

3. Federal Prison Placement Policies

Notwithstanding the general preference of Congress and the U.S. Sentencing Commission to discourage sentencing departures based on family ties and responsibilities, there are various ways in which the federal criminal justice system is sensitive to family ties and responsibilities when dealing with "the nature, extent, place of service, or other incidents of an appropriate sentence."¹⁹⁸ In this respect, a judge could, in consideration of a family's location, recommend that the Bureau of Prisons place an offender closer to his family.¹⁹⁹ Indeed, as Judge Posner wrote in *Froehlich v. Wisconsin Department of Corrections*,²⁰⁰ concerning the transfer of a female state prisoner whose children sued to keep her in Wisconsin, although such an accommodation is not constitutionally imposed on prison officials, "it may be a moral duty."²⁰¹

Additionally, a series of programs to accommodate families in placement decisions have emerged, though often in very short supply.²⁰² For example, the Federal Bureau of Prisons instituted a program called Mothers and Infants Together (MINT). Under this program, "[e]ligible women who have been sentenced to incarceration reside in a community correction setting with their infants for up to 18 months after delivery."²⁰³ Myrna Raeder elaborates upon other similar programs put in place at the state level:

California funded its Pregnant and Parenting Women's Alternative Sentencing Program Act and has opened two long-term community

195. *Id.* § 570.31(a)(1). Such furloughs are also granted "to enrich specific institution program experiences."

196. *Id.* § 570.32(a)(1) (defining immediate family as "mother, father, step-parents, foster parents, brothers and sisters, spouse, and children").

197. *Id.* § 570.32(a)(3).

198. 28 U.S.C. § 994(d) (2000).

199. Notably, it is easier to accomplish this accommodation for men than it is for women; there are many fewer prisons with female populations. See Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4, 18 (2005).

200. 196 F.3d 800, 802 (7th Cir. 1999).

201. *Id.*

202. Raeder, *supra* note 199, at 11, 18.

203. *Id.* at 17.

correctional facilities pursuant to California Penal Code 1174, to which women are sentenced directly, without serving time in prison, where they can reside with their minor children under six years of age for up to three years. The focus is not only on treatment of the mother, but emphasizes the development of the mother-child bond. In addition, for the last 20 years, California also has operated a Community Prison Mother Program, where inmates with less than six years remaining on their sentences may reside with their children in a residential facility where they receive comprehensive programming to enable them to better reintegrate into their communities. Small programs exist in a number of states, but currently there is no groundswell to make such programs the norm rather than the exception.²⁰⁴

4. *Other Intersections of Family Ties and Prison Practices*

There are still other punitive policies and practices involving family ties. Some prison administrators, for example, have enacted policies that prevent those condemned to death from giving their family members a final hug prior to execution.²⁰⁵ Some states allow families of *victims* to watch the execution of those responsible for the death of family members even when general access to watching the execution is severely circumscribed.²⁰⁶ Another accommodation given by the penal system (and the Constitution more broadly) to families generally includes giving prisoners the right to marry;²⁰⁷ some argue that the state should even extend to prisoners the right to procreate.²⁰⁸ Also, in the event of an inmate's death, the federal prison system notifies family members and allows federal chaplains to be involved with the inmate's family during the initial periods of grief.²⁰⁹

Additionally, there is a little known provision in the federal criminal code, 18 U.S.C. § 3582(c)(1)(A), which might be utilized to protect fami-

204. *Id.*; see also Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children*, 44 ST. LOUIS U. L.J. 377 (2000).

205. See Ryan A. Byrd, Comment, A "Last Hug" Before Execution: The Case in Favor of Contact Visitation for Death Row Inmates in Texas, 2 SCHOLAR 249 (2000) (describing and criticizing a no-contact policy in Texas).

206. See Patricia G. Barnes, *Final Reckoning: States Allow Victims' Families To Watch Executions*, 82 A.B.A. J. 36 (1996) (noting that Texas, Virginia, Louisiana, California, Washington, Illinois, Pennsylvania, and Oklahoma are the states with policies allowing such viewings).

207. *Turner v. Safley*, 482 U.S. 78 (1987); see Jason O. Runckel, *Criminal Procedure: Ending a Prisoner's Right to Have Personal Visits*, 28 PAC. L.J. 772, 773 (1997) (noting that California Constitution guarantees to prisoners the right to marry). The federal guidelines for prisoner marriage (requiring wardens to grant prisoners permission to marry, subject to a few exceptions) are contained in FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5326.04, MARRIAGES OF INMATES (updated 1998).

208. Jaime Escuder, Comment, *Prisoner Parents: An Argument for Extending the Right to Procreate to Incarcerated Men and Women*, 2002 U. CHI. LEGAL F. 271.

209. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5553.06, ESCAPES/DEATHS NOTIFICATION (updated 1999).

lies during the punitive phase of the criminal law.²¹⁰ The provision “allows a court, upon the motion of the Director of the Bureau of Prisons, to reduce a sentence for ‘extraordinary and compelling’ reasons.”²¹¹ Although the provision is employed only rarely (and usually in cases of illness), the organization Families Against Mandatory Minimums (FAMM) has urged the Sentencing Commission to instruct judges to make greater use of that law, which could facilitate sentence reductions in many more cases than executive clemency provides.²¹² In particular, FAMM has recommended that certain family-related reasons should meet the “extraordinary and compelling” circumstances test.²¹³

Finally, it is also worth noting that the Bureau of Prisons encourages inmates to use their funds to assist their families and meet their “family needs.”²¹⁴ The Bureau has also developed parenting programming with the objectives of promoting “family values,” counteracting “negative family consequences resulting from . . . incarceration,” and intending for the “institutional social environment [to] be improved through opportunities for inmates to maintain positive and sustaining contacts with their families.”²¹⁵ The programs require expenditure of substantial governmental resources on developing family ties between the incarcerated and their families.²¹⁶

210. See Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT'G REP. 188 (2001).

211. *Id.* at 188.

212. *Id.* at 188–89.

213. *Id.* at 191 (arguing that “the death or incapacitation of family members capable of caring for the [prisoner’s] minor children, or other similarly compelling family circumstance” should be sufficient to make a prisoner eligible for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)). Several courts have recently offered explication of § 3582(c)(1)(A). See *United States v. Guerrero*, 166 F. App’x. 757, 757 (5th Cir. 2006) (“Guerrero does not argue that he has an illness from which he will die within one year or that his medical condition has rendered him unable to provide self-care. Thus, he has not shown that the Bureau of Prisons abused its discretion in applying its interpretive rule restricting the application of 18 U.S.C. § 3582(c)(1)(A)(i) to inmates who have been diagnosed with medical conditions that are terminal within one year or who suffer from severely debilitating and irreversible conditions that render them unable to provide self-care.”); *Williams v. Van Buren*, 117 F. App’x. 985 (5th Cir. 2004) (discussing what it calls the “compassionate release” provision); *United States v. Maldonado*, 138 F. Supp. 2d 328, 333 (E.D.N.Y. 2001) (same, denying relief). The Bureau of Prisons has the regulatory authority to define what constitutes “extraordinary and compelling” reasons and has promulgated Program Statement 5050.46, *Compassionate Release; Procedures for Implementation of 18 U.S.C. § 3582(c)(1)(A) and 28 C.F.R. § 571.60* to explain that the BOP will only seek to help a prisoner come within statute (for the BOP must make a motion under this provision) when “circumstances of terminal illness with a predictable life expectancy . . . would likely prevent a person from completing his/her sentence.” FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5050.46, COMPASSIONATE RELEASE (1998).

214. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.07, § 541.12(11), *INMATE DISCIPLINE AND SPECIAL HOUSING UNITS* (1987).

215. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5355.03, *PARENTING PROGRAM STANDARDS* (updated 1995).

216. *Id.*

F. *Identifying a Family Ties Benefit: Some Difficulties*

Our survey of some of the more prominent points of intersection between family life and the criminal justice system reveals one overriding theme: the government repeatedly extends benefits, accommodations, and privileges to family interests.²¹⁷ Many difficult puzzles arise from this phenomenon.

First, in making any benefits available solely on the basis of family ties, the state necessarily is making express normative judgments regarding who counts as family and who does not.²¹⁸ Thus, large numbers of persons who might justifiably, in our view, see themselves as entitled to family ties benefits are excluded. Perhaps the most obvious example is families of same-sex couples, who are routinely denied treatment as equals in the provision of family ties benefits, such as the evidentiary privileges.²¹⁹ When the state makes choices regarding families, it risks

217. One reader of an earlier draft suggested that this article could start from a different premise, one that tried to put family law first, and thus saw the criminal justice system's intrusion into the family and willingness to sacrifice family interests as requiring special justification. To be sure, that would afford an interesting lens to view these issues; however, to the extent that such a perspective might suggest that society would *benefit* from a general prioritization of the family unit over the prohibitions on force or fraud, we respectfully disagree. A society that did not prioritize protection against force or fraud would undermine the very security necessary for families (and everyone else) to flourish. (At the margins, it might suggest sparing violent offenders from punishment merely on account of their being parents or children.) Cf. Alon Harel, *Why Only the State May Inflict Criminal Sanctions: On the Incoherence of Privately-Inflicted Criminal Sanctions*, 28 CARDOZO L. REV. (forthcoming 2007) (manuscript at 16, on file with author) ("It is easy to conceive of a state that does not redistribute resources or even a state that does not maintain a tort law system. Thinking, however, of a society without criminal law system[s] or without a scheme of sanctions for the violation of norms seems tantamount to thinking of a stateless existence."). As we show in Part II.A, we respect the importance of the family in society, but we are reluctant to elevate categorically the promotion of family interests above the basic values underlying criminal law norms when those interests conflict. Moreover, we prefer that familial status not be the sole marker by which established relationships of care giving are protected. In any event, legislatures might seek to carve out a middle ground by articulating and limiting the conditions and circumstances in which criminal law values trump (e.g., felonies involving fraud or violence) and those circumstances where the concern for family interests would prevail (e.g., petty crimes). But at the very least, there should be a greater awareness for the way in which these two realms of activity intersect.

218. See also Travis, *supra* note 186, at 37 ("[M]any prisons narrowly define the family members who are granted visiting privileges. Michigan's corrections department, for example, promulgated regulations in 1995 restricting the categories of individuals who are allowed to visit a prisoner. The approved visiting list may include minor children under the age of eighteen, but only if they are the prisoner's children, stepchildren, grandchildren, or siblings. Prisoners who are neither the biological parents nor legal stepparents of the children they were raising do not have this privilege. . . . Many prisoners' extended family networks, including girlfriends and boyfriends who are raising prisoners' children, are not recognized in these narrow definitions of 'family.'"). See generally Murray, *supra* note 141.

219. We find the bright-line marriage rule impossible to justify. Others agree that same-sex partners ought to be granted the same privilege rights that married couples get. See, e.g., Jennifer R. Brannen, *Unmarried with Privileges? Extending the Evidentiary Privilege to Same-Sex Couples*, 17 REV. LIT. 311 (1998) (arguing that same-sex couples should be entitled to claim spousal privileges); Elizabeth Kimberly (Kyhm) Penfil, *In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?*, 88 MARQ. L. REV. 815, 845 (2005) ("[T]he debate between those who would protect communications between same-sex partners and those who would not more readily resembles the paradigmatic dispute between Antigone and

marginalizing persons who consider themselves family members but are not recognized as such by the state. In this sense, use of the family to distribute benefits may be underinclusive.²²⁰

Second, even assuming one could agree on which people count as a “family,” reliance on that category will often be overinclusive. You might not like your spouse at all and could harbor no hesitation to testify against him; but he still might reap the benefits of an interfamily testimonial privilege.²²¹ To be sure, the obvious advantage of using family as the dividing line here is administrability. But it is not easy to administer when we operate with competing definitions, and the state must take a value position on who counts.²²²

Third, the government does not always demonstrate a consistent pattern of who counts as family for each of these benefits. In the federal sentencing context, for example, where the courts look to find out whether the defendant is an irreplaceable caregiver, the concept of family for determining extraordinary family ties and responsibilities appears rather broad.²²³ If a grandparent or an aunt can take care of the children, then the single-parent defendant is unlikely to get a substantial departure, if at all.²²⁴ By contrast, in other areas where the government distributes family ties benefits, the range of relevant family members may be narrow—for example, evidentiary privileges.²²⁵

Fourth, we recognize that some practices that confer benefits on families may also serve other purposes that in fact directly benefit the state. For example, pretrial release determinations that examine the presence of a defendant’s family ties in the area may be viewed as a

Creon. Those who, like Creon, believe the current, state-imposed laws are inviolate will refuse the privilege. Those who, like Antigone, believe the eternal laws of family loyalty and ethical choice supercede the state’s current pronouncement of the law will seek to apply the privilege.”); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 202 (2003) (advocating “sweeping reform” in rewarding diverse adult relationships, rather than just marriage). Cohabiting couples with serious relationships similarly deserve privilege protection if married people do. For a contrary view, see Annotation, *Communication Between Unmarried Couple Living Together as Privileged*, 4 A.L.R. 4th 422 (2005) (collecting cases unanimously drawing a bright-line test at marriage and refusing to provide cohabiters with spousal privileges).

220. Of course, the exclusion of people here is not a problem unique to the criminal law context. And the fact of a benefit’s underinclusiveness is not a sufficient reason to jettison the benefit, but rather is a potential reason to expand who receives it.

221. It bears mention, though, that many jurisdictions confer a right to a willing spouse to testify.

222. One possible solution to the administrability challenge would be to give people a discrete number of persons eligible for privileges and to designate those persons *ex ante* through a registry. See *infra* note 316.

223. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 cmt. n.1(B) (2006).

224. Consequently, in the federal context, it might appear that family ties actually work against some defendants because of the broad network of persons on which they might rely. On this view, this could seem more like a tax on defendants with family ties than a benefit to them. We disagree. By narrowing the class of offenders who might benefit from family ties departures to simply those who occupy a role of irreplaceable caregiver, the cases implementing the 5H1.6 provision help ensure that defendants with family ties are not benefited vis-à-vis those similarly situated defendants without any special family ties or responsibilities.

225. The federal courts, in other words, expand the notion of family capaciously for purposes of sentencing but restrict it for purposes of extending evidentiary privileges.

benefit for the family. Nonetheless, familial considerations may also serve as an imperfect proxy for assessing a defendant's flight risk, an issue in which the state has a clear and appropriate interest. Similarly, the various accommodations of the family in the context of prison administration may reflect (imperfect or indirect) choices of decision makers in the criminal justice system to advance goals such as strengthening precarious families, or alternatively, reducing recidivism or facilitating offender rehabilitation and reintegration into society. And perhaps—though this seems more contestable—when the state takes an interest in a defendant's criminal motivation (say, to steal bread for hungry children) based on family loyalty, it may be assessing severity of moral culpability rather than giving the family any benefit as such.

We acknowledge the general difficulty of identifying what counts as a genuine benefit to the family. This challenge results, in part, because a variety of extant and historical practices arise under the cloud of the traditional governmental reluctance to intervene in family life, even to protect a family's most vulnerable members.²²⁶ Thus, when government prosecutors fail to pursue domestic violence, such as marital rape or child abuse, it is unclear whether that pattern of prosecutorial inaction constitutes a family ties benefit.²²⁷ The origins of the pattern of noninterference were, as we explain in Part II, clearly intended to protect the family against the reach of the state. But this policy choice may simply be a wrong-headed approach to advancing family interests. Thus, it is hard to say that, in those situations, the state is in fact advancing the welfare of the institution of the family or a particular family. Clearly, not all apparent "benefits" actually advance the interests of family life or the lives of particular members of families.

Nonetheless, as should be apparent from our discussion thus far, there are at least a handful of situations where the criminal justice system has actively accommodated, promoted, or privileged familial interests or chosen policies that at least disparately benefit those with families. We have in mind here the evidentiary privileges, familial status defenses, sentencing discounts for offenders with family ties and responsibilities, and exemptions for family members from harboring fugitives. The next Part shifts from the descriptive to the normative, as we consider what factors should help determine whether a particular accommodation of family interests by the criminal justice system is an appropriate policy choice.

226. See *supra* note 64.

227. As Alice Ristorph noted in a comment on an earlier draft, the failure to prosecute marital rape and other domestic abuse may reflect less about family benefits and more about contested views that men who have forced sex with their wives are less "blameworthy" than those who have forced sex with strangers, and that violence against family members is less blameworthy than violence against others.

II. ERECTING THE SPARTAN PRESUMPTION: STRUCTURE, SCOPE, AND RATIONALE

A. *Family and the Modern State: An Ambivalent Relationship*

The modern defense of using the state, its institutions, its laws, and its coercive force to support the family often rings in “communitarian” tones. The argument usually proceeds by drawing upon the “historical,”²²⁸ “constitutive,”²²⁹ or “situated”²³⁰ selves that constitute a polity.²³¹ Such selves are composed of loyalties, role-responsibilities, and personal ties that are, in some very basic sense, logically and morally prior to the individual. The self, it is sometimes argued, is linked up so inextricably with these group and relational affiliations that any moral system embodied by a state and its laws must appreciate, respect, and facilitate the self’s authentic expression of that which creates its very identity. States must either find a way to acknowledge special “associative” duties flowing to family members that may conflict with and trump more general duties to people as such,²³² or risk irrelevance and illegitimacy.

Accordingly, it can be argued that states ought not ignore the individual self’s derivation from and debt to the family.²³³ If the family defines the individual, a state’s administration of justice must serve its citizens by appreciating the very sources of their individuality. Privileging and giving priority to the family—a central source of selfhood—is one

228. See GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 3 (1993).

229. See MEIR DAN-COHEN, *Responsibility and the Boundaries of the Self*, in *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 199–200 (2002) (originally published at 105 HARV. L. REV. 959 (1992)).

230. See MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 15–29 (1999); Regan, *supra* note 21, at 2067–89.

231. These accounts of the self have their roots in the early communitarian theories of CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3–24 (1989) (developing the idea that selves have “inescapable frameworks” that any theory of justice and the state must accommodate); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 37–39 (1991) (developing the idea of the self with “horizons of significance”); and MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (developing the idea of the “encumbered” self).

232. For more on the distinction between associative and general duties, see SAMUEL SCHEFFLER, *Families, Nations, and Strangers*, in *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* 48, 49–50 (2001).

233. A variant of this argument is offered by Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 147 (2003). Drawing on JOSEPH RAZ, *THE MORALITY OF FREEDOM* 38–69 (1986), Hills suggests that state officials should defer to decisions made by competent “private governments”—of which the family is an example. Hills, *supra*, at 193–96. Such private governments promote individual freedom and should be accorded special associational rights and liberties. Hills’s presumption that families’ internal decision-making processes should command deference holds so long as the decision at issue would be more likely to be handled appropriately by the private government than by the state. In what follows, we ultimately contest the notion that the family and its internal decision-making process should receive any deference by the state in the criminal law context. This is ultimately no real challenge to Hills, who concedes that deferring to private governments may be inappropriate if such deference does not improve decisions. See *id.* at 195–96. Nevertheless, with Hills, we are mindful that the state can draw on the family’s expertise and efficiency—and appreciate that these reasons may sometimes help rebut our preferred presumption of no deference.

way to have the state connect with the individuals to which it must dispense justice. Moreover, without extending benefits and immunities to the family, the state risks losing compliance from its citizens; some benefits may be necessary to establish and maintain the state's legitimacy. Indeed, while the benefits may seem inappropriate in the context of the criminal justice system, they might be viewed as a net benefit for inducing general compliance with a legal regime.²³⁴

There is yet another available justification for the state's support of the family—one that is potentially more practical and less philosophical. One could argue that because the state either cannot or will not live in accordance with what Plato's *Republic* idealizes for the Guardian class—no private families with all children being held in common²³⁵—the state needs to keep families together and solvent. The state can draw from the rich panoply of resources naturally furnished and expended by the family in creating good citizens. By giving families special support, the state can economize on expenditures that it would otherwise be forced to bear in educating its citizenry and preparing its members to contribute to the stability and flourishing of the regime. This is a crude way of thinking about the matter, to be sure. But it is one that must have a grain of truth: the state simply cannot afford to provide all the services families routinely provide relatively efficiently and effectively, so it “subcontracts” such work to the family—and “pays” it accordingly. Families will not be able to provide care services completely for free—and can rightfully demand that the state (which is parasitically living off of its successes) subsidize the hard work of helping children “take their place as responsible, self-governing members of society.”²³⁶ The state helps itself when it subcontracts cheaply the “formative project of fostering the capacities for democratic and personal self-government”²³⁷—and leaves it in generally reliable hands.

There is a third argument available to those wishing that the state continue to furnish families with special treatment. Some argue for an

234. See Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical* 9 (U. of Penn. Law School Pub. Law and Legal Theory Research Paper Series, Research Paper No. 06-32), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924917 (“If the criminal law tracks the community's intuitions of justice in assigning liability and punishment, it is argued, the law gains access to the power and efficiency of stigmatization, it avoids the resistance and subversion inspired by an unjust system, it gains compliance by prompting people to defer to it as a moral authority in new or grey areas (such as insider trading), and it earns the ability to help shape powerful societal norms.”); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

235. PLATO, *THE REPUBLIC* 155–68 (Francis MacDonald Cornford ed. 1945).

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

237. Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 FORDHAM L. REV. 1569, 1569 (2004); see also MARTHA FINEMAN, *THE AUTONOMY MYTH*, at xviii (2004) (“It is very important to understand the roles assigned to the family in society—roles that otherwise might have to be played by other institutions, such as the market or the state.”). Although space constraints have prevented us from giving the subtle and important work of McClain and Fineman its due, we think it important to give a flavor of this form of argument in the text.

“ethic of care” in political and moral life more generally—and think the state can facilitate this ethic by supporting families in the right way.²³⁸ As Deborah Stone puts it,

Caring for each other is the most basic form of civic participation. We learn to care in families, and we enlarge our communities of concern as we mature. Caring is the essential democratic act, the prerequisite to voting, joining associations, attending meetings, holding office and all the other ways we sustain democracy. Care, the noun, requires families and workers who care, the verb. Caring, the activity, breeds caring, the attitude, and caring, the attitude, seeds caring, the politics.²³⁹

Accordingly, making sure the state cares for the family ensures that citizens can care for one another, the state, and politics.²⁴⁰

These arguments have much to recommend them; together they seem persuasive and suggest that the law’s recognition of family ties might be more than just irrational sentimentalism or a knee-jerk instantiation of “family values.”²⁴¹ These arguments go beyond the notion oft heard that strong families lead to a strong nation—and the contention that families help furnish “civic virtue” and “social capital.”²⁴² Although many have tried to connect familial self-government with democratic self-government,²⁴³ the scholars we draw upon put meat on the bones of the mottos and creeds routinely invoked. Obviously, we have not exhausted the field or comprehensively explained how these ideas cash out in particular legal contexts; instead, we have aimed only to summarize very briefly the arguments of those who grapple with the role of the family in the state’s endeavor to secure the political conditions for human flourishing.

Ultimately, we find little to quarrel with when these arguments are considered at the most general level. All things being equal, we do not think states can succeed without being attentive to the way in which selves are constructed through families—and we agree that if states are going to feed on the capacity-generating benefits families confer, it is not inappropriate for families to demand some subsidization in return. Families may be labors of love; but they are full of real undercompensated labor all the same.

238. See JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 3 (1993); Deborah Stone, *Why We Need a Care Movement*, *NATION*, Mar. 13, 2000, at 13, 15.

239. Stone, *supra* note 238, at 15.

240. Some feminists remain suspicious of the “ethic of care” because it seems intrinsically gendered—and using the state to promote care might only further ensnare women in particular into the hard work of caring. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 179 (2000).

241. McClain, *supra* note 237, at 1569.

242. See DONALD BRAMAN, *DOING TIME ON THE OUTSIDE* 6–7 (2004).

243. See NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000).

Nevertheless, we do not think that the arguments to support family benefits at a general level of political theory can succeed in every area of the law. For the reasons we sketch in the remainder of this Part, we think that the criminal justice system is an especially inappropriate place to recognize the family's importance in our common lives together as citizens—especially through the use of family ties benefits.²⁴⁴ Put briefly, the consequences of wrongly or unfairly distributing criminal penalties or causing more crime trump the invocation of “family privacy” or “family preservation” when conflicts come to the fore.

We advance four normative cost considerations; together, we think they erect a presumption—albeit rebuttable—against family ties benefits in the criminal justice system.²⁴⁵ The normative costs we identify can be summarized briefly. Benefits to families in the criminal justice system historically facilitate gender hierarchy and domestic violence; undermine the pursuit of accuracy in the effective prosecution of the guilty and the exoneration of the innocent (thus possibly leading to unwarranted harshness or leniency in the administration of justice); disrupt our liberal political commitments to treat similarly situated persons with equal concern and discriminate against those with little or no family; and incentivize more crime and more *successful* crime. For these reasons, we are generally skeptical of using the criminal justice system to promote family interests absent a compelling reason and no feasible alternative means.

B. *Some Normative Costs of Family Ties Benefits*

1. *Patriarchy and Power: Historical Perspectives*

The historical context in which the family's relationship to the criminal law has evolved reveals that many benefits to the family often served (and in some cases, continue to serve) to perpetuate patriarchy, gender hierarchy, or domestic violence.²⁴⁶ Indeed, in the context of crimes against children, the sanctuary the family has enjoyed against the criminal law has served in particular to perpetuate child abuse and neglect. The cultural assumption, validated at times by the Supreme Court, has been that the “natural bonds of affection” between parent and child

244. See Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 530 (2005) (arguing that we can furnish respect for intimate relationships through various means—and need not pursue all strategies at once in every issue area).

245. “To say that these [arguments] are seen as [creating a] presumption is not to say that they can never, in the end, be outweighed by other considerations. It is merely to say that, in the first instance, they present themselves as considerations upon which one must” render judgment. SAMUEL SCHEFFLER, *Conceptions of Cosmopolitanism*, in BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT, *supra* note 232, at 121.

246. Cf. Markus Dirk Dubber, *The Power to Govern Men and Things: Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1345 (2004) (describing the patriarchal genealogy of the modern police power and noting that a clear view of the origins of state power can help achieve the legitimate use of power).

will protect our children.²⁴⁷ But this assumption has entailed a perverse result: a culture of relative indifference toward violence in the family, particularly against children.²⁴⁸ This is not a hard and fast rule, as many family ties benefits have "liberalized" over the years and now operate to prevent family members from using their special immunities to subvert prosecution for domestic violence and child abuse. Still, there can be no question that many of the policies canvassed in Part I—and the continued application of many family ties benefits—have ignoble origins and serve to further domination in the "private" sphere.

As recounted in Wayne Logan's illuminating article, *Criminal Law Sanctuaries*, the family has long been understood as an untouchable site for criminal justice.²⁴⁹ Under Roman law, the doctrine of *patria potestas* empowered fathers and husbands to dominate family life without fear of the state's interference; thus, adulterous wives could be killed without public retribution, and wives could be beaten with impunity.²⁵⁰ In colonial America, Puritan courts squarely "placed family preservation ahead of physical protection of victims,"²⁵¹ allowing men to use force against wives and children for "legitimate" reasons, a limit rarely tested out of reluctance to disturb the privacy of family life.²⁵² Law enforcement interest in family violence then waxed and waned over the generations, with periods of activism butting up against a deep-rooted tradition of noninterference in the affairs of a family.²⁵³

Over time, wife beating was officially banned,²⁵⁴ but like so much else, the law on the books eclipsed the law on the streets, as the act of wife beating was often viewed as a nonevent from the eyes of the state—it was, as one scholar (cynically?) called it, the "rule of love."²⁵⁵ Unsurprisingly, children also suffered under the de facto sanctuary from the

247. *Parham v. J.R.*, 442 U.S. 584, 602 (1979); see also *Lehr v. Robertston*, 463 U.S. 248, 256 (1983) ("The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility.").

248. See generally Collins, *supra* note 77 (manuscript at 7–9).

249. See Logan, *supra* note 87.

250. Terry Davidson, *Conjugal Crime: Understanding and Changing the Wifebeating Pattern* 99 (1978); Logan, *supra* note 87, at 339; see also Mason Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 295 (1972) (explaining that doctrine of *patria potestas* also gave a father the right to "kill, mutilate, sell, or offer his child in sacrifice").

251. PLECK, *supra* note 68, at 17–33.

252. *Id.* at 27–29; see also Logan, *supra* note 87, at 340.

253. See generally Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, in *FAMILY VIOLENCE* 19, 19–57 (Lloyd Ohlin & Michael Tonry eds., 1989) (describing the history of reform efforts in matters of family violence). Pleck notes that "[t]he greater the defense of the rights and privileges of the traditional family, the lower the interest in the criminalization of the family." *Id.* at 20.

254. See, e.g., *Fulgham v. State*, 46 Ala. 143, 146–48 (1871); *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871).

255. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

reach of criminal law.²⁵⁶ Needless to say, there was still great difficulty in prosecuting and punishing marital rape.²⁵⁷

In the 1970s, the tide began to shift, at least in part as a result of greater sensitivity to the concerns raised by feminists. Police officers, for instance, were no longer urged or instructed to play the role of “mediator” or “peacemaker” when called to a domestic disturbance; they could play their normal role of enforcer of the criminal law.²⁵⁸ Some scholars contest whether that “normal” role is a desirable role in the family context for fear that the implementation of “no-drop” or “shall-arrest” policies²⁵⁹ might end up alienating victims from a criminal justice system that is indifferent to or dismissive of their particular interests.²⁶⁰

That said, notwithstanding some advances in prosecution norms for domestic violence, the criminal law system still exhibits a great reluctance to interfere in the private life of the family. Scholars, such as Logan, point to several examples of this ongoing phenomenon: elder abuse,²⁶¹ tolerance of domestic violence in homosexual relationships,²⁶² the con-

256. Logan, *supra* note 87, at 341 (“Child abuse, by mothers and fathers alike, similarly continued without significant intervention.” (citing 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW §§ 878–891 (Little Brown 5th ed. 1872) (elaborating upon the chastisement right in families))); Robert W. Ten Bensel et al., *Children in a World of Violence: The Roots of Child Maltreatment, in THE BATTERED CHILD 3* (Mary Edna Helfer et al. eds., 5th ed. 1997) (historical survey of child abuse). As Logan explains, it was not until the widespread use of x-ray technology, which could discern evidence of abuse that children were too afraid to discuss, that the tide changed, and jurisdictions began adopting criminal laws against child neglect or abuse. Logan, *supra* note 87, at 342–43.

257. According to Logan, “[m]arital rape, as of the mid-1980s, largely remained a legal impossibility, with the drafters of the influential Model Penal Code expressing concern over ‘unwarranted intrusion of the penal law into the life of the family.’” Logan, *supra* note 87, at 347; *see also* MODEL PENAL CODE § 213.1 cmt. 8(c) (1985).

258. *See* 42 U.S.C. § 3796hh(c)(1)(A) (2000) (requiring units of government to “encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed” to be eligible for certain grants); MARC. L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 297–306 (2d ed. 2003) (discussing changes in police responses to domestic violence); LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992); Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1851–56 (2002); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1518–19 (1998).

259. *See* R. Michael Cassidy, *Reconsidering Spousal Privileges after Crawford*, 33 AM. J. CRIM. L. 339, 348 (2006) (distinguishing soft from hard no-drop policies).

260. *See* Coker, *supra* note 65, at 803–05; Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 569–70 (1999); Suk, *supra* note 67, at 45. *But see* Annalise Acorn, *Surviving the Battered Reader’s Syndrome, or: A Critique of Linda G. Mills’ Insult to Injury: Rethinking our Responses to Intimate Abuse*, 13 UCLA WOMEN’S L.J. 335, 340 (2005); Cassidy, *supra* note 259, at 350 (surveying counter-arguments and studies supporting claim that welfare and autonomy of women are improved through tough policies on domestic violence).

261. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—the Legal Framework*, 31 CONN. L. REV. 77 (1998); Audrey S. Garfield, Note, *Elder Abuse and the States’ Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859 (1991).

262. Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990); Symposium, *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121 (2001).

tinued difficulty of prosecuting marital rape,²⁶³ and the free use of corporal punishment against children.²⁶⁴ Moreover, the scourge of domestic violence continues at astonishingly high levels.²⁶⁵ The effects of these willful silences and deferential nods to the family have been, in Logan's words, an unrelenting "form of criminal predations, perpetrated in the shadow of public law."²⁶⁶

The historical context provided above only partly underwrites our Spartan presumption. Our argument reaches well beyond the fear that benefits to the family facilitate the perpetuation of gender hierarchy and domestic violence—though these reasons alone might suffice to reorient our doctrines and practices. Indeed, the overwhelming respect for families afforded by our law is often criticized by feminist scholars who are undoubtedly right to express discomfort that the state subsidizes a domain in which women and children are routinely dominated.²⁶⁷ For this reason, we think the state should be very cautious when deciding to extend benefits or privileges on the basis of family ties in the criminal justice system.²⁶⁸

2. *Accuracy and Justice*

Benefits to the family in the criminal justice system also endanger the accurate and just imposition of punishment. As we described earlier, various jurisdictions afford family members special privileges that exempt them from having to testify at trial or from providing other assistance to law enforcement, even if they have information critical to the accurate prosecution or exoneration of defendants or others.²⁶⁹ At bottom, there are places where truth and family loyalty conflict, and the state should not knowingly afford benefits to family members, or exempt them from duties borne by other members of society, simply because of

263. Logan, *supra* note 87, at 347; see also Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1482 (2000) (noting the "partial norm and uneven" reform of marital rape law).

264. Logan, *supra* note 87, at 347 (citing MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES* (1994); Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353 (1998); David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147 (1998)).

265. *Id.* at 372 (citing PATRICIA TJADEN & NANCY THOENNES, *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY III* (2000)) (estimating that 4.8 million women experience every year some form of sexual or physical abuse, and that annually about 2.9 million men endure physical assaults by their partners).

266. *Id.* at 348.

267. See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25–40 (1989).

268. If our skepticism toward family ties benefits were implemented in law and practice, we might see the state's criminal justice system serve as a vehicle to interrupt and upend patterns of private patriarchy and domination. But this would only be a first step; as Laura Rosenbury pointed out to us in a comment on an earlier draft, reducing private patriarchy would not address the various ways the state's institutions historically perpetuated its own kind of public patriarchy.

269. See *supra* Part I.C.2.

familial relationships to the defendant. When innocent people mistakenly sit in prison (or guilty people escape prosecution altogether) as a result of these benefits, then our commitment to the accurate distribution of justice is undermined at an intolerable cost.²⁷⁰

To be sure, we recognize that our concern about privileges also has an empirical component. For one thing, in defense of the testimonial privileges, the state can argue that it will be effectively inviting perjury without them—and that no “truth” benefit can be conferred by trying to force people to testify against their better judgments to maintain the secrets of a loved one against state intrusion.²⁷¹ Although we have found no empirical evidence to support the thesis that family members would lie under oath if forced to testify against a loved one (in sufficient numbers to undermine the quest for truth in criminal trials), there is some plausible appeal to the suggestion. Additionally, it may turn out that having the privilege deters future crime because the communication of the information to the spouse may have the salutary effect of the spouse encouraging the defendant to forbear further crime. (Of course, if it turns out that this is empirically grounded, then the privilege or immunity should be limited to communications regarding future conduct, not past conduct.)

Similarly, at work in the exemption for family members’ harboring fugitives must be an assumption that the temptation to commit the crime of harboring in certain contexts is too great. A parent would have a very difficult time turning away a child at the door precisely at a moment of extreme vulnerability. Some might think that prudence demands that we exempt those family members who are, in this situation, undeterrable;²⁷² others may think mercy is appropriate for those too weak to turn their closest relatives away in a time of desperate need. Indeed, some jurisdictions seem to acknowledge that family members have reduced culpability; accordingly, some states do not immunize family members but charge them with a lesser crime.

Our reaction to these efforts to excuse family members’ commission of a crime (perjury and harboring) is the same: the criminal law is a separate sphere of justice, with its own primary values, among which are the protection of citizens and the accurate and fair prosecution of those who have endangered public safety and contravened the laws passed to protect that interest in security.²⁷³ Although it cannot be denied that humans are frail and fallible—in particular when it comes to family loyalty—we believe it risks too much accuracy in the criminal justice system to immunize family members from crimes they may commit in service of a rela-

270. See Harel, *supra* note 217.

271. FLETCHER, *supra* note 228, at 81 (arguing that the perjury rationale for the intrafamilial privileges might justify it where other rationales fail).

272. See 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 338 (1827).

273. Cf. MICHAEL WALZER, SPHERES OF JUSTICE 283 (1983).

tive's obstruction of justice and to give them a free pass from answering governmental subpoenas. The state simply cannot legitimate its acceptance of perjury and obstruction by refusing to prosecute individuals who engage in these practices. Moreover, those who think it is unattractive to make a parent testify against a child should undertake a thought experiment: imagine that because of a parent's failure to testify against her child, another person sits wrongfully on death row, a person who would otherwise be exonerated. That wrongfully convicted person may also have a family whose interests in their child's life should be protected. The fact that it seems like it is only an apparently distant and disembodied government that loses access to evidence should not obscure the fact that the state is acting on behalf of potential future victims as well as past victims. The state must fairly and effectively balance its solicitousness of the defendant against others in society.

There are certainly other aspects of the criminal justice system that similarly undermine the quest for accuracy, such as the exclusionary rule associated with evidence procured in violation of the Fourth Amendment.²⁷⁴ But we do not believe the existence of such practices undermines our argument here. The exclusionary rule, for example, vindicates another critical interest of our system of criminal justice, the constitutional prohibition against unreasonable searches and seizures.²⁷⁵ In contrast, we do not think the interest typically invoked in defending those family ties benefits that impede accurate punishment or exoneration—encouraging close familial relationships—constitutes sufficient reason to abdicate our commitment to the truth-seeking function of the criminal justice system.

3. *Equality*

Family ties benefits not only impede the accurate and just administration of criminal penalties, but they can also threaten basic commitments to equality under law. Thus, our third difficulty with family ties benefits is that they can disrupt norms of equality that should otherwise prevail in an attractive regime of liberal governance.²⁷⁶ A desideratum in criminal law investigation and prosecution should be to treat citizens' interests with equal concern, and without fear or favor. The extension of

274. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that the exclusionary rule is an essential part of the Fourth and Fourteenth Amendments). The attorney-client privilege is another example and will be discussed in greater detail in *infra* Part III.A.1.

275. Moreover, with the right alternative measures available, some scholars have suggested that there is good reason to revisit the wisdom of the exclusionary rule. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 20–31 (1997).

276. See, e.g., Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1198 (2000) (noting that liberal discourse normally entails commitments which respect that "individuals, and not groups, are the primary political units and bearers of rights; [and] that equality means, first and foremost, the right of every individual to 'equal respect and concern' in pursuit of her conception of the good").

special privileges to persons simply because of their family situation bears an onus of justification especially because any benefits that accrue to those who have specially recognized family ties will be unavailable to those who lack such family ties. Whether this constitutes pernicious or permissible discrimination may be subject to some debate, but we think it is the former in all but the rarest of circumstances.

We do not think it especially controversial to draw upon a principle of equality under the law. This basic liberal commitment underwrites not only our governing documents and institutions, but it is a prerequisite for a legitimate system of criminal justice as well. Accordingly, benefits and special treatment that emerge from leniency on account of family status are, generally speaking, unattractive within a properly liberal criminal justice system.²⁷⁷

At one level of abstraction, when a criminal derogates from the democratically derived codes of proper conduct, he indicates a superiority that claims he is not bound by the rules that bind others. Society builds credible criminal justice systems to diminish the plausibility of those claims of superiority, and by its attempt to punish offenses, the criminal justice system endeavors to make clear that no one is superior to the law. Mercy (including mercy derived from family ties benefits) is so threatening to the very basic equality principle undergirding our constitutional democracy because it allows the offender to maintain his claim of superiority, and to point to his unanswered crime as evidence of that superiority.²⁷⁸ Because at least part of the justification for the state's administration of criminal justice is that it must—under the principle of equality—try to diminish the offender's claim of superiority, the state fails part of its essential purpose in having a criminal justice system when it distributes mercy to some offenders merely because of their family status.²⁷⁹ Having a family, while “constitutively” relevant to an individual's identity, is morally orthogonal to the offender's claim of superiority as represented through the crime. Accordingly, allowing mercy based on family ties subverts the institutional task of recalibrating the messages of equal worth undergirding the liberal institutions of criminal justice.²⁸⁰

The principle of equality also has a more straightforward valence that does not require extended discussion: unjustified disparities in sentence disposition or duration contribute mightily to the perception of the

277. See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1452–74 (2004).

278. This account draws from Jean Hampton's discussion in JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 157–61 (1988), and Markel, *supra* note 277, at 1453–56.

279. Of course, the degree of disruption to the equality norm is diminished if the liability of the offender is established and the leniency affects only the sentence incrementally rather than the fact of being adjudged guilty.

280. Indeed, various feminist scholars have emphasized the importance of holding women accountable when they are offenders. See Kay Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 385 n.125 (2006); cf. Martha Mahoney, *Women's Lives, Violence and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 59, 64 (Martha Fineman & Roxanne Mykitiuk eds., 1994) (discussing how it is “so difficult” for us “to see both agency and oppression in the lives of women”).

illegitimacy of the criminal justice system. To illustrate: imagine that I physically attacked my neighbor and that such attacks are illegal. If the state, in its ordinary course of business, knowingly did nothing in the face of my crime, its inaction could be read to express two social facts: first, an indifference to the legal rights of its citizens, particularly to the security of their persons and property; and second, a statement of condescension to me that my actions will not be taken seriously by the state. When the state makes an effort to investigate, prosecute, and punish me for my crime, by contrast, it tells me that I will be held accountable for my unlawful actions. It also sends a signal to my fellow citizens that their legal rights are being vindicated by the state.²⁸¹

These various expressions of care and concern are significantly more difficult to articulate when the state must address many offenders, many victims, and many citizens. These difficulties are best alleviated when institutions exhibit fidelity to rule of law values, under which like cases are treated alike, in accordance with legal norms that are known or knowable. In a situation where we must address two similarly situated offenders, and an unjustified disparity results, these departures from rule of law values will invariably trigger demoralization, resentment, and, perhaps in some cases, outrage and violence. Thus, in light of the risks associated with disparity—and the gashes in the moral fabric of impartial justice such disparities create—the principle of equality should be a lodestar guiding our collective actions in the criminal justice system.

It goes without saying that invoking the principle of equality does not mean mindless fealty to treating every offender with the same punitive response. Some level of granular analysis is required to sort cases appropriately—only the “like” should be treated alike. But once we have devised reasonable bases for distinguishing among classes of offenses and offenders, only compelling reasons and narrow options should suffice to displace the outcome that would have been otherwise obtained in light of the classification scheme that has been established through democratic institutions.²⁸²

281. Thus, when family members receive punishment discounts on account of who the victim was, we are saying that their victim is not worth the same amount as she would have been if the victim were not a family member. Cf. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 73 (1976) (“[D]isproportionately lenient punishment for murder implies that human life—the victim’s life—is not worthy of much concern.”).

282. But see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that rhetoric of equality should be abandoned). It is true that Peter Westen cleverly shows why the concept of equality itself is, in some very real sense, tautological, circular, and uninteresting. That likes should be treated alike is also not actually true as an independent moral principle: if someone said to treat all murderers to green lollipops equally, we would think they were crazy, not egalitarians. His very reasonable point is that the substantive moral rules that tell us who are relevant equals and how to treat any one individual from that class contain all the relevant data to perform any moral calculus; the equality principle only contains what we already know—that the rule that prescribes conduct or treatment of one person in a group would likewise apply to anyone else with the same relevant conduct or orientation. *Id.* at 572–73. He delightfully argues that “justice” fares little better, rendering “equal justice under law” one big empty redundancy. See *id.* at 558.

That said, we recognize that incarceration may wreak havoc on innocent third parties, many of whom are wholly innocent family members.²⁸³ But our concern for minimizing harms to innocent third parties should not necessarily be tethered to proof of a family relationship; it is both over- and underinclusive to limit benefits to family members. Moreover, as we explain later, there may be ways to minimize these harms without actually extending unfair sentencing discounts to someone simply because one is a father or mother, or son or daughter. Still, to the extent that rehabilitative aims are pursued through our corrections systems, we can imagine sites within the criminal justice system where the Spartan presumption is overcome by distributing benefits in a manner that is neutral to family status but still pays close attention to the obligations of those with unique care-giving roles.

Still, we think Westen's thesis gets taken too far when he calls equality (and by extension, justice) an "empty vessel with no substantive moral content of its own." *Id.* at 547. For our purposes, the ideal of equality is a proxy for the uncontroversial claim that the criminal justice system's intrinsic legitimacy rests on its ability to treat all fairly, without favoring certain classes of citizens for morally irrelevant characteristics. Having a family—like being of a certain race or religion—may be psychologically relevant to a person's identity; but it is morally arbitrary from the standpoint of criminal justice. The principle of equality functions as a stand-in for the more general point that a person's status as a family member is not, in principle, a mitigating or aggravating factor in the administration of punishment. Making assumptions that family members are entitled to a special brand of criminal justice is inconsistent with the criminal justice system's focus on distributing punishment for culpability without favoring the status of an offender.

More generally, we are sympathetic to the response to Westen's article made by Kent Greenawalt. See Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1169–70 (1983) ("The applicability of the principle [of equality] provides an additional moral reason for complying with an established standard of how people are to be treated. In many situations the principle also affects the substantive conclusions that can properly be reached, bearing on whether differences in ultimate treatment are warranted and, if so, on the methods for determining how choices among individuals are to be made. [And s]omewhat less directly, the principle also affects how justifications of unequal treatment should proceed and what should be done in instances of uncertainty over whether people are relevantly alike or unlike."). But see Peter Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983).

283. See generally Darryl Brown, *Third Party Harms in Criminal Law*, 80 TEX. L. REV. 1383 (2004). Importantly, we recognize that many aspects of the criminal justice system have a disparate—and profoundly troubling—impact on family life in minority communities. See, e.g., BRAMAN, *supra* note 242, at 1–11 (ethnography of effects of incarceration on family and community life in the District of Columbia); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005 (2001); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004). We also recognize that our current sentencing regime has particularly harsh consequences for incarcerated mothers and their children. See, e.g., Raeder, *supra* note 161, at 678–99. Rather than use the criminal justice system to confer benefits just on members of favored groups such as traditional nuclear families, however, we believe a better response would be more sanity with respect to drug law enforcement, less harsh sentencing policies, expanded use of the coercion or duress doctrines, and greater use of alternatives to incarceration. See, e.g., Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. (forthcoming 2007) (draft available at www.danmarkel.com). Additionally, if we want to direct benefits to improve family life, we believe it more appropriate to do so through the distributive-justice institutions of social policy and not through criminal justice "benefits" that are indirect and potentially more costly along other dimensions.

4. *Do Family Ties Benefits Incentivize More Crime?*

Finally, we note that some family ties benefits can have the unwanted effect of incentivizing more criminal activity—and more successful criminal activity to boot. To the extent the law effectively signals messages to the public by highlighting that family membership confers special benefits, some family ties benefits would encourage family members to keep their criminal enterprises in the family. Jeremy Bentham disfavored the notion of spousal privilege precisely because “it secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime”²⁸⁴—and facilitates criminals converting their own castles into “a den of thieves.”²⁸⁵ Today, many jurisdictions have acknowledged the need for a joint spousal criminal activity exception, precisely to reduce the likelihood of the den of thieves arising in the castle. Moreover, if sentencing policies serve to create a nonincarcerable (or less carcerable) class of persons because these persons are “irreplaceable caregivers,” then those persons will seek out criminal endeavor or be, other things being equal, the most sought after by others to serve in criminal enterprises.

In short, we fear that family ties benefits will help fortify a sanctuary from criminal law, and thus encourage the enlistment of family members into criminal enterprises of all sorts, whether fraud or murder, embezzlement, or racketeering.²⁸⁶ With respect to sentencing, we should be especially anxious, for as Judge Kleinfeld noted, “[n]o class of persons can be immunized from imprisonment without assisting recruitment for criminal enterprises by providing an incarceration-proof labor force.”²⁸⁷ This point has been reiterated by other appellate courts construing sentencing departures based on family responsibilities,²⁸⁸ as well as by members of other branches of government.²⁸⁹ We note that we have thus far found little empirical research examining this hypothesis; it remains fertile ground for future research.²⁹⁰

284. Bentham, *supra* note 272, at 338.

285. *Id.* at 340.

286. “Criminal families” exist well beyond the *Godfather* trilogy. For a good introduction to scholarship about criminal families, see DIEGO GAMBETTA, *THE SICILIAN MAFIA: THE BUSINESS OF PRIVATE PROTECTION* (1993).

287. *United States v. Menyweather*, 431 F.3d 692, 708 (9th Cir. 2005) (Kleinfeld, J., dissenting).

288. *United States v. Guy*, 174 F.3d 859, 861 (7th Cir. 1999) (noting that the trial court acknowledged that incarcerating the defendant would impose hardship on her family but was averse to creating a situation “where a person could steal with relative impunity and not expect incarceration simply because they come from a large family, or have responsibilities for a large family”).

289. Cf. JOSEPH GOLDSTEIN & JAY KATZ, *THE FAMILY AND THE LAW* 368 (1965) (Dwight Eisenhower, considering clemency for Ethel Rosenberg’s espionage conviction, noted that “if there would be any commuting of the woman’s sentence without the man’s then from here on the Soviets would simply recruit their spies from among women.”).

290. For example, do states with particularly vigorous parental discipline defenses have a higher rate of child abuse? In states that exempt family members from prosecutions for harboring fugitives, are prosecutors encountering significant obstructive activity from family members?

This point about the incentives these benefits extend to families raises an important related observation. When a state decides to extend a benefit on the basis of family ties, the state is not only reflecting background social preferences but also occupying a position of power with which to shape the institution and norms of families. For instance, the state can construct norms of appropriate family behavior by using the criminal law in the context of “deadbeat dad” statutes, which are not merely punitive but designed to encourage responsible parental behavior. Similarly, the state may elsewhere shape our sense of where one’s obligations to the family end and where one’s obligations to the public begin by applying incentives via the criminal law. Thus the state can actually construct what we consider appropriate or desirable familial conduct rather than just responding to how we think families behave in some predetermined and fixed manner.²⁹¹

C. Scrutiny of Family Ties Benefits: A Normative Framework for the Spartan Presumption

In light of these four distinct normative concerns, we think a presumption against family ties benefits is warranted when considering a potential policy in the criminal justice system that affects family life, even though not every family ties benefit triggers all or any of these concerns.²⁹² Thus, the bare proposal of a benefit should not be categorically rejected under this framework—it just means the benefit should undergo scrutiny.

This scrutiny requires inquiry into three matters. First, to what extent does the particular family benefit contribute to patriarchy, inaccuracy, inequality, or risk of heightened crime, collusion, or complicity? If the family ties benefit does not incur one of these normative costs, then it may be appropriate to extend it, especially if the interest underlying the family ties benefit is substantially beneficial (and substantially achievable through the benefit). But if the normative costs of the family benefit obtain, it is important to inquire whether there are potentially persuasive compelling state interests (separable from any family-promotion agenda) upon which a benefit draws. Finally, we propose asking whether there are other means available to achieve the particular outcome without the particular benefit. In other words, can the benefit be distributed in family-neutral terms, looking more at the function played by the recipient of

291. We thank Dave Fagundes for this point. On an earlier draft, Fagundes commented that perhaps the penalties for harboring fugitives in the intrafamily setting should be even higher than the general norm in order to account for the additional difficulty of deterring this behavior. Our fear is that this would impose an unjustified “tax” on family ties and, in the process, emit social messages that themselves run at odds with our commitment to implementing equality in the criminal justice system.

292. We recognize that not every family ties benefit raises all four concerns. Indeed, some might not trigger any of them. For our purposes in what follows, we do not rank their importance either. Nor do we argue that a benefit must trigger a certain number of the relevant cost considerations to offend our normative framework.

the benefit and not the status of the beneficiary? In the final analysis, there will have to be a judgment applied to whether the proposed family benefit advances a goal in which the government has an especially compelling interest, notwithstanding the reasons underlying the Spartan presumption.

Clearly, this form of scrutiny will not resolve all questions: we will inevitably have disputes about the strength of competing claims. But it will do some work in helping us think more clearly about the challenge of family ties in criminal justice.

III. THE SPARTAN PRESUMPTION IN ACTION

In this Part, we apply the normative framework to a handful of areas that we have discussed earlier in the descriptive Sections of the article. Using the framework developed in Part II, we explain in Section A how some of the various benefits we canvassed in Part I face difficulties: evidentiary privileges for familial members in many situations; most sentencing discounts for those with family ties; and exemptions from prosecution or other defenses based on familial status.²⁹³ In Section B, we contend that other benefits, by contrast, survive scrutiny because there are compelling state interests that are properly vindicated or because the benefits trigger such minimal normative costs that the presumption against family ties benefits should be rebutted. However, even in these situations, we think there should be some effort to distribute the benefits in terms that are neutral to family status when possible. Finally in Section C, we show how some benefits can succeed by being retailored through alternative means. In this Section, for instance, we address what is perhaps the most difficult case—that of the irreplaceable caregiver who is asking for a sentencing discount, and in this connection, we discuss the use of “time-deferred sentencing,”²⁹⁴ as well as the use of programs that redound to the benefit of family members, but not exclusively to them and not on account of their status as family members.

A. *Application of the Spartan Presumption*

1. *Evidentiary Privileges*

a. *Competing Assessments of Familial Privileges*

Views about the marital privileges are, unsurprisingly, mixed. These privileges are ostensibly justified not only because they are rooted in the common law but because they are presumed to have a persuasive

293. We treat the evidentiary privileges question in depth as an example of our analytical framework and then we discuss some of the other examples more briefly to avoid repetition.

294. This refers to sentences to be served by an “irreplaceable caregiver” which are delayed until a point when the need for care is diminished or alternative means of care are secured.

rationale: the spousal immunity “provides social benefits by preventing marital discord,”²⁹⁵ and the marital-communications privilege is said to “foster[] openness between spouses by ensuring that none of their confidences will be revealed in court.”²⁹⁶ In short, “[t]he basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake [is] a belief that such a policy [is] necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well.”²⁹⁷

But not all agree that the spousal privileges are proper exceptions to the hoary rule that every man’s evidence should be available in the administration of justice. In recent years, the spousal immunity has come under more serious fire from commentators than the marital-communication privilege, which on its face just looks like other confidential communication privileges in a relationship of trust: attorney-client, psychotherapist/social worker-patient, and so on.²⁹⁸ Still others think that spousal immunity makes sense if we really care about protecting family harmony—and that we do not need the marital-communication privilege because people will trust their spouses naturally and are usually indifferent to legal entitlements to privileges. Moreover, once the marriage dissolves, the justification of “keeping the family” together dissolves with it—and a marital-communications privilege certainly should not outlive the marriage (as it currently does in some of the jurisdictions that recognize it).²⁹⁹ Finally, some oppose the immunity because, in practice, it operates in a gendered manner: “[t]he plain fact is that . . . the adverse testimony privilege operates largely to prevent wives from testifying against their husbands . . . [and] reinforce[s] a traditional ethic of self-sacrifice for women within marriage.”³⁰⁰ The detractors aside, the marital privileges enjoy widespread support in the nation’s courts and state legislatures.³⁰¹

295. *Developments in the Law*, *supra* note 111, at 1577.

296. *Id.*

297. *Hawkins v. United States*, 358 U.S. 74, 77 (1958).

298. See, e.g., HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 544 (2d ed. 1988) (spousal immunity “was never supported by any but specious reasons”); 8 WIGMORE, *supra* note 104, § 2228 (stating that spousal immunity is “the merest anachronism in legal theory and an indefensible obstruction to truth in practice”); David Medine, *The Adverse Testimony Privilege: Time to Dispose of a “Sentimental Relic,”* 67 OR. L. REV. 519 (1988).

299. See 2 STONE & TAYLOR, *supra* note 107, § 5.08.

300. REGAN, *supra* note 230, at 90. Most importantly, the spousal privilege disadvantages victims of domestic abuse, especially in a post-*Crawford* landscape. See generally Cassidy, *supra* note 259 (describing how *Crawford v. Washington*, 541 U.S. 36 (2004), makes it much more difficult to prosecute domestic abusers).

301. It is worth noting that there are often exceptions to the spousal privileges: they tend not to apply in cases involving spousal violence, child abuse or neglect. REGAN, *supra* note 230, at 91. But see Cassidy, *supra* note 229, at 367–69 (citing ALA. CODE § 12-21-227; D.C. CODE ANN. § 14-306; GA. CODE ANN. § 24-9-23; MASS. GEN. LAWS ANN. CH. 223, § 20; and MO. ANN. STAT. § 546.260, which codify adverse testimony privileges without any exception for crimes committed by one spouse against the other—and GA. CODE ANN. § 24-9-21; N.H. R. EVID. 504; N.C. GEN. STAT. § 8-57(c); S.C. CODE ANN. § 19-11-30; and W. VA. CODE ANN. § 57-3-4, which codify spousal-communications privileges).

With respect to broader intrafamilial privileges, there are several arguments offered by their proponents. Proponents argue that "[f]orced disclosure of confidential communications between children and parents not only destroys the trust between parent and child necessary to foster open communication, it pits a parent against a child in a court of law."³⁰² As the *In re Agosto* court put it, in one of two federal district courts to recognize the child-parent privilege, "[t]o damage the parent-child relationship would result in damage to the child's relationship to society as a whole."³⁰³ Advocates routinely cite the Supreme Court's decision in *Wisconsin v. Yoder*, which stressed that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."³⁰⁴ The importance of this relationship is the reason that society seeks to foster open communication between parents and children.³⁰⁵ In short, the "arguments in favor of adoption of the parent-child privilege center around the importance of loyalty . . . inherent to the [] relationship."³⁰⁶ This is generally known as the "preservation of the family" argument.³⁰⁷ It has particular salience when we consider that it is routine for juvenile delinquency lawyers to tell their clients not to speak with their parents about their cases.

Another related argument relies upon the "cruel trilemma" presumably imposed upon subpoenaed family members who must "either (1) testify truthfully and condemn the accused relative, (2) testify falsely and commit perjury, or (3) refuse to testify and risk contempt."³⁰⁸ As *In re Agosto* found, in putting witnesses in this position, "the law would not merely be inviting perjury, but perhaps even forcing it."³⁰⁹ This argument emphasizes not only that we put family members in an awkward position, but that the search for truth itself will be hampered because in our zeal-

without such an exception). There are a lot of nuances to how the spousal privileges apply—and those details extend beyond our immediate concern here. For the specifics and how they frustrate law enforcement in the domestic violence context, see Cassidy, *supra* note 259. Federal courts tend to create an exception for joint criminal enterprises, see REGAN, *supra* note 230, at 91 (citing *United States v. Marashi*, 913 F.2d 724, 730–31 (9th Cir. 1990); *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985); *United States v. Broome*, 732 F.2d 363, 365 (4th Cir. 1984)), and some states have followed suit, see *State v. Witchey*, 388 N.W.2d 893, 895–96 (S.D. 1986); *Wolf v. State*, 674 S.W.2d 831, 841–42 (Tex. App. 1984). But see *Johnson v. State*, 451 So. 2d 1024, 1024 (Fla. Dist. Ct. App. 1984); *State v. White*, 480 A.2d 230, 232 (N.J. Super. Ct. Law Div. 1984). Obviously, we endorse the federal approach—and the states that have embraced it; it speaks directly to our fourth consideration, that the privileges serve to incentivize more successful criminal activity.

302. *Need for Parent/Child Privilege*, 22 CHAMPION 10, 11 (April 1998) (proposal by the National Association of Criminal Defense Lawyers for enactment of a statutory parent-child communication privilege by Congress and state legislatures).

303. 553 F. Supp. 1298, 1326 (D. Nev. 1983).

304. *Id.* at 1304 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

305. *Id.* (citing Susan Levine, Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 782–83 (1979)).

306. Jessica Perry, Note, *The Parent-Child Testimonial Privilege: An Argument for Qualified Recognition*, 37 BRANDEIS L.J. 97, 106 (1998/1999).

307. *Id.*

308. *Id.*

309. *In re Agosto*, 553 F. Supp. at 1326.

ous pursuit of it, we are inviting falsified testimony that will adulterate the system more than it will foster the system's integrity. There is also the possibility, as mentioned earlier, that the extension of these privileges works in favor of reducing crime; a spouse with an adverse testimonial immunity may decide to talk to his wife (because he knows she cannot testify against him), and during that talk, she may persuade him to desist from future crimes.

More generally, advocates of the expansion of intrafamilial privileges beyond the spousal privileges argue by analogy to other privileges already recognized in the courts and by legislatures. The professional privileges are generally thought to encourage the free flow of information in socially valuable relationships where trust is required for the success of the relationship.³¹⁰ Similarly, the marital privilege supposedly serves the function of preserving harmony and fostering openness in socially valuable relationships. Proponents of other intrafamilial privileges argue by analogy to other relationships of trust to reinforce their case.³¹¹ A final strategy proponents (and adopting courts) have drawn upon is basing the extended privilege in the constitutionally recognized right to privacy.³¹²

In response to those who favor extending intrafamilial privileges, critics (including judges on many federal and state courts) argue that there is no case law to support such a new privilege; that privileges are meant to be granted very sparingly and narrowly for they are in derogation of the search for truth; that further intrafamilial privileges do not pass the "Wigmore test;"³¹³ and that Congress may, if it wishes, furnish

310. The generally acknowledged purpose of the attorney-client privilege is "to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); see also *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 68 cmt. c (2000) ("The rationale for the [attorney-client] privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services.").

311. *United States v. Ismail*, 756 F.2d 1253, 1258 (6th Cir. 1985) (suggesting that the parent-child privilege could be analogized to the marital privileges insofar as they both contribute to family "harmony").

312. Another option some have pursued is to claim the privilege under the First Amendment. See *In re Greenberg*, 11 Fed. R. Evid. Serv. 579, 1982 WL 597412, at *1 (D. Conn.) (recognizing a parent-child privilege under the Free Exercise Clause because of the Jewish law's prohibition from having parents testify against their children); see also *Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244, 248 (10th Cir. 1988) (rejecting the claim of a fifteen-year-old Mormon who invoked the Free Exercise Clause to avoid testifying against his mother). But see *Smilow v. United States*, 465 F.2d 802, 804 (2d Cir. 1971) (refusing to grant such a privilege because the court was skeptical of the genuinely religious basis of the claim despite claimant's invocation of potential "divine punishment" and "ostracism from the Jewish Community"). Some have also suggested that the Fifth Amendment privilege against self-incrimination should be held to protect people from being forced to testify against their family members. See, e.g., Margaret Carlson, *Should a Mom Rat on Her Daughter?*, *TIME*, Feb. 23, 1998, at 25.

313. Courts routinely apply the criteria adumbrated by John H. Wigmore in his evidence treatise. 8 *WIGMORE*, *supra* note 104, § 2192. The "Wigmore Test" considers four factors: (1) the communication must originate in confidence that it will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the rela-

such a privilege if there is a true need for it.³¹⁴ More basically, critics “commonly assert that people typically know little or nothing about their privilege[s] and that, even if they did, the knowledge would rarely alter their communicative behavior.”³¹⁵ In short, intrafamilial privileges are very unlikely to incentivize people to talk with their families if they are not otherwise inclined to do so. As unseemly as it may be to force people to testify against their family members, it may just be the cost of doing justice.

b. The Spartan Presumption’s Application to Privileges

We think our normative framework offers a different perspective on intrafamilial privileges, one that has heretofore often been overlooked: that family ties generally ought not to be privileged in the administration of criminal justice. Accordingly, not only should courts and legislatures reject the parent-child and more attenuated intrafamilial testimonial privileges; but they should also revisit the marital privileges, which enjoy widespread support. In short, it is our view that the family neither needs nor deserves any special protection when the smooth and fair administration of criminal justice is at stake. Just as our society values friendship as a very beneficial social relationship of trust but fails to entrust friends with testimonial privileges,³¹⁶ we believe that the family can sustain itself without special immunity from the criminal justice system. We take no position here, however, on the ongoing debates about whether there should be intrafamilial privileges in the civil context.³¹⁷ But because the intrafamilial evidentiary privileges implicate our four normative considerations—and all four of them no less—we think such benefits are inappropriate and should therefore be abandoned.

As we have already recounted, the testimonial privileges have an undeniably patriarchal etiology. Based in an old English common law rule of complete disqualification in which a wife was not allowed to tes-

tion must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of the litigation. *Id.*

314. All of these arguments appear in *In re Grand Jury*, 103 F.3d 1140, 1144 (3d Cir. 1997).

315. *Developments in the Law*, *supra* note 111, at 1474.

316. For an effort to think through how we might furnish testimonial privileges to friends, see Levinson, *supra* note 24, at 643–54. Levinson argues that it might be a good idea if people could choose to give a limited number of “privilege tickets” to whomever they want—thereby, deciding for themselves where they most need a relationship of trust. *See id.* at 654–62. The value of friendship and family in political and legal life is further explored in Ethan J. Leib, *The Politics of Family and Friends in Aristotle and Montaigne*, 31 INTERPRETATION: J. POL. PHIL. 165 (2004), and Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007) (arguing that many areas of the law should confer upon the friend special status and consideration).

317. It is worth noting that at least one commentator would like a “qualified” parent-child privilege that would apply only in criminal contexts rather than civil contexts because the “stress placed on the family bond would be greater where criminal punishment was at stake . . .” Perry, *supra* note 306, at 114. In our view, precisely because much more tends to be at stake in the pursuit of criminal justice, the familial privileges are especially inappropriate in the criminal context.

tify against her husband,³¹⁸ the testimonial privileges have roots that would offend our first normative consideration. Indeed, women routinely were not considered to be competent witnesses at all. Even those who contest the disqualification theory of the derivation of the privileges and assume that the privileges developed from a theory of “petit treason” against the head of a household³¹⁹ could not deny that the protection of the “head of a household” traditionally protected men. And although the testimonial privileges have been modernized in most places to defang their patriarchal roots,³²⁰ they continue to operate in a male-friendly manner: men commit more crime, so it will benefit men more often if their spouses (or mothers or sisters) are prevented from testifying against them. As Wayne Logan writes, “[e]videntiary law . . . continues to betray an age-old reluctance to interfere; the spousal privilege, for instance, prohibits the government from compelling the testimony of a battered spouse, should prosecution ensue.”³²¹ This is especially disconcerting in the wake of *Crawford v. Washington*, which will only further exacerbate the use of spousal privileges to protect male domination in the household.³²²

Even bracketing the gendered roots and effects of the intrafamilial testimonial privileges that give us pause, our second normative consideration is also implicated. Testimonial privileges are very much exceptions to the common law principle that “the public has a right to every man’s evidence.”³²³ Because the public has a compelling interest in the efficient and correct administration of its criminal justice system, the law does not lightly create exceptions to the rule that people must testify truthfully before legal tribunals. Even the few privileges recognized by

318. “[I]t hath been resolved by the Justices that a wife cannot be produced either against or for her husband.” 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628); *see also* 8 WIGMORE, *supra* note 104, § 2227.

319. *See* 8 WIGMORE, *supra* note 104, § 2227.

320. *See Developments in the Law*, *supra* note 111.

321. Logan, *supra* note 87, at 347. *See generally* Malinda L. Seymore, *Isn’t It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032 (1996). There are exceptions, both at common law, and today in many jurisdictions, for crimes against spouses or others in the household. *See* Cassidy, *supra* note 259, at n.170 & n.205 (citing AK. R. EVID. 505(A); ARIZ. REV. STAT. ANN. § 13-4062; CAL. EVID. CODE § 970; COLO. REV. STAT. § 13-90-107; CONN. GEN. STAT. ANN. § 54-84A; HAW. REV. STAT. § 626-1; IDAHO CODE ANN. § 19-3002; KY. R. EVID. 504; MD. CODE ANN., CRTS. & JUD. PROC. § 9-106; MICH. COMP. LAWS ANN. § 600.2162; MINN. STAT. ANN. § 595.02; NEB. REV. STAT. § 27-505; NEV. REV. STAT. § 49.295; N.J. STAT. ANN. § 2A:84A-17; N.C. GEN. STAT. § 8-57; OHIO REV. CODE ANN. § 2945.42; OR. REV. STAT. § 40.255; 42 PA. CONS. STAT. § 5913; TEX. R. EVID. 504(B); VA. CODE ANN. § 19.2-271.2; WASH. REV. CODE ANN. § 5.60.060 (1); W. VA. CODE ANN. § 57-3-3; WYO. STAT. ANN. § 1-12-104); *see also* *State v. Taylor*, 642 So. 2d 160, 166 (La. 1994) (creating an exception by judicial construction); *Stubbs v. State*, 441 So. 2d 1386 (Miss. 1983) (same); *State v. Benson*, 712 P.2d 252 (Utah 1985) (same). Still, as Cassidy notes, a number of jurisdictions permit no such exception. Cassidy, *supra* note 259, at 367–68 (citing Alabama, the District of Columbia, Georgia, Massachusetts, and Missouri).

322. *See* Cassidy, *supra* note 259, at 352 (describing how *Crawford v. Washington*, 541 U.S. 36 (2004), makes it much more difficult to prosecute domestic abusers).

323. 8 WIGMORE, *supra* note 104, § 2192. *See generally* *United States v. Bryan*, 339 U.S. 323, 331 (1950).

the law are not to be “expansively construed” because they “are in derogation of the search for truth.”³²⁴ Privileges that facilitate the exclusion of relevant evidence from a fact finder seriously impede the truth-seeking function of the trials, which hampers both the effective prosecution of the guilty and the exoneration of the innocent. These privileges matter not only at trial, but also beforehand, because their availability at trial casts a shadow over plea bargaining encounters between the state and the defense lawyer. Without other independent evidence, a prosecutor will be more likely to drop a case against a potential defendant if the prosecutor knows a husband can block the testimony of, or revelations about communications to, his wife.

We acknowledge, of course, the speculative concern that the privileges may help prevent perjured testimony from polluting the trial. Perhaps the privileges function to prevent family members from lying on the stand—a result that may, after all, serve the “truth.” To the extent that any credible empirical evidence would bear out such a claim, we might reconsider our conclusions about the benefit’s implication for the normative consideration of accuracy. We also recognize the empirical possibility that the privileges may have a deterrent effect on crime if spouses communicate intentions to commit future crime and are subsequently able to dissuade each other from committing that future crime,³²⁵ though we have not seen empirical evidence to support this possibility, and we doubt that such instances are widespread.

Third, there is a basic inequity built into intrafamilial testimonial privileges. Although this inequity is not as obvious as the central case where an offender gets differential treatment in a sentence on account of his family ties, the normative consideration of equality is implicated nevertheless: those with spouses (rather than friends or same-sex partners) get to share the details of their crimes with a loved one without consequence. This may have a cathartic effect for offenders, rendering an ultimate confession to the police less likely.

More importantly, it creates a class of persons, who might otherwise have extremely useful information about an offender, immune from questioning at trial. This allows the offender to maintain a sense of superiority—both over his household and over the polity, whose interests in vindicating justice play second fiddle to the protection of the “sanctity” of his family. This is unfair to the state and unfair to victims whose rights can be vindicated only if the police and prosecution can do their jobs effectively. Creating rules that prevent the police and the prosecution from learning the truth are counterproductive to the tasks of criminal justice. Although one can sympathize with the difficulty of testifying against a family member, we suspect that thoughtful citizens would not want to live in a regime with such privileges for family members when

324. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

325. We are indebted to Michael O’Hear for this point.

they realize that a perpetrator of crimes is often being shielded by family members, who are potentially immune from questioning on the witness stand.

Finally, our last normative consideration is also implicated by the testimonial privileges that protect family members. To the extent that defendants are getting signals from the evidentiary privileges,³²⁶ the privileges furnish incentives to keep criminal conspiracies within the family. Spouses are more likely to recruit each other into criminal activity because they know they can occlude their communications with their spouse later on. The law needs tools to disrupt conspiracy and make it less efficacious, not more so. A better system would realize that the law should aim at “help[ing to] destabilize trust within the conspiracy, cue the defection of conspirators, and permit law enforcement to extract more information from them.”³²⁷ Unsurprisingly, some jurisdictions have adopted a joint-spousal-criminal-activity exception to the marital-communications privileges.³²⁸ Obviously, in lieu of full-scale abandonment of the privileges, we welcome at least this development.

In light of the troublesome normative costs in the context of familial testimonial privileges, we think there is a good basis to eliminate these privileges. We do not see any compelling state interests that could render these privileges appropriate or acceptable, unless our empirical concerns regarding perjury and deterrence were proven demonstrably.³²⁹ Moreover, although we recognize that some argue that familial interests are prepolitical or prelegal in some sense such that the law needs to step aside in the face of family loyalties (rendering family interests to be sufficient to override the maxim that the public is entitled to every man’s evidence), we are not persuaded. At least as a matter of fit with other as-

326. We are somewhat skeptical of the capacity for decision-rule doctrines in the law of evidence and crimes to influence most people’s primary conduct. See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004). But there might be pockets in the population that are especially susceptible to these rules, such as the families involved in organized crime; these families are repeat players and can obtain counsel to guide their conduct.

327. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1333 (2003).

328. REGAN, *supra* note 230, at 91. For further discussion on the “joint criminal enterprise” exception that speaks directly to this consideration, see *supra* note 302.

329. Mary Coombs mentioned, in her comments upon an earlier version of this paper, that although we emphasize that the spousal privileges are family-specific benefits, we disregard the reality that the state cannot take a neutral position in this context: if the state did not give the “innocent” spouse a testimonial privilege, the state’s prosecutors would have an extra tool (and an extra sharp one, at that) in coercing testimony from a defendant because the state could always leverage pressure against the innocent spouse. We think that there remain two neutral positions, neither of which the state adopts in its current solicitude for the family. Either the state could afford testimonial privileges to a wide circle of persons that extend beyond the spousal context or it could afford no one such privileges. We prefer the latter approach because we see no reason to give criminals access to confessors, who may both help defendants evade capture and avoid confession to law enforcement. We do not see this preferred neutral policy as a “tax” on families in particular because any defendant who trusts any intimate will give the prosecutors a tool for coercion all the same. Most important for our purposes here is not neutrality as between defendant and state but neutrality as between defendants with family networks and those without.

pects of the legal landscape, we note the state's intimate regulation of family law; thus, it is hard to take this argument seriously. Marriage itself is an undeniably legal relation—and it betrays common sense to think a general respect for the “private sphere” of the family should be sufficient to overcome our normative framework, which itself derives from the task of trying to assess whether family ties benefits are appropriate in the criminal justice system. In this case, to say that family ties should override our normative framework is only to disagree that our normative framework establishes a presumption against family ties benefits in the criminal justice context in the first place.

Moreover, those who consider the protection of family interests sufficient to override the law's meddling in family loyalties have an extra step of justificatory work to do that we think cannot be done successfully—one must defend not only the general idea that it would be nice for the law to protect the family from some legal incursions but the more specific proposition that the law must protect families *in the context of criminal justice*, a site where we think the law cannot afford this type of benefit. Too much is at stake when the lives and liberties of men and women are held in the balance.

That said, we can imagine that jurisdictions might be interested in narrower options than the ones we endorse. For instance, Maryland has a two-strikes policy regarding the invocation of the privileges in courts.³³⁰ Alternatively, jurisdictions might want to limit the application of the privilege to cases involving a discrete set of crimes, leaving violent or more serious felonies outside the scope of the privilege (or even other benefits, such as the exemptions and defenses that are family-status based). A third strategy might be to limit the privilege to cover communications regarding only future conduct, not past conduct.

We cannot, of course, deny that our catalogue of normative considerations might seem to condemn other testimonial privileges. For example, the attorney-client and psychotherapist-patient privileges might clearly result in prosecutors and police having less information to pursue justice. Although these privileges have no especially ignoble histories, they are, at a general level, in derogation of the search for truth and have the potential to implicate an equality norm.

Still, we think the normative considerations we have highlighted condemn intrafamilial privileges in ways different and more substantial. In the first place, we think other testimonial privileges do not fare as badly through our normative framework: they neither offend our first consideration, nor do they reasonably trigger substantial concerns under the fourth consideration. On the contrary, the lawyer-client privilege, for example, can help *prevent* crime by facilitating communications with po-

330. MD. CODE ANN. CTS. & JUD. PROC. § 9-106(a) (West 2006); cf. CAL. CODE CIV. PRO. 1219(c) (West 2007) (sentencing victims of domestic violence guilty of contempt for counseling or community service).

tential offenders to steer them away from unlawful conduct. Moreover, even our second normative consideration—accuracy—does not clearly disfavor the lawyer-client privilege. The lawyer-client privilege substantially contributes to the vindication of our adversarial system of justice. By giving the defendant a true and zealous advocate who is bound by a duty of confidentiality to him, we give the defendant a fighting chance to use the criminal justice system to prove his innocence; this ultimately contributes to the project of accuracy. So, upon further investigation, the lawyer-client privilege actually might enhance accuracy, have no ignoble origins, and may create incentives for the ultimate deterrence of crime. We do not often worry that psychotherapists and lawyers are actually going to become coconspirators (though, of course, such results are not unheard of).

Finally, even if one could make the claim that other testimonial privileges fail our normative framework, we would not be the first to notice that some of the privileges rest on less than firm footing: Kaplow and Shavell and others have argued that to the extent the privileges have value, the value extends only to advice regarding prospective behavior—not past behavior.³³¹ In any case, to the extent that the other privileges pursue compelling state interests that *are* appropriate in the criminal justice sphere, we acknowledge that our normative framework is not the final word on whether a benefit is acceptable. Other testimonial privileges may be justifiable by countervailing interests that override the considerations outlined above.

2. *Exemptions from Prosecution for Harboring Fugitives*

As discussed in Part I, another way in which states favor family relationships is by exempting family members from prosecution. Eighteen states currently exempt immediate family members from prosecution for harboring a fugitive or reduce their potential liability.³³² What are the rationales offered for these family exemptions? First, perhaps “it is unrealistic to expect persons to be deterred [by the possibility of criminal prosecution] from giving aid to their close relatives.”³³³ Criminal punishment is therefore unwarranted as a deterrent because it would be ineffective in any event. Second, perhaps such statutes are “an acknowledgement of human frailty.”³³⁴ Under this view, legislatures have simply recognized that the bonds of familial love will inevitably trump any per-

331. See Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 597 (1989) (questioning the merits of the attorney-client privilege); see also JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM 473–75, 477, 479 (J. Bowring ed., 1842) (arguing that the attorney-client privilege serves to let the guilty go free).

332. See *supra* notes 47–49.

333. See Charles Daniels & Teresa Storch, *Criminal Law*, 14 N.M. L. REV. 89, 105 (1984) (citing WAYNE LAFAVE, *CRIMINAL LAW* 716 (4th ed. 2003)).

334. See *State v. Mobbley*, 650 P.2d 841, 843 (N.M. Ct. App. 1982) (Lopez, J., dissenting).

ceived obligation to the state. A third rationale is the one expressed by a Florida court: "society's interest in safeguarding the family unit from unnecessary fractional pressures."³³⁵

Analyzing these statutes under the framework of our four normative considerations, we conclude that the family exemption is misguided and should therefore be soundly rejected by state legislatures. The exemptions obviously contribute to a fundamental inequity: close friends who provide assistance face prosecution, while family members do not. Further, like the evidentiary privileges, these exemptions have patriarchal origins and may serve to shield from prosecution those who commit crimes in the home. The focus of these exemptions at common law was to exempt wives from liability for following their "duty" by shielding their husbands. To be sure, these statutes have now become gender neutral by extending their protection to other immediate family members, so perhaps they should not be invalidated on the basis of their patriarchal roots alone. But these are not our strongest normative arguments; we therefore turn to our two remaining considerations.

In terms of accuracy, these exemptions do a different kind of mischief than threatening our ability to sort the guilty from the innocent; they facilitate a guilty person's escape from punishment entirely. Allowing an individual to obstruct justice by hiding a family member obviously frustrates "the essential government functions of locating and apprehending criminals."³³⁶ Moreover, this immunity is granted without regard to the heinousness of the underlying crime—the exemption is granted whether the fugitive is a forger or a murderer. The statutes sweep with too broad a brush in another regard as well—they protect those family members who might never have previously enjoyed a meaningful relationship with the primary offender, but simply came to the aid of a relative when asked for assistance after the commission of a crime.³³⁷ It is also difficult to imagine that it is the government's decision to prosecute that creates significant stresses upon the family; rather, the responsibility for that would seem to lie squarely on the shoulders of the family member who decided to enlist his relatives to assist him in his illegal activities.

Finally, like the testimonial privileges, these statutory exemptions create perverse incentives. In a state with a family exemption, there is no reason for a defendant to commit a crime unilaterally; he has every incentive to enlist close family members to help him conceal evidence and hide from the authorities because those family members face no criminal consequences for their actions. Why should we create an incentive for a defendant to recruit accomplices and thereby increase the chances of

335. *State v. C.H.*, 421 So. 2d 62, 65 (Fla. Dist. Ct. App. 1982).

336. *United States v. Hill*, 279 F.3d 731, 737 n.17 (9th Cir. 2002).

337. The Florida court recognized the issue that "some immunized family members might render assistance to an offender for reasons other than familial affection" but simply noted this did not render the statute "fatally overinclusive" under its constitutional analysis. *C.H.*, 421 So. 2d at 65.

success for his criminal venture? As the Supreme Court recognized forty years ago:

[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.³³⁸

Because family exemptions pose such significant costs in terms of preventing the government from punishing clearly criminal activity and creating incentives for conspiratorial activity, we believe our presumption against such benefits is clearly triggered. Further, these benefits provide no substantial benefit. We reject the notion that allowing siblings to dispose of murder weapons for one another is an essential component of family harmony. Even if we were to concede the point that not every brother would be deterred by the threat of criminal punishment from hiding a murder weapon for his beloved sibling, it might still be the case that the possibility of punishment would deter the killer from making the request in the first instance.

3. *Familial Status Defenses*

In demonstrating how our normative framework would apply in the context of familial status defenses, we have chosen to focus on the example of the parental discipline defense as it is used in child abuse prosecutions. Parents have employed corporal punishment to discipline children and mold their characters for centuries with minimal interference from the state.³³⁹ The historical origins of the tradition of noninterference in matters of family violence have been well documented both here and elsewhere.³⁴⁰ We choose here to focus on the less-obvious concerns this defense raises in terms of equality and incentivizing more criminal activity.

In terms of equality, the parental discipline defense elevates the right of the parent to discipline his child over the right of the child not to be subjected to physical force. We would never allow an adult to exercise comparable physical force against another adult or against someone else's child; any adult who took a belt to the backside of an unrelated

338. *Callanan v. United States*, 364 U.S. 587, 593 (1961).

339. See, e.g., Thomas, *supra* note 250, at 293 (describing the maltreatment of children from ancient Greece through twentieth-century America).

340. See, e.g., PLECK, *supra* note 68, at 6; Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 572–81 (1992).

adult or child would be eligible for swift and condign punishment.³⁴¹ Why is a child's relative entitled to escape punishment within the criminal justice system when an unrelated adult is not? The nature of the defendant's conduct and the physical harm suffered by the victim is the same under both scenarios. Critics of course respond that the *motive* underlying the conduct is different, that the parent wishes to discipline and the stranger wishes to harm. But this reflects a rose-colored view of parenthood that so often permeates the criminal law. We as a society desperately want to believe that all parents are altruistic and loving individuals who always act in their children's best interest.³⁴² But the prevalence of child abuse and neglect in America shows this assumption is too often untrue.³⁴³

In terms of the negative incentives created by the use of corporal punishment, spanking is often a precursor to more serious parental violence.³⁴⁴ Deanna Pollard argues that "the defense of 'discipline' is raised in forty-one percent of homicide prosecutions against parents who 'accidentally' killed their child."³⁴⁵ Pollard further suggests that spanking increases the chances that the child victim of a parent's violence will himself be more likely to engage in aggression and other antisocial behavior later in life, including engaging in domestic violence in his own family.³⁴⁶

Because of the normative costs associated with these family status defenses, we believe it triggers our presumption. We recognize that critics of our position will argue that the utilities of this "family ties benefit" are indeed substantial: many believe spanking is in fact beneficial to children; others simply believe that parents should be allowed to make their own disciplinary choices without undue interference by the state. For the reasons stated above, we are unpersuaded that these interests are sufficient to override our normative considerations.

341. See Franklin Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 523-24 (1987) (using a hypothetical to suggest that if a stranger slapped a child, it would be considered assault and battery, but the matter would be treated very differently by the legal system if a mother slapped her own child).

342. See Thomas, *supra* note 250, at 293 (noting "our reluctance to believe that parents—whom we expect to love and protect their offspring—could maltreat or abuse their own children, sometimes even fatally"). Thomas further notes that "[o]ur laws and legal systems have developed over hundreds of years around the notion that parents will love and protect." *Id.*

343. See, e.g., Ira Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1324 (1994) ("[I]t is now clear that the psychological influences at play in family life are not limited to the positive sentiments of affection and concern."). For example, the National Clearinghouse on Child Abuse and Neglect Information concluded that there were approximately one thousand four hundred child abuse and neglect fatalities in the United States in 2002, although that number is in all likelihood too low because these cases are traditionally underreported. See ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2002, at 51, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm02/cm02.pdf>.

344. See Pollard, *supra* note 72, at 621-22.

345. *Id.* at 621.

346. *Id.* at 602-13.

4. *General Sentencing Discounts*

As discussed earlier, until the recent *Booker* decision by the Supreme Court, which rendered the federal sentencing guidelines advisory,³⁴⁷ the federal government's position on family ties discounts at sentencing has probably been the most restrictive compared to the policies guiding sentencing in the several states. Even in the federal context, of course, courts found ways to extend discounts to offenders with extraordinary "family ties and responsibilities." Now with the imprimatur from the Supreme Court in *Booker*, federal courts are more likely to award discounts out of compassion for the defendant's family responsibilities. Moreover, to the extent the federal courts conform to the pre-*Booker* guidance from the Sentencing Commission, it bears emphasis that the federal courts address only a small fraction of the cases in the national criminal justice system. And as we saw earlier in Part I, many states expressly tell judges to calibrate a sentence based, in part, on one's family ties and responsibilities in sentencing offenders.

Thus, offenders who are parents or caregivers to spouses or elders may, depending on the jurisdiction, be in a position to receive a sharp discount from the punishment they might otherwise receive. Not only does this facilitate ad hoc disparities between offenders who are otherwise similarly situated across cases, it also hastens to create inequalities between persons involved in the very same offense.³⁴⁸ These disparities require justification.

An offender—so long as he satisfies the competence criterion for punishment³⁴⁹—anticipates (or should reasonably be expected to anticipate) a risk that he will be punished in accordance with extant sentencing norms. If we make that presumption, which is not an unreasonable one, there is nothing unfair—putting aside proportionality issues—about the offender seeing that risk of punishment materialize. No unfairness to the defendant attaches to punishing persons for conduct they could, by hypothesis, control with consequences they can reasonably anticipate.³⁵⁰

347. *United States v. Booker*, 543 U.S. 220 (2005).

348. *See, e.g., supra* Part I.D.1 (discussing *Johnson* case at text accompanying note 151).

349. As previously urged by one of us, the competence criterion must be satisfied at the time of the criminal offense, the trial, and during the punishment to satisfy the moral requirement that punishment be intelligible to the offender. Specifically, the offender must have freely undertaken the criminal action and known (or reasonably should have known) that his conduct was unlawful at the time he committed the crime; at the time of adjudication, the offender had to either freely and knowingly plead guilty or have the competence to assist in the preparation of his case for trial; and at the time at which the punishment is inflicted, he had to be able to understand that he is being punished for his unlawful actions. *See Markel, supra* note 277, at 1445–46.

350. Of course, reducing the sentence or precluding culpability may be entirely appropriate if the offender had diminished capacity, or if the crime was committed under duress because of a relationship with the primary offender or because of a history of domestic violence within the relationship. Similarly, if there can be a causal connection drawn between the feature of a person that elicits someone's compassion (i.e., the mother was stealing to feed her children) and the choice to commit the crime, then that too might be a reason for a legitimate departure. Or, if there is some other reason related to the merits of the case that warrants less punishment: for example, the offender has reduced

The resulting disparities in sentences across otherwise similarly situated defendants at least shift the burden of justification for discounts onto their proponents. A person who commits a crime can reasonably foresee that if prosecuted and punished, his punishment will affect not only himself but also his family. Just about everyone acknowledges that extending a discount to an offender for a reason unrelated to his crime constitutes an undeserved windfall. Of course, the fact that offenders do not deserve sentencing discounts does not mean that accommodations should never be made—there may be compelling nondesert-related reasons to extend such accommodations, and we discuss some of them below in the context of the irreplaceable caregiver.

As we adverted to earlier, giving benefits to defendants with family ties in the currency of sentencing discounts will also, on the margin, incentivize this class of defendants to seek out greater criminal opportunities, or they will be recruited or pressed into action by others. Still, we think there are some important exceptions that may override these troublesome normative costs (particularly with respect to innocent third party harms). We therefore address what those circumstances are and how to deal with them in Section C, where we examine how the use of alternative means may be available to reduce these normatively significant costs.

B. Family Ties Benefits that Survive Scrutiny

There are various places in the criminal justice system where the state has the opportunity to accommodate family interests either without incurring the troublesome normative costs we identify or where a compelling state interest exists that might justify providing the benefit. Additionally, there are domains where the state can take an interest in vindicating family interests, as long as the means adopted do not offend our normative framework.

1. Child-Sensitive Arrest Policies

A child-sensitive arrest policy is a good example of a situation where our normative cost structure is not implicated.³⁵¹ Arranging to ar-

the social cost of his wrongdoing by coming forward to the government. Absent these considerations, we can insist on a meaningful distinction between factors about someone's background that, in the main, should not mitigate the sentence, and factors surrounding someone's criminal action with which an attractive vision of criminal justice is properly concerned. *Id.* at 1466–67. Of course, all this assumes there are no justifications or excuses for the offender either.

351. Raeder, *supra* note 199, at 8 (citation omitted) (“Where are the children? Although it is estimated that nearly 20 percent of women are arrested in the presence of their children, relatively few police departments have developed protocols for child-sensitive arrest practices. Whether or not a woman had her child with her when she was arrested, jurisdictions vary widely about obligations of police and Child Services. Thus, while not typically thought of as a function of defense counsel, it is important to find out if the female defendant has minor children, and, if so, their location, because many of these women are not in intact families. In other words, counsel should assume that many

rest an individual outside the presence of his minor children, while ensuring that the children have safe and comfortable living arrangements after the arrest, is a family ties benefit or accommodation in the sense that it might be more administratively burdensome for police or prosecutors. But the four costs we identified in Part II are otherwise irrelevant. Therefore, the presumption against such a benefit is rebutted, and we believe the policy is an appropriate one for the criminal justice system to pursue.

Even in situations where the normative costs are implicated, however, there can still be compelling state interests that can justify the benefits, like concern for prisoner reentry or reducing grave harms to innocent third parties. We examine how this works in the context of prison policies immediately below.

2. *Prison Policies*

Our normative framework requires a fairly nuanced approach to the evaluation of prison policies. Assessing the appropriateness of prison policies' promotion of family interests cannot be done monolithically. That is because each individual policy we mentioned when elaborating upon this area of the criminal justice system in Part I risks implicating different normative considerations, varying our ultimate appraisal of each particular policy. Accordingly, we cannot present a unified approach to prison policies as such. At some very basic level, it is understandable that our punitive practices aim to take account of family ties; we often harm entire families for one member's wrongdoing by punishing and removing the wrongdoer from the home. Still, our normative framework will furnish some reasons to think that there is an unfairness and inequality associated with state promotion of family ties in the penal context. Moreover, we think many of the policies can be recrafted in terms that are neutral to family status.

However, we think there is one central difference between most of the other family ties benefits discussed and the set of practices we group together as prison policies: a potentially compelling state interest in offender reentry that may be appropriately vindicated through benefiting those with family ties (though not necessarily only those with family ties). In the context of corrections, we cannot ignore that the family can play a central role in facilitating successful prisoner reentry, one of the most

women will not have voluntarily revealed to the police that they have children or disclosed their whereabouts, given the realistic fear that their children may become involved in the foster care system, triggering the ASFA timeline leading to termination of family rights. Ascertaining that a woman's children are safe will both let her focus on assisting in her defense, and ensure that she does not face child endangerment charges if no one is at home or someone unreliable is watching the children."); *id.* (encouraging lawyer to see if there "are any programs that will house both mother and child"). For support, Raeder cites to CLARE M. NOLAN, CAL. RESEARCH BUREAU, CHILDREN OF ARRESTED PARENTS: STRATEGIES TO IMPROVE THEIR SAFETY AND WELLBEING (2003), available at <http://www.library.ca.gov/crb/03/11/03-011.pdf>.

important, if often overlooked, functions of our penal system. While the criminal justice system's interest in offenders prior to the service of a sentence must focus on the inculcation of the guilty and the exculpation of the innocent—a task routinely undermined by the provision of benefits for family ties—once an offender is sentenced and moral responsibility for a crime is placed on the right shoulders, our penal system can rightfully draw upon the resources of the family to help reintegrate an offender back into society and to encourage rehabilitation while incarcerated. It is in the penal context where the interests in rehabilitation and reintegration might trump the considerations within our normative framework—and where the family might be entitled to benefits precisely because it is doing work that is subcontracted out by the state. As we discussed in our introductory remarks to Part II, one of the strong arguments for having the state benefit the family arises when the family is doing work the state very much wants done—but the task can be accomplished more cheaply and effectively by drawing upon the natural resources within the family. Nonetheless, our normative framework remains useful in analyzing a host of prison policies.

For example, in trying to assess the furlough policies we recounted in Part I, our normative framework demands an inquiry into how such policies could potentially implicate an ideal of fairness or equality. Why should those with family members get more days off from their prison sentences than those without family? Although our other normative considerations do not seem applicable to furloughs, our norm of equality seems offended by policies that favor those with family members.

Similarly, visitation policies that may prevent certain inmates from receiving visitation merely because a set of visitors is not within the definition of family membership³⁵² seems very unfair to those without family recognized by the state. Because courts allow substantial discretion to prison officials in devising visitation policies,³⁵³ there can be inequities that escape notice. Accordingly, the normative framework we offer here indicates that prisons ought to devise such policies with care not to extend benefits to those with families that cannot accrue to those without families. It offends a sense of justice that inmates with families should get differential treatment such that policies discriminate against those

352. FED. BUREAU OF PRISONS, POLICY STATEMENT 7300.4A(a), VISITING REGULATIONS; *see also* GLASER, *supra* note 180, at 362; AM. CORRECTIONAL ASS'N, *supra* note 180, at 542; AM. PRISON ASS'N, *supra* note 180, at 342; COMM'N ON ACCREDITATION FOR CORRECTIONS, *supra* note 180, at 68; FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.07, § 541.12(5), INMATE RIGHTS AND RESPONSIBILITIES (1987).

353. *See, e.g.*, *Block v. Rutherford*, 468 U.S. 576, 585 (1984); *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979); *In re Dyer*, 20 P.3d 907, 912 (Wash. 2001) (finding that prison authorities have wide discretion to administer an extended visitation policy because “[i]t is not in the best interest of the courts to involve themselves in the ‘day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. Courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.’” (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995))).

without families. To the extent that discrimination against those without families implicates our third normative consideration, our presumption against family ties benefits has some—albeit limited—force.

Yet, in the post-sentence phase of the criminal justice system, we cannot help but conclude that certain compelling interests may counteract our worries about family ties benefits such that our presumption should be deemed rebutted as a general matter. First, only one of our four normative considerations is implicated here—the equality prong. Moreover, we acknowledge the role that relations of care giving can play in the corrections system. The Federal Bureau of Prisons embraces family ties in its policy statements because they can be especially rehabilitative.³⁵⁴ We acknowledge that family reunification after incarceration may serve as an appropriate predicate to favor the family in certain prison policies. Accordingly, our sympathy for some of the “pro-family” arguments we adumbrated at the beginning of Part II are given effect in this context. In particular, the compelling state interest of rehabilitation counters our presumption that family ties should not be promoted by the criminal justice system.

That said, our preferred strategy here would be to look at function instead of status. If there are ways of crafting the relevant policies in ways that satisfy the goals of prisoner reentry without reliance on family status (because family status may be both under- and overinclusive³⁵⁵), then we should look at those ways rather than using the imperfect proxy of “family” to achieve these goals. An additional way in which we think the state can satisfy the imperatives of punishment is to realize that the coercion the state metes out as part of its punishment need not be done in temporally contiguous ways. If we think of punishment in terms of units, it might be better to ensure that offenders spend five days a week working at home and the remaining two days in a carceral facility. That might lengthen the period in which the punishment occurs, but it might also serve society’s interest in ameliorating innocent third party harms and achieving successful prisoner reentry. If courts or prison officials are given the guided discretion to decide when a punishment-units approach should be embraced, then the offender is still being coerced—and for social purposes, not to the benefit of the offender. (The social meaning of this coercion can be expressed more clearly by limiting the offender’s movements when not serving time in a carceral facility.)

The compelling state interest analysis is especially relevant in prison policies related to the placement of inmates within the correctional system.³⁵⁶ Family ties are routinely considered when establishing an in-

354. See BUREAU OF PRISONS, POLICY STATEMENT 7300.4A(1).

355. See *supra* Part I.F. (“Identifying a Family Ties Benefit: Some Difficulties”).

356. BRENDA MCGOWAN & KAREN BLUMENTHAL, WHY PUNISH THE CHILDREN? A STUDY OF CHILDREN OF WOMEN PRISONERS 50–53 (1978); Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1680 (2003).

mate's "place of service."³⁵⁷ Although this effort to use prison placement to help families might be seen as a benefit for family ties—and might also implicate the third of our normative considerations (like furlough and visitation policies)—we think the compelling state interest in rehabilitation rebuts the presumption against such benefits altogether. Still, our normative consideration of nondiscrimination against those without family counsels for sensitivity in designing such benefits: those with other good and rehabilitative reasons for visits, furloughs, and specific placement needs should be heeded so as to minimize favoritism for those with families.

There is yet another potential compelling state interest that also counsels for greater toleration of family ties benefits in the penal system: the interests of extremely vulnerable third parties. As we highlighted in Part I, some innovative programs have been created to help mothers and their children stay together, notwithstanding a prison sentence that would otherwise keep a mother away from her children.³⁵⁸ To be sure, the focus on providing only women with these alternatives could be said to implicate our first normative consideration insofar as such programs reinforce traditional gender roles and stereotypes (i.e., that parenting is primarily a woman's responsibility, and that men are entitled to less consideration for their status as fathers). Moreover, our third normative consideration is potentially offended because women who are not pregnant or mothers do not get the same "discount" in their prison terms; and men are almost completely excluded from such programs as the federal MINT program and California's Pregnant and Parenting Women's Alternative Sentencing Program Act.³⁵⁹ Finally, our fourth normative consideration is implicated because such programs could set up incentives for mothers to be targeted for criminal recruitment because they may be afforded especially light sentences.

Nevertheless, we think these programs may yet be defensible in service of the potential irreplaceability of a caregiver, something we discuss at length in the next Section on sentencing discounts that may survive the scrutiny of our normative framework. We would recommend, however, that such programs become nongendered, in that they be made available to men who, for example, have sole custody of infants.

A final example is the location of prisons and the assignment of prisoners within a prison system. If prisons are built in remote rural areas, or if prisoners are sent to prisons far from their families, then it will be harder for the families of most prisoners to come visit; equally difficult may be access to the therapy or social resources we want to see

357. See, e.g., 28 U.S.C. § 994(d) (2000).

358. These programs are particularly important because of the disproportionate harm that incarceration can visit upon mothers and their children. For example, women are more likely to face termination of parental rights if sent to prison than men, because women are more likely to have sole custody of their children and therefore not to have ready access to another suitable caregiver.

359. 28 U.S.C. § 994(d).

available to offenders as part of the coercive punishment they endure at the hands of the state.³⁶⁰ It seems perfectly appropriate for states to consider ease of access to those who may facilitate reentry (whether family or friends) when making decisions regarding prison construction or prison assignment after conviction; such policies do not offend our four normative considerations and simply prevent the intimates of inmates from paying extra costs and forcing offenders to serve “harder” time.³⁶¹

C. Sites Where Alternative Measures Are Possible

1. Time-Deferred Sentencing for Irreplaceable Caregivers

Although we have advanced the unusual position—taken primarily and unpopularity by the federal government’s sentencing guidelines³⁶²—that ordinarily a defendant’s family ties and responsibilities should not serve as a basis for a lighter sentence, we are sensitive to the serious arguments made by proponents of sentencing departures for those with significant care-giving responsibilities. These arguments merit attention and amplification.

Primarily, the proponents of these departures can point to the anticipated harms to innocent third parties as a reasonable basis to distinguish the sentences “caregivers” should get from the ones who do not have those responsibilities.³⁶³ In other words, they can reject the claim that offenders with urgent family responsibilities are similarly situated to

360. MCGOWAN & BLUMENTHAL, *supra* note 356, at 50–53; Genty, *supra* note 356, at 1680.

361. Kelly Bedard & Eric Helland, *The Location of Women’s Prisons and the Deterrence Effect of “Harder” Time*, 24 INT’L REV. L. & ECON. 147–49 (2004). Notably, Bedard and Helland are able to show that the “harder” time actually serves a deterrent effect; so what may look like a “tax” on families may in the end be an indirect way to keep the family together. *Id.* at 148–49. They conclude: “[t]he evidence suggests that an increase in average prison distance leads to a decrease in crime. A 40-mile increase in the average distance to a female penitentiary reduces female violent crime, property crime and murder rates by 6.9, 2.3 and 13.3%, respectively.” *Id.* at 165.

These results are very provocative and suggest that a “family sensitive” location policy may actually recommend having the state place women as far away from their families as possible as an indirect way to deter their participation in crime. Although a sustained inquiry into family taxes is beyond the scope of this article, the Bedard and Helland results suggest how empirical work could usefully illuminate the relationship between family ties and criminal justice. Still, it is important to acknowledge that Bedard and Helland appreciate the externalities associated with using remote prison locations for their deterrent effect and do not ultimately endorse using “harder” time as a way to keep families together:

The evidence presented in this paper suggests remote prison locations and/or restricted visitation as low cost crime deterrence mechanisms. However, our estimates do not quantify the welfare implications of this change. Increasing the distance to women’s prisons (or an outright ban on visitation) has clear externalities. There is ample evidence that a mother’s incarceration has adverse effects on her children. It therefore seems quite likely, although not certain, that even more severe restrictions on maternal visitation would exacerbate an already bad situation for the children of female inmates. As such, the secondary effects therefore render the long-run general equilibrium effects of prison location on crime rates ambiguous.

Id. at 166 (citation omitted).

362. See Raeder, *Gender and Sentencing*, *supra* note 21, at 908–09; Raeder, *supra* note 147, at 251; Weinstein, *supra* note 147, at 169.

363. See, e.g., Genty, *supra* note 356, at 1680.

those offenders without pressing family responsibilities. Insisting on such a distinction is reasonable, they might add, because, in a particular case or class of cases, the private harm of removing a caregiver's support to an innocent third party outweighs the public gain from continuous incarceration.³⁶⁴ In this respect, the judge need not be expressing any claim about the diminished moral culpability of the offender who receives the sentencing discount. Rather, the claim is simply that we recognize that this offender deserves no breaks, but we think the weight of these other considerations (i.e., the harms to innocent third parties) should trump. To the extent this departure disrupts equality norms, the proponents say, such departures are justifiable.

The justification may take several forms. First, there is an argument that depriving children of parents in order to incarcerate the parents for purpose of punishment is itself a criminogenic (crime-creating) policy.³⁶⁵ Second, notwithstanding the culpability of the offenders and the harm suffered by the victims of their crimes, that harm is already done; the state should not inflict its own harms on the offender's children or other members benefiting from the offender's care giving. Indeed, if we urge offenders to bear responsibility for the reasonably foreseeable consequences of their actions, so too must social planners who create institutions of punishment bear such responsibility.

By that logic, our compassion and concern should properly extend to harm imposed on innocent third parties by the state's punishments.³⁶⁶ We are therefore willing to agree that compelling circumstances arise when an offender is the sole and irreplaceable caregiver for minors or for aged or ailing persons with whom the defendant has an established relationship of care giving. Here we abjure any reason to privilege the familial relationship in the context of any accommodations made to "irreplaceable caregivers." What matters from our vantage point is that the defendant is serving a critical social role as irreplaceable caregiver.³⁶⁷

Ordinarily, however, we think that harms to innocent third parties should be ameliorated through the institutions of distributive justice, not criminal justice. In an attractive polity, a child without a parent should receive state and communal aid regardless of whether the parent is not

364. See generally Darryl Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 343-48 (2003) [hereinafter Brown, *Cost-Benefit Analysis*]; Darryl Brown, *Third Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1407 (2002).

365. Cf. Paul Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 919 (1997) (arguing that "[parental] training prevents more crime than the deterrent effect of prison"). On the related claim that lengthy terms of incarceration are criminogenic and counterproductive, see Brown, *Cost-Benefit Analysis*, *supra* note 364, at 346.

366. See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 459 (2005); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 711-16 (2005).

367. We recognize our approach may incur slightly higher "information costs" by abandoning the simple proxy of family status, but this approach in practice is not likely to be more costly than the ex-ant costs of verifying the reality of familial care-giving responsibilities.

around due to sickness, death, or imprisonment. But where the state has persistently failed its obligations of distributive justice, it would not be unreasonable to tailor the punishment of “caregiver” offenders in a way that mitigates third-party harms without simultaneously elevating the offender’s status in violation of the principle of equal justice under law.

For that reason, we think, assuming the crime was severe enough that some form of incarceration is deemed necessary, it may be appropriate for legislatures to authorize greater use of time-delayed sentencing to offenders with irreplaceable care-giving responsibilities.³⁶⁸ For example, where an offender is the irreplaceable caregiver for children, the offender in a time-delayed sentencing scheme would defer his punishment until after the children reach the age of majority or until alternative and feasible care can be arranged.³⁶⁹ In the case of caring for aging parents or ill spouses, the sentence may be delayed until the person receiving the care is deceased, improved in health, or able to obtain care from another person or entity. During the period that the sentence is deferred, the offender’s freedom of movement would be dramatically limited so that only work and necessary chores (i.e., taking one’s child to the doctor) would be permitted. Electronic bracelets or other tracking devices could be used to ensure compliance. Additionally, during the time of deferral, the state could attach extensive community service obligations or other release conditions such as drug testing. 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.

Of course, this option should not be restricted to only those with a blood relationship or marriage. If there is an established relationship of care giving, then that should be the critical issue. On the other hand, this option should not be available when the defendant has already committed a crime either with or against the child, or has exhibited a propensity to harm his family (e.g., prior convictions for reckless endangerment of a child), or is such a dangerous criminal that it would be foolish for society to let him remain free. Simply put, there might be some crimes whose violations would render an offender ineligible for this kind of differentiated-sentencing scheme. But there are ways of using alternative punishments that still, by their coercion or deprivation, communicate to the of-

368. Of course, we also think there are a variety of noncarceral punishments that might be appropriate for many nonviolent crimes. One of us (Markel) has written on this earlier. See Markel, *supra* note 277, at 1452–74; Markel, *supra* note 283.

369. To prevent the offender from trying to delay sentencing indefinitely, we might want to restrict the length of the deferral. Thus, if the crime occurs at T1, and the defender only has one child who is four years old, the defendant would be permitted to defer sentencing for fourteen years. This limit would apply even if the defendant subsequently had more children after T1. During those fourteen years, the offender would effectively be on probation, such that if the offender violated other conditions of the delayed sentencing, the offender would then go to prison. This does not eliminate the imposition of harms on children but it reduces, in part, the likelihood of such harm being realized.

fender the norms of equal liberty under law without wreaking (as much) havoc on the lives of innocent third parties.

As should be clear from the foregoing, we are very sympathetic to the concerns of innocent third parties affected by draconian sentencing policies. Myrna Raeder, for example, has forcefully illustrated that our current sentencing regime has particularly harsh consequences for incarcerated mothers and their children.³⁷⁰ But recognizing the consequences of a sentencing regime is not the same as effectively condemning it in whole cloth. For one thing, a caregiver who is also a serial killer should not receive a sentencing discount simply because of the caregiver's status as a mother. Rather, the critical issue here seems to be that many of the crimes for which women are convicted (providing low-level assistance to a drug trafficking ring, for example) do not deserve the extremely harsh sentences that are currently imposed for that activity. Thus, many of Raeder's very legitimate concerns about the "gendered differences in criminality"³⁷¹ could be taken into account when we properly consider such factors as the nature of the criminal conduct, the criminal history of the defendant, and so on, in making a sentencing decision for an individual defendant, or a class of defendants similarly situated. Further, many of the harms to innocent third parties can be addressed by ameliorating the sentences imposed for nonviolent crimes across the board, which are the crimes some suggest that women are more likely to commit in any event. But this analysis, and the prescriptions that flow from it, do not require the extension of sentencing discounts simply because of family ties or responsibilities.

In sum, we recognize that punishment (especially in the form of incarceration) affects innocent third parties. Those innocent third parties, however, are not connected to the defendant through family status alone. Thus, to the extent legal officials *should* tailor a punishment in recognition of its deleterious impact on innocent third parties, the law should reject a categorical effort to accommodate only those innocent third parties who are family members.³⁷² Second, we doubt that the criminal justice system should be the first resort to resolve the social needs of families in distress. But in those situations where distressed-family problems arise with no alternative resources available to ameliorate the situation, it is preferable to establish more options including time-deferred sentencing or, for example, custodial options where the sole caregiver and the cared-

370. See, e.g., Raeder, *supra* note 199, at 8–9. Indeed, Raeder herself typically centers her critique on the costs incarceration poses on nonviolent offenders.

371. See *id.* at 3–8.

372. A similar point may be made about the introduction of victim impact or defendant impact evidence. For example, some jurisdictions limit who may offer statements on behalf of victims or defendants to family members only. See text accompanying notes 178–79. Although we are personally divided over the desirability of victim or defendant impact evidence, we all agree that statutes or policies that permit only family members to offer statements are too narrowly cabined.

for individuals can live together, assuming that the offender's offense was not directed against his children (or others) in the first instance.³⁷³

2. *Greater Access to Phone Calls in Prison*

Another situation where alternative measures may be feasible involves access to telecommunication options in prisons. Recently, the *New York Times* editorial page argued for the end of New York state's prison practice requiring inmates to call their families collect (and then collecting a commission from the inflated rates of those phone calls). The *Times* contended that the "billing strategy erodes fragile family ties by discouraging prisoners from keeping in touch with loved ones—especially small children—who often have difficulty visiting because they live hundreds of miles away."³⁷⁴ The *Times* has called the collect-call policy (dominant in many state³⁷⁵—but not federal—prisons) "a hidden tax on prisoners' families, who tend to be among the poorest in American society"; indeed, "inmates' families must often choose between paying phone bills or paying the rent."³⁷⁶ One might wonder if there is more to excessive phone rates in prison than merely successful lobbying and incentives generation by phone companies.³⁷⁷ Madeleine Severin explains that "[t]o some extent excessive prison phone rates reflect nationwide ambivalence about prison costs and prisons in general [because, according to some,] . . . the phone rates alleviate a burden on taxpayers" who are already "paying an enormous amount to warehouse, feed, get cable

373. Raeder refers to these programs as options for mothers with children. See generally Raeder, *supra* note 147; Raeder, *Gender and Sentencing*, *supra* note 21.

374. Editorial, *Please Deposit All Your Money*, N.Y. TIMES, Aug. 31, 2005, at A18.

375. California's state prisons have perverse phone systems, as do many other states. See Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391, 392–93 (2002) ("With respect to the financial incentives, it is estimated that inmate calls generate a billion dollars or more in annual revenue. One prison pay phone can generate \$15,000 annually; a typical public pay phone generates only one-fifth of that amount. Faced with the possibility of such revenues, MCI installed its inmate phone service in prisons throughout California at no charge to the state. As part of the deal, in exchange for the right to be the sole provider of telephone services to prisoners, MCI pays the California Department of Corrections a thirty-two percent share of all revenue derived from the calls.").

376. See also Editorial, *Keeping in Touch with a Parent in Prison*, N.Y. TIMES, Jan. 14, 2004, at A14.

377. See Travis, *supra* note 186, at 37 ("The high price of collect calls reflects sweetheart arrangements between the phone companies and corrections agencies, under which the prisons receive kickbacks for every collect call, about 40 to 60 cents of every dollar. This arrangement translates into a substantial revenue source for corrections budgets. In 2001, for example, California garnered \$35 million, based on \$85 million of total revenue generated from prison calls. Some states require, by statute or policy, that these revenues pay for programs for inmates. Most states simply deposit this money into the general budget for their department of corrections."). For more on the economic background of these policies, see Carver, *supra* note 375, at 397–98 ("[T]he state receives the benefit of having a [telephone] service provided, but does not have the corresponding burden of paying for that benefit. That burden falls on the families of the inmates.").

television and other perks to these criminals.”³⁷⁸ Yet the counter arguments are clear:

Inmates’ families counter that they, not their convicted loved ones, pay the bills and the rates are unfairly punishing innocent people. Families and legislatures further assert that maintenance of familial and other relationships between inmates and the outside world serves an important penological interest in lowering recidivism rates.³⁷⁹

Ultimately, we too think that prisons could move away from the extant collect-call policy in the state prisons. But such a design shift should be justified in terms that are family neutral, because the desire to strengthen family ties is a proxy for other state interests, much like the use of certain pretrial release conditions that assessed family ties in a particular venue.³⁸⁰ We have some reason to believe that reforming collect-call policies in state prisons will help families maintain contact—and contribute to the flourishing and, at least potentially, the rehabilitation of all inmates, not just those with family ties.³⁸¹

3. *A Note on Alternative Measures: Function, Not Status*

We think it bears emphasis that the accommodations to family ties that we discussed in this Section might better be viewed as doing away with a “tax” on all offenders than affording a real benefit to families. For instance, the availability of fairly priced phone calls will redound to the benefit of all prisoners, even if some inmates with families may benefit more than others. Similarly, time-deferred sentencing for irreplaceable caregivers may benefit families more often than others, but we would not want to see the benefit of time-deferred sentencing restricted to those who give care only for their family members. This is a perfect example of where helping families need not offend our normative considerations—and we have no trouble signing on to policies that help families in this benign way, affording a benefit in a nondiscriminatory fashion. In short, we are generally skeptical toward distributing family ties benefits prior to and including determinations of criminal liability and most instances of

378. Madeleine Severin, *Is There a Winning Argument Against Excessive Rates for Collect Calls from Prisoners?*, 25 CARDOZO L. REV. 1469, 1473 (2004).

379. *Id.*; see also Travis, *supra* note 186, at 37 (“In a study, conducted by the Florida House of Representatives Corrections Committee, family members reported spending an average amount of \$69.19 per month accepting collect phone calls. According to this report, ‘[s]everal family members surveyed stated that, although they wanted to continue to maintain contact with the inmate, they were ‘forced to remove their names from the inmate’s approved calling list because they simply could not afford to accept the calls.’” (citation omitted)).

380. See *supra* Part I.

381. Cf. Genty, *supra* note 356, at 1674 (“Of those [incarcerated] parents who have phone contact [with their children], only about half of the mothers and forty percent of the fathers in state prison make at least monthly phone calls. The figures are much better for parents in federal prison, with approximately eighty percent of the mothers and seventy percent of the fathers making phone calls at least once a month.”).

sentencing. When it comes to sentencing of irreplaceable caregivers and matters affecting the incarceration of an offender, however, we are more inclined to reengineer the current panoply of family ties benefits in terms that are neutral to family status and instead focus on promoting those functions delineated by established relationships of care giving.

IV. CONCLUSION

As we noted earlier, we believe that there very well may be appropriate places for the modern liberal state to recognize and accommodate the significance of family life. But the criminal justice system, with a few exceptions that we sketched above, in general is not one of them. While our criminal justice system reflects many values, surely the critical and dominant ones are the promotion of accurate and fair verdicts and the protection of citizens from serious wrongful harm. Privileging certain individuals because of their membership in a state-denominated family unit threatens these core functions. When we excuse certain classes of individuals from prosecution entirely, solely on account of a family relationship, we both allow potentially dangerous individuals to escape punishment and create a more attractive class of accomplices. When we allow a husband to prevent his wife from offering relevant testimony on the witness stand that may exculpate someone else, we inhibit the truth-seeking function of a criminal trial. When we allow a wife to claim a privilege, but not a partner in a same-sex relationship, we subtly but inevitably convey our disapprobation of those relationships. Although this seemingly simple story can get more complicated, we have argued that it rarely gets so complicated as to sanction the privileging of family ties over our commitment to doing justice in a sphere in which the liberty and lives of women and men are at stake.

To be sure, the troubling normative costs we associate with these family ties privileges and benefits require verification; and, we hope other scholars will participate in finding out the empirical costs of these family ties benefits. It is possible that comparing crime rates in jurisdictions that have these benefits with those that do not (both domestically and abroad) will yield interesting results. Some apparent benefits to families in the criminal justice system, for instance, may prove to be self-defeating.³⁸² Other seemingly “private” family ties benefits might demonstrate tangible general public advantages.³⁸³ And still others are less

382. Cf., e.g., Bedard & Helland, *supra* note 361, at 165–66.

383. Elizabeth Scott and Amitai Aviram shared the reaction that average citizens may view certain family ties benefits as ways by which the state tries to induce compliance with the overall legal regime. Cf. Robinson & Darley, *supra* note 234, at 497–99; Robinson, *supra* note 234, at 15–17. In other words, absent these benefits and privileges, confidence in the legitimacy of the criminal justice system would erode precipitously. In some such situations, prosecutors might end up exercising their discretion to decline exacting “full justice” because they would face the threat of jury nullification. These suggestions are provocative—as far as they go. But we think that the elimination of the unjustified family ties benefits can be explained in a moral vocabulary (accuracy, equality, crime-reduction)

susceptible to empirical “verification” because the benefits involve tradeoffs between competing normative values, such as the family ties benefits that pose risks to relevant equality norms.³⁸⁴

Although we are open minded about the possible empirical effects these various benefits cause, we are, at least right now, especially doubtful that the family needs systematic support through the use of criminal justice benefits in order to enable and ensure its flourishing.³⁸⁵ We recognize that the tension between loyalty to the family and loyalty to the state is real, and that the choices faced by families like the Sheinbeins are agonizing. But when conflicts between family and the criminal justice system arise, especially prior to the determination of sentence, the need to prevent adverse consequences and attacks on our fundamental values should generally prevail over the need to promote family preservation and “harmony.” Indeed, when family relationships involve criminal complicity, those families seem already in disrepair and are likely undeserving of state protection, notwithstanding the relatively minor taxes the state may put on familial-status relationships inside and outside the criminal justice system.³⁸⁶

Although our presumption against family ties benefits can be rebutted, we believe the scrutiny called for under the presumption is warranted—and entail curtailing some of the benefits or privileges the criminal justice system already recognizes, and being cautious to new ones.

that would resonate with much of the population. Just as government has successfully disturbed and altered social norms involving racism or sexism, so too could institutions of criminal justice shape social norms and not just uncritically reflect them. In any event, it may turn out this concern about non-compliance is exaggerated; we need empirical work to study whether jurisdictions without family ties benefits are suffering from higher crime rates than those with them and whether those jurisdictions that have either adopted or abandoned such benefits found any noticeable differences within their own jurisdiction.

384. For example, the punishment discounts given to parents, on the one hand, rupture equality norms and, on the other hand, may work to reduce harms that young children may endure in the absence of a parent.

385. For instance, we are aware that families often help in the reintegration of offenders into society, but we doubt that families would refuse to offer that help in the absence of family-specific privileges extended during the course of investigating, prosecuting, and punishing the predicate criminal activity.

386. See Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Problem of Family Taxes* (2007) (unpublished manuscript, on file with authors) (examining various burdens—e.g., omissions liability, vicarious liability, sentence enhancements—placed by the state on those offenders with familial connections to the crime in the criminal justice system).

