
REPLIES & RESPONSE

TO PUNISHING FAMILY STATUS

DO FAMILIES NEED SPECIAL RULES OF CRIMINAL LAW?: A REPLY TO PROFESSORS COLLINS, LEIB, AND MARKEL

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INTRODUCTION

The criminal law occasionally imposes liability on persons for acts and omissions affecting members of their family where such liability would not exist absent the family relationship. For instance, parents can be held criminally liable for neglecting to supervise their own children, when failure to supervise unrelated children would not result in liability.¹ Is such criminal liability desirable?

Collins, Leib, and Markel argue that the criminal law should never impose special obligations on people solely by virtue of their familial relationships with others.² This is not because the criminal law should not protect people from neglect or abuse by members of their family. It is because the family relationship – parent, spouse, etc. – ought not to be the basis for such liability. In every case in which the existence of a family relationship is a necessary element of a crime, Collins, Leib, and Markel would replace that relationship with the defendant’s implied or express agreement to provide care to the victim.³ This voluntary agreement, not the family relationship, would form the basis for liability.

Collins, Leib, and Markel have made an extraordinarily thoughtful and nuanced contribution to criminal and family law. To appreciate the subtlety of their work, one has to place the article in the context of the often acrimonious debates that beset scholarship at the intersection of these two areas, especially surrounding domestic violence and child abuse. It has become a standard trope of much feminist legal scholarship to reject the idea of treating the family as an

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¹ Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1340 (2008).

² *Id.* at 1332.

³ *Id.* at 1360 (conceding that “voluntary relations can be fuzzy at the margins”).

especially privileged private sphere, immune from state intrusion.⁴ But such scholars still want to maintain special rules of criminal law for families. To combat social norms that induce the police and prosecutors not to intervene in domestic conflicts, these scholars urge that domestic violence be subject to law enforcement rules uniquely applicable to domestic violence cases, such as mandatory arrest and “no-drop” prosecution policies.⁵ Such policies have sparked intense controversy in light of evidence that the victims of domestic abuse do not necessarily desire the automatic arrest and prosecution of their abuser and that such policies could even deter victims from seeking governmental help.⁶ The invective stirred up by these debates is often personal and heated.⁷

The debate over domestic violence is just a specific instance of the larger controversy over whether the family needs to be governed by special criminal laws. Collins, Leib, and Markel suggest the law might be wiser to govern families by general categories that are not family-specific.⁸ Admittedly, they are not entering the debate about how to deal with domestic violence. But their contribution fits into this larger debate of which the controversy over “no-drop” prosecutions and mandatory arrest policies are a part – namely, whether the family ought to be subject to its own special criminal regime. It is a tribute to their originality and intelligence that they do so with such care and subtlety, spotting a problem that has largely been ignored in a well-trodden field and proposing such a balanced solution.

⁴ See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) (discussing how the concept of family privacy should not prevent governmental action to combat domestic violence).

⁵ Under “no-drop” policies, authorities may not consider the victim’s preferences when deciding whether or not to proceed with a domestic violence prosecution. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 184-88 (2000); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666-73.

⁶ On the intrusion of such policies into the choices of abused partners, see LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* 33 (2003) (arguing that these policies are “mostly symbolic” and do not ultimately reduce incidents of domestic violence); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 42 (2006) (arguing that the “prosecutorial use of criminal court protection orders” result in state-imposed de facto divorce). On the tendency of such policies to target disproportionately low-income households and racial minorities, see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 775 (2007).

⁷ See, for example, Emily Sack’s attacks on Mills and other “pseudofeminists.” Sack, *supra* note 5, at 1700-18 (defining “pseudofeminists” as “those who label themselves feminists, but in fact attack actual feminists in order to pursue a conservative agenda”). Linda Mills, in turn, has a habit of psychoanalyzing the motives of feminists who disagree with her. See Annalise Acorn, *Surviving the Battered Readers’ Syndrome, or: A Critique of Linda G. Mills’ Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 13 UCLA WOMEN’S L.J. 335, 338 (2004).

⁸ Collins, Leib & Markel, *supra* note 1, at 1332.

Eliminating family-specific categories from the criminal code will have three beneficial consequences, according to Collins, Leib, and Markel.⁹ First, eliminating the element of a family relationship would ensure that duties to care for others are not restricted in morally arbitrary ways. In particular – and this seems to be the authors’ primary concern – same-sex couples could undertake to care for each other and their children even though they were excluded from assuming the legal status of adoptive parent or spouse.¹⁰ Second, the duties to care would be rooted in consent to provide care, rather than in familial status, rendering these duties more consistent with the “structure” of criminal law, because that structure places the individual’s voluntary consent at the root of legal obligation.¹¹ To facilitate such consensual caregiving arrangements, Collins, Leib, and Markel urge that the state set up registries in which individuals can commit themselves publicly to providing some range of caregiving services to other people – commitments that the state will then enforce with unspecified criminal sanctions.¹² Finally (but most ambiguously) the authors wish to minimize the scope of the criminal law to protect personal liberty.¹³

How persuasive is this argument against punishing family ties? Unfortunately, as much as I admire the article, I remain unpersuaded as to its bottom-line recommendation, for three reasons. First, the goal of avoiding arbitrary discrimination could best be avoided by reforming family categories like “parent” and “spouse” rather than purging them from the criminal code. Second, there is little public need for the prosecutor to impose criminal sanctions for failure to honor care-giving commitments as a general matter. Instead, the “internal structure” of family ties might be more focused on the narrower problem of child-rearing. Finally, if one’s goal is minimizing government intrusion into family relationships, then having a special set of criminal standards for parental omissions, distinct from other caregivers, might be a sensible idea. In short, we might still need a special criminal law for parental caregivers, but no criminal law whatsoever to enforce caregivers’ commitments outside the child-rearing context.

I. REFORMING FAMILY CATEGORIES

First, consider the authors’ argument about avoiding arbitrary discrimination, which seems to be primarily focused on the exclusion of same-

⁹ *Id.* at 1363, 1365-68.

¹⁰ *Id.* at 1363 (including unmarried heterosexual partners, grandparents, and platonic or polyamorous friends who live together in a category with voluntary same-sex partners).

¹¹ *Id.*

¹² *Id.* at 1365-66 (explaining, for example, that “[i]f adult children wanted to signal their willingness to shoulder burdens to care for their parents, then [registering] would be an *option*, rather than the *requirement* it is under a few states’ rules”).

¹³ *Id.* at 1367-68.

sex couples from the right to adopt children.¹⁴ The authors and I agree that same-sex couples are capable of being good spouses and parents. The authors infer that if state law precludes same-sex couples from performing these roles, then it would be unjust for the criminal law to rely on such discriminatory concepts at all for heterosexual couples.¹⁵

But same-sex couples' competence at parenting and partnering is a justification for enlarging the categories of marriage and parenthood to include same-sex couples, not for eliminating those concepts from the criminal law. If the concepts of "parent" and "spouse" are unjustly defined, then why not reform the concepts in every part of the law rather than adopt the halfway measure of merely reforming the criminal code to eliminate reference to these categories? Admittedly, there will be obvious political obstacles to the reform of marriage and adoption law. But there will be similar political obstacles to creation of "covenants of care" that include same-sex couples. It is not as if

¹⁴ *Id.* at 1376-77. The authors sometimes seem to imply that people with temporary custody of children do not have legally recognized parental status. In fact, grandparents or neighbors who can prove they are temporarily a child's primary caretaker are generally recognized as de facto parents, with most of the ordinary authority to make decisions on behalf of the child entrusted to their care. *See Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004) (recognizing grandparents as de facto parents, but noting that they are not equal in all respects to biological parents). The authors also note there are non-traditional groups that might also do a good job of raising children such as polyamorous groups larger than a pair of adults. *See Collins, Leib & Markel, supra* note 1, at 1372. Perhaps they are correct. Absent reliable data supporting such a contention, however, I would be reluctant to characterize exclusion of any such group from the job of child-rearing as "arbitrary." Not every conceivable group, after all, is well-suited for the task of raising children: I am guessing, for instance, that even the authors would balk at allowing a for-profit corporation to adopt children, a la "The Truman Show." *THE TRUMAN SHOW* (Paramount Pictures 1998) (depicting the life of a man adopted as a child by a corporation, which filmed his every movement, unbeknownst to him, and broadcast his life as a popular television program). Once one concedes the position that the power of raising children must be limited to groups well-suited for the task, then claims about the arbitrariness of family-based discrimination must rest on empirical evidence about whether a particular group's incentives, numbers, internal structure, etc., make them reliable caretakers of children. Since the authors provide no substantial evidence that polyamorous groups as such are well-suited for child-rearing, I demur on the question of whether excluding them from family care burdens is "arbitrary." Of course, the U.S. Supreme Court would resolve such disputes about whether discrimination is "arbitrary" by deferring heavily in favor of state laws defining family relationships. *See, e.g., Smith v. Org. of Foster Families*, 431 U.S. 816, 855-56 (1977) ("In such a context, restraint is appropriate on the part of courts . . . [T]he procedures provided by New York State . . . are adequate to protect whatever liberty interests [foster parents] may have . . .").

¹⁵ Collins, Leib & Markel, *supra* note 1, at 1337.

domestic partnerships, for instance, have escaped the maelstrom of controversy that has swallowed up same-sex marriage in so many states.¹⁶

II. DEFINING THE STRUCTURE OF FAMILY TIES

Second, Collins, Leib, and Markel have not provided an overwhelmingly persuasive argument that the “internal structure” of family ties burdens suggests the criminal law ought generally to enforce commitments to provide care to others.¹⁷ Collins, Leib, and Markel do not explain precisely what they mean by a law’s “internal structure,” but I infer that they are invoking something like Dworkin’s concepts of “fit” and “justification.”¹⁸ The purpose of promoting voluntary caregiving “fits” as an explanation of family ties burdens, because the relevant familial relationships are all voluntary. Moreover, this purpose is a normatively attractive justification, because caregiving is a normatively worthy goal to promote.

Putting aside the question of “fit,” one might ask whether the account of family ties burdens offered by Collins, Leib, and Markel is normatively attractive. Why should anyone think the law ought to provide *criminal* enforcement for all or most voluntary commitments to provide care? Yes, family ties are voluntary; but so are most contracts for caregiving services. Why has the law singled out family ties and treated them differently from, say, contracts with law firms, hospitals, therapists, health spas, masseuses, dentists, and other providers of caregiving services? The doctor who negligently leaves a sponge in a patient during surgery is liable for malpractice; she has breached a commitment to provide reasonable care. Yet, absent extraordinary recklessness, she does not go to jail. The father who is similarly negligent in letting his child play in traffic might very well be criminally sanctioned. Why the distinction? A persuasive account of family ties burdens requires a tighter account of the purpose of these burdens – an account that does not sweep up any caregiving contract into its ambit but instead focuses on what is distinctive about families.

Consider, as a rival candidate for explaining family ties, the possibility that families are paradigmatically concerned with child-rearing. Many of the burdens triggered by family relationships, of course, expressly define the care that must be given to children. But even those burdens triggered by spousal relationships – for instance, laws against bigamy or adultery – are explicable as

¹⁶ See, e.g., *Nat'l Pride at Work v. Michigan*, 748 N.W.2d 524, 543 (Mich. 2008) (holding that public employers providing health-insurance benefits to their employees' same-sex domestic partners violated the state's marriage amendment, which defined marriage as a union “of one man and one woman”).

¹⁷ See Collins, Leib & Markel, *supra* note 1, at 1359-63.

¹⁸ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 123 (1977) (explaining that his “rights thesis” includes two aspects: a descriptive aspect that explains the present structure of the institution of adjudication, and a normative aspect that offers a political justification for that structure).

efforts to define an institution that is well-suited for procreation and the raising of children. The term “adultery” has its origins in worries about an “adulterated” blood line, not in mere romantic jealousy.¹⁹ That couples rather than triples or quadruples marry each other similarly bears an obvious relationship to the raising of children: two people are the minimum number necessary for procreation, and two parents provide the minimum number necessary for dividing labor between earning income and rearing children.

Of course, there are married couples who do not raise children, so the child-rearing account of family ties is under-inclusive. This under-inclusiveness is not, however, fatal to the general accuracy of the conceptual account. One might say that the paradigmatic purpose of families is to raise children even though not all families raise children, just as the paradigmatic purpose of for-profit corporations is to turn a profit for their owners, even though not all corporations are profitable. Moreover, the authors’ rival account of family ties’ internal structure seems over-inclusive, because it cannot exclude voluntary caregivers – insurance companies, law firms, hospitals, psychiatrists, etc. – who bear not even a rough “family resemblance” to the institution conventionally denoted by the term “family.”

Neither my nor the authors’ account of family ties’ “structure,” in short, is a perfect “fit” for existing law. The child-rearing explanation, however, has the virtue of explaining why there is a societal interest in enforcing familial commitments with criminal sanctions. By contrast, the account offered by Collins, Leib, and Markel does not provide a powerful case for such public enforcement. Why should we enlist the prosecutor and police to promote caregiving commitments, however voluntary they might be? As Leib has conceded in a thought-provoking article otherwise defending the legal recognition of friendship, it is not obvious that such caregiving commitments are always beneficial to society, even if friendship is a good thing for the friends who are parties to that relationship.²⁰ This is not to say that particular friendships cannot shed some social benefits on non-parties. For the sake of English literature, I am glad that Boswell and Johnson were friends, but, for the sake of Midwestern bankers, I regret Bonnie Parker and Clyde Barrow’s romance. The “amico degli amici” that form the Sicilian Mafia are (as their name implies) bound by ties of loyalty and friendship, but not to the advantage of Italian society. The social value of a caregiving commitment, in other words, depends on the social value of the underlying friendship. None of these casual observations suggest that Leib is wrong to argue in favor of civil enforcement of friendships – for instance, by implying some sort of fiduciary relationship between friends. I mean only to suggest that the benefits of friendship and romance are not self-evidently persuasive justifications for

¹⁹ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 28 (Stuart Berg Flexner ed., Random House 2d ed. 1987) (defining “adulterate” in part as “to debase or make impure by adding inferior materials or elements”).

²⁰ Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 657-62 (2007).

enlisting the prosecutor and police to enforce friends' caregiving commitments.

Assuming that one did not accept the nihilistic argument of David Benatar,²¹ the existence of future generations is a positive good – indeed, the source of all value, if one believes that value is secular in origin. Child-rearing is necessary to create future value. A society without exclusive friendships would be sad; a society with fewer properly raised children is pro tanto deprived of the future value of humanity.²² The law, therefore, does not protect children merely because they are vulnerable, as Collins, Leib, and Markel suggest, but because children are a positive good. Unlike, say, blindness or leukemia, childhood is a “vulnerability” we want to reproduce every generation rather than eliminate. In this sense, the state has a more urgent interest in encouraging responsible child-rearing than in promoting voluntary caregiving arrangements more generally – even caregiving for vulnerable groups. Of course, it has been frequently suggested that the productive function of families in child-rearing has been eroded by the “de-familization” of society – the socialization of familial responsibilities.²³ But the data do not bear such an interpretation: the intergenerational transfer of wealth and services (clothing, education, housing, food, etc.) provided by families dwarfs the contribution of the state.²⁴

²¹ DAVID BENATAR, *BETTER NEVER TO HAVE BEEN: THE HARM OF COMING INTO EXISTENCE*, at vii (2006) (“Each one of us was harmed by being brought into existence Although it is obviously too late to prevent our own existence, it is not too late to prevent the existence of future possible people.”). Benatar’s peculiar position is based on the simple observation that, if non-existent people lack interests, then no one suffers from foregoing benefits by not being born, while everyone who is born suffers some degree of pain that non-existence would eliminate. Thus, non-existence is better than existence, Q.E.D. The argument is driven by the non-identity problem identified by Derek Parfit – the position that persons suffer no harm from not coming into existence, because non-existent persons, not existing, cannot be harmed (or, for that matter, benefitted). DEREK PARFIT, *REASONS AND PERSONS* 351, 487-90 (1984).

²² I do not assert that future children have an interest in being brought into existence, because there is a genuine paradox about whether non-existent people have interests. But I will stipulate that the existence of humans is pro tanto a source of value if, after they are born, their lives have value. Some philosophers deny that creation of happy people (as opposed to making existing people happy) has any value. See Jan Narveson, *Utilitarianism and New Generations*, 76 *MIND* 62, 62 (1967). For a detailed exploration of the unresolved paradoxes that arise from either asserting or denying the value of additional lives, see PARFIT, *supra* note 21, at 420 (discussing the paradox of “mere addition,” which occurs “when, in one of two outcomes, there exist extra people (1) who have lives worth living, (2) who affect no one else, and (3) whose existence does not involve social injustice”).

²³ See, e.g., Connie Rosati, *What is the “Meaning” of “Marriage”?*, 42 *SAN DIEGO L. REV.* 1003, 1007-08 (2005) (suggesting that expanding the state’s role in child-rearing might erode the traditional family).

²⁴ For some statistics about the magnitude of social welfare spending that performs familial functions, see Piotr Michon, *Familisation and Defamilisation Policy in 22 European Countries* 2 (Sept. 21, 2006) (unpublished manuscript, available at

This public interest in promoting the proper care of children also helps explain what would otherwise be a question-begging tendency of the law (and the authors) to infer “consent” to provide support for children on the basis of extremely thin evidence. Collins, Leib, and Markel, for instance, are willing to infer that a father consents to supporting his children by having sexual intercourse.²⁵ Such consent is obviously a stipulation about assumption of risk, not an argument about the defendant’s actual state of mind. No one believes that men mentally tote up and consciously accept the risks of an unwanted pregnancy just because they do not have contraception handy. By contrast, in an ordinary loan contract, the borrower would get three days to rescind any agreement, and he would have to receive actual, rather than constructive, notice of the law.²⁶ Why is it reasonable to place on the father the burden of apprising himself of the legal consequences of his omissions but not on the borrower? The obvious answer is that there are powerful moral reasons for fathers to pay child support but less powerful ones for borrowers to bear the default risk of their debts. The father “ought” to have known that his careless omission could have massive financial consequences for him, because we believe that bearing those consequences is an important social responsibility. As Louis Jaffe noted long ago in his analysis of “voluntary” organizations like unions and corporations, “consent” is a plastic concept more readily inferred when we approve of the goals to which the putative “consent” has been given.²⁷ Therefore, there might be less to the principle of consent than meets the eye. In the same way as the authors insist that voluntary sex implies voluntary parenthood, John Locke insisted that people “consent” to the laws of the nation in which they reside by not emigrating.²⁸ Might it be more productive to forego this talk of consent and instead focus on the normative goals that lead us so easily to infer that consent exists?

In short, neither consent nor caregiving is sufficient to define the essence or structure of family ties. Instead, one needs to see these ties as necessarily connected to the business of child-rearing in order to make sense of why the state takes an interest in enforcing them with criminal sanctions. One might

http://www.espanet2006.de/downloads/ESPAnet2006_paper_Michon.pdf) (comparing state policy towards working families in Europe and their consequences for women’s labor market activity).

²⁵ Collins, Leib & Markel, *supra* note 1, at 1371 (“[W]e view the risk of pregnancy as a risk people voluntarily assume when they engage in sexual relations, even when using birth control.”).

²⁶ 15 U.S.C. §§ 1601, 1602, 1635 (2006) (requiring that obligors have three business days to rescind transactions and that creditors “clearly and conspicuously” notify obligors of this right).

²⁷ Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 219-20 (1937) (suggesting that voluntary organizations such as unions and trade associations frequently exercise power “irrespective of the will of particular individuals” governed by them).

²⁸ For a discussion of the ambiguous role of “consent” in Locke’s theory, see John Dunn, *Consent in the Political Theory of John Locke*, 10 HIST. J. 153, 158 (1967).

object that this focus on child-rearing infuses the law of family ties with a heteronormative bias. But I am not sure that heteronormativity follows from a focus on child-rearing (or, in a phrase that I owe to Dan Markel, “repronormativity”).²⁹ Same-sex couples raise kids as effectively as heterosexual couples, and their children are generally related to one of the partners; the focus on child-rearing in no way excludes them from a properly reformed legal concept of the family. In any case, to overlook the repronormativity of the family as it is defined and recognized by the laws of the United States is to abandon any honest effort at finding a true Dworkinian “fit” between the explanation and content of the laws.³⁰

What follows from an account of family ties centered on child-rearing? Starting from such an account, one might trim back on family ties burdens in a different manner than that recommended by Collins, Leib, and Markel, to eliminate laws that seem orthogonal to the child-rearing goal. Punishing adultery in relationships without children, for instance, would cease to be a justifiable expenditure of law enforcement resources. Likewise, bigamy, polygamy, polyandry, and other plural marriage arrangements would be evaluated with an eye to their effects on the proper care of children in the household.³¹

But criminal enforcement of caretaking duties incident to ties of romance or friendship would not be part of the law, because there does not seem to be any public interest in deploying scarce prosecutors’ time to pursue such offenses. Indeed, it is likely that laws against adultery or polygamy where children are not involved have already practically lapsed into desuetude. Collins, Leib, and Markel can cite only a handful of prosecutions – cases that were publicized in newspapers precisely because they were so unusual.³²

III. THE DIFFICULTY OF DETECTING PARENTAL OMISSIONS

In sum, I am not convinced that either the moral arbitrariness of our current family categories (“spouse,” “parent”) or some unmet need to provide criminal enforcement of voluntary caregiving commitments outside of the family suggests the elimination of legal burdens based on family ties. So long as *parents* primarily raise children, the criminal law will be needed as a last resort to ensure that parents carry out their responsibilities.

²⁹ Collins, Leib & Markel, *supra* note 1, at 1359 (defining repronormativity as “a clear policy to promote procreation”).

³⁰ DWORKIN, *supra* note 18, at 123.

³¹ Effective child-rearing would likely require some constraints on the number and kind of decisionmakers entitled to act as children’s caretakers, with, say, a kibbutz being the absolute outside limit on size. RANDOM HOUSE DICTIONARY, *supra* note 19, at 1053 (defining “kibbutz” as “a community settlement, usually agricultural, organized under collectivist principles”).

³² Collins, Leib & Markel, *supra* note 1, at 1345 n.100, 1346 n.109.

Collins, Leib, and Markel would not disagree. But they would urge that the duties of parents to their children are, at least insofar as the criminal law is concerned, not different in kind from the duty of any fiduciary acting on behalf of a minor. There is no need for custom-tailored criminal sanctions against “parents” as such, according to the authors; instead, parents ought to be subject to roughly the same legal scheme that governs anyone else with long-term and pervasive authority over children.³³

But all people who have custodial control over minors are not alike. Personnel who work for institutions – prisons, schools, orphanages, hospitals, etc. – are governed by elaborate legal and professional standards and are subject to pervasive bureaucratic supervision. By contrast, people who serve as adoptive, biological, or de facto parents are simultaneously unregulated and uncompensated for their labor and time. The state cannot check up on their performance with any thoroughness; as a matter of sheer logistical necessity, the state must trust that these parents have extraordinary loyalty to their children’s interest. This loyalty is ensured by some combination of their specific and long-term connection to a very small number of children entrusted to their care, their biological ties to their children, and their willingness to bear extraordinary financial and personal burdens on behalf of their children.

The virtually unregulated character of parenthood might preclude subjecting them to anything like the criminal standard to which, for instance, teachers are subject. If a teacher did not supervise his students by allowing a bully to terrorize them, then the omission could easily come to the attention of the state through the principal’s office. If a parent is equally careless, the state has far less information about the shortcoming. By necessity, the state is forced to rely on parents themselves for information about the services the parents provide.

This fundamental reality – dependence on parents for information about the quality of caregiving as well as the caregiving services themselves – suggests caution in using the criminal law to enforce duties of care against parents. In particular, it is possible that parents ought to be subject to much more lenient duties of care than institutional caretakers, because criminal sanctions may deter parents from reporting any difficulties in the home. If fear of criminal sanctions deters the over-burdened and incompetent parent from seeking help from adoption agencies, social workers, schools, or other welfare agencies, then the state’s criminal sanctions would exacerbate the very parental negligence that it seeks to correct.

The problem is not merely speculative. There is evidence that, when faced with the prospect of the automatic arrest and prosecution of an abusive partner, women will not call the police even when abused.³⁴ In effect, the threat to

³³ *Id.* at 1373-74.

³⁴ MILLS, *supra* note 6, at 33 (arguing that mandatory arrest and prosecution policies eliminate professional discretion and ignore the victim’s desires); Radha Iyengar, *The Protection Battered Spouses Don’t Need*, N.Y. TIMES, Aug. 7, 2007, at A19 (“[M]andatory

invade the household with criminal law enforcement makes that very threat ineffective. *Mutatis mutandi* it is easy to see how a similarly strict criminal law could deter parents who need help from seeking it from the state. If a beleaguered single mom thinks she cannot properly raise her children, she may want to approach the state to turn custody over to someone who can. But the shadow of potential prosecution might deter her from doing so, just as it seems to deter her from calling the police when she is being beaten. Of course, parents may no more physically or mentally abuse their child than a stranger may; the state must intervene with the normal criminal sanctions for any child abuse. These egregious parenting failures, however, may be easier to detect than parental omissions. For the latter – say, failing to stop truancy, failing to provide adequate discipline, or failing to ensure at-home supervision – the state’s dependence on the parent for information about childrearing is some reason to relax criminal sanctions.

CONCLUSION

Collins, Leib, and Markel would not necessarily disagree that the criminal sanctions imposed on negligent parental caregivers ought to be lenient in light of the state’s special dependence on parental cooperation. But once one recognizes that parents are fundamentally different from other caregivers in this respect, one has re-introduced those family categories that Collins, Leib, and Markel want to banish from the criminal law. My guess is that those specific categories are here to stay. So long as child-care service is largely performed in the homes of unsupervised, uncompensated private parties, criminal law will need some special rules by which to govern these unique service providers – rules that will, regrettably or not, deploy the family-specific concept of “parent.”

arrest laws are having an unintended, deadly side effect. The number of murders committed by intimate partners is now significantly higher in states with mandatory arrest laws than it is in other states.”).