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CRIMINAL LAW AS FAMILY LAW

Andrea L. Dennis*

INTRODUCTION

Paul wanted to live with either his mother or his girlfriend in his old neighborhood, but his supervision officer told him he could not live in the neighborhood because that is where he would get in trouble. Instead, Paul lived in a three-quarter rooming house, hoping his mom or girlfriend would soon move so he could live with one of them.¹

James wanted to visit his daughter who lived out of state, but his supervision officer would not authorize the travel.²

Alex was arrested on a parole-violation warrant while at the hospital with his girlfriend awaiting the birth of their child.³

Chuck worried that when he visited with his daughter at a court-supervised daycare, police would arrest him in front of his daughter for a warrant violation.⁴

The stories of Paul, James, Alex, and Chuck—all of whom were being supervised in the community as part of a criminal case—reveal the extent to which the criminal justice system can interfere with family life and family autonomy.⁵ Their stories, though, are but a small sample of what individuals and families under criminal justice control experience.

The criminal justice system has morphed dramatically over the last several decades, achieving more pervasive control over the lives of

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1. Christine Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 448 (2011).

2. *Id.* at 449.

3. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 34 (2014).

4. *Id.* at 31.

5. *Id.* at 31, 34; Scott-Hayward, *supra* note 1, at 448–49.

individuals than ever before.⁶ The expansion began with the proliferation of criminal statutes, generating the now well-known concept of over-criminalization.⁷ The expansion also encompassed increasing the range of possible sanctions for criminal misbehavior and creating overlapping enforcement regimes.⁸ Two more instances of criminal justice expansion include mass surveillance and policies and practices that swept youth out of the juvenile justice system and into the criminal justice system.⁹ A product of the expansion has been mass incarceration; more individuals than at any point in American history are now housed in correctional facilities.¹⁰

The expansion of criminal justice has not only placed more individuals under criminal justice control, but also has inserted itself into virtually every aspect of family life.¹¹ The modern criminal justice system regulates intrafamilial behavior that society deems wrongful as well as many facets of family life that are considered socially desirable.¹² Legislatures have enacted new criminal laws targeting behavior between family members.¹³ Law enforcement and prosecutors directly and indirectly punish family members for the behavior of other family members.¹⁴ Courts can obtain jurisdiction over families who are the subject or target of criminal and quasi-criminal court proceedings.¹⁵ Corrections officials separate

6. Cf. Scott-Hayward, *supra* note 1, at 422.

7. HERITAGE FOUND., OVERCRIMINALIZATION AN EXPLOSION OF FEDERAL CRIMINAL LAW (2011), http://thf_media.s3.amazonaws.com/2011/pdf/fs0086.pdf.

8. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 105 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014), <http://nap.edu/18613>.

9. JAY STANLEY & BARRY STEINHARDT, AM. CIV. LIBERTIES UNION, BIGGER MONSTER, WEAKER CHAINS: THE GROWTH OF AN AMERICAN SURVEILLANCE SOCIETY 1 (2003), https://www.aclu.org/sites/default/files/field_document/aclu_report_bigger_monster_weaker_chains.pdf; Brief of Jeffrey Fagan et al. as Amici Curiae Supporting Petitioners at 7–8, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), <http://eji.org/files/10-9647,%2010-9646%20tsac%20Jeffrey%20Fagan,%20et%20al.pdf>.

10. NAT'L RESEARCH COUNCIL, *supra* note 8, at 33.

11. Sara S. Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 750 (2005).

12. *Id.*

13. Scott-Hayward, *supra* note 1, at 448–449.

14. *Id.*

15. Lina Guillen, *Supervised Visitation & Child Custody*, LAWYERS, <http://family-law.lawyers.com/visitation-rights/supervised-visitation-and-child-custody.html> (last visited Sept. 7, 2016).

adults, parents, and children from each other, sometimes for lengthy periods.¹⁶ Government officials and private citizens monitor family relationships and behavior—both public and private—and report alleged misconduct for criminal justice enforcement.¹⁷ This sweeping expansion has altered family autonomy and undercut family stability.

As with most aspects of the criminal justice system, the expansion has disproportionately and negatively impacted Black communities and social networks, including Black families.¹⁸ In comparison to their population numbers, Blacks are disproportionately involved in every aspect of the criminal justice and related systems, such as the child welfare and juvenile justice systems.¹⁹ Blacks are more likely to be surveilled, have contact with the system, be arrested, be convicted, and be confined or supervised for lengthier periods of time.²⁰ This disproportionate experience of criminal justice is felt not simply by individual Black citizens. Black families are inevitably impacted by the criminal justice experience of family members.²¹ Additionally, the family as a unit can be the target or subject of criminal justice oversight.²²

Despite these pervasive trends, with limited exception, legal scholars mostly have neglected to explore the intersection of criminal law, family law, and racial justice. Meares, Roberts, and King have explored the effects of mass incarceration on Black social networks, including Black families.²³ Roberts has explored the relationship

16. NANCY G. LA VIGNE ET AL., *BROKEN BONDS UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS* (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF>.

17. Samantha Gluck, *How to Report Domestic Violence, Domestic Abuse and Hotlines*, HEALTHYPLACE, <http://www.healthyplace.com/abuse/domestic-violence/how-to-report-domestic-violence-domestic-abuse-and-hotlines/> (last updated July 19, 2016).

18. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–82 (2004).

19. *Id.* at 1274.

20. *Id.*

21. *See id.* at 1281.

22. TRACY G. MULLINS & CHRISTINE TONER, *IMPLEMENTING THE FAMILY SUPPORT APPROACH FOR COMMUNITY SUPERVISION* 11 (2008), <https://www.appa-net.org/eweb/docs/APPA/pubs/IFSACS.pdf>.

23. Shani King et al., *Cost-Effective Juvenile Justice Reform: Lessons from the Just Beginning “Baby Elmo” Teen Parenting Program*, 93 N.C. L. REV. 1381 (2015); Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 CRIMINOLOGY & PUB. POL’Y 296

between criminal justice and child welfare for Black mothers and families.²⁴ Morrison has considered the racial aspects of intimate partner violence discourse and regulation.²⁵ Crimmigration scholars have examined the impact of the merging of criminal and immigration laws on families, particularly Latino families who comprise the largest portion of the immigrant population.²⁶ Finally, reentry scholars examining the relationship between offender reintegration and family life focus on Black families.²⁷ Beyond these areas, though, scholars have not devoted attention to the impact of the myriad other aspects of criminal justice expansion that today encroach upon many aspects of Black family life. In short, criminal law, family law, and racial justice generally are examined in silos or at best in pairs.

However, the relationship between criminal justice and family and racial justice can no longer be ignored. A multitude of criminal justice policies and practices have many different and deep impacts on Black families.²⁸ For example, consider the impact of community supervision on Black family life. Community supervision—also known as community-based corrections or community corrections—is a practice or program in which government agents supervise individuals in residential or community settings, not detention facilities.²⁹ Community supervision includes pre-trial release of defendants, service of probationary sentences, and completion of parole or supervised release which take place after an individual

(2004); Roberts, *supra* note 18.

24. DOROTHY E. ROBERTS, *SHATTERED BONDS* v–vi (2002).

25. Adele Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1068 (2006).

26. Anita Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 650 (2014).

27. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 690 (2006).

28. Rose M. Brewer, *Imperiled Black Families and the Growth of the Prison Industrialized Complex in the U.S.*, COUNCIL ON CRIME & JUSTICE, <http://www.crimeandjustice.org/councilinfo.cfm?pid=58> (last visited Aug. 15, 2016).

29. Office of Justice Programs, *Community Corrections*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/corrections/community/pages/welcome.aspx> (last modified July 13, 2016).

completes a custodial sentence.³⁰ As part of community supervision, courts and program officials impose conditions on supervised individuals, including participation in social service programs, travel restrictions, curfews, and electronic monitoring.³¹ Agents and courts enforce compliance with these conditions by imposing sanctions for violations, including incarceration.³²

Policymakers have offered community corrections as a panacea to mass incarceration, freeing both individuals and governments from the costs of confinement.³³ Community supervision is not without cost, though, and may not be the ideal solution it is portrayed to be.³⁴ Community supervision disrupts family networks and restructures families in ways that are counter to preferences regarding family autonomy, stability, and loyalty.³⁵

Supervision officers approve or disapprove where an individual lives and with whom, and can restrict the ability of family members to socialize with each other.³⁶ They make unannounced home visits and conduct warrantless searches of homes.³⁷ Agents monitor whether or not supervisees are complying with obligations unrelated to their offense, such as familial and child support.³⁸ To surveil and control individuals, officials gather personal family information collateral to the offense and rely on family members to report misbehavior.³⁹ If ever an agent determines an individual is not in

30. *Id.*; Nat'l Inst. of Justice, *Corrections & Reentry*, CRIME SOLUTIONS, <http://www.crimesolutions.gov/TopicDetails.aspx?ID=28#Overview> (last visited Sept. 6, 2016).

31. *E.g.* Ga. State Bd. of Pardons and Paroles, *Parole Conditions*, GEORGIA.GOV, <http://pap.georgia.gov/parole-conditions> (last visited Sept. 11, 2016).

32. *E.g.* Ga. State Bd. of Pardons and Paroles, *Parole Violations & Revocations*, GEORGIA.GOV, <http://pap.georgia.gov/parole-violations-revocations> (last visited Sept. 6, 2016).

33. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL'Y 51, 52 (2013).

34. *See* Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1015 (2013) (arguing probation and post-release supervision “are often imposed on the wrong people and executed in ways that predictably lead to revocation”); Scott-Hayward, *supra* note 1, at 441 (arguing parole does not foster reentry and may hinder reintegration).

35. *See infra* Part III.

36. Scott-Hayward, *supra* note 1, at 426, 448.

37. *Griffin v. Wisconsin*, 483 U.S. 868, 868 (1987) (permitting warrantless search of probationer’s residence); MINN. DEP’T. OF CORR., REVIEW OF GUIDELINES FOR REVOCATION OF PAROLE AND SUPERVISED RELEASE: 2009 REPORT TO THE MINNESOTA LEGISLATURE 27 (2009).

38. 18 U.S.C. § 3563(b)(20) (2012).

39. Klingele, *supra* note 34, at 1037.

compliance with conditions, the agent can ask the court to incarcerate and remove the individual from family life.⁴⁰

Community supervision represents only one instance in which the contemporary criminal justice regime impacts family law and racial justice. In the last several decades, criminal law has rewritten family law and family life, especially for Black families.⁴¹ This social and legal phenomenon demands intense scrutiny. This Article begins that effort.

The Article proceeds in four parts. Part I points out the lack of attention devoted to the intersection of criminal, family, and racial justice.⁴² As scholars have already explained, the historic link between racial and family justice has been erased from modern conceptions of family law doctrine and scholarship.⁴³ Additionally, legal subjects that both impact family life and implicate racial justice issues have been cleaved off from family law discourse. The separation of racial justice from modern family law and scholarship is also related to the virtual exclusion of criminal justice from family justice conversations. With limited exception, modern family law and scholarship rarely examines its relationship with criminal justice or the role of criminal justice in family life.

Part II charts the terrain of the modern, wide-ranging criminal justice system.⁴⁴ What began as the dramatic proliferation of criminal statutes has exploded into a breathtakingly broad criminal justice system that sanctions and surveils more individuals than ever, controls individuals by channeling them into overlapping enforcement regimes, ensnares juveniles from their earliest years, and has resulted in mass incarceration.⁴⁵ This Part both generally maps the new criminal justice landscape and specifically identifies points

40. *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973).

41. Roberts, *supra* note 18, at 1282.

42. *See infra* Part I.

43. Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO STATE L.J. 575, 591 (2011).

44. *See infra* Part II.

45. *Id.*

of entry for criminal law into family life as well as the disproportionate impact of criminal justice on Black families.⁴⁶

Part III uses community supervision as a case study to reveal the substantial way in which criminal justice intrudes into everyday family life.⁴⁷ This Part begins by describing the practice of community supervision, including the various forms of supervision, numerical data, and the mechanics of supervision.⁴⁸ This Part then specifically identifies how community supervision infiltrates family life and family autonomy and undermines family stability and loyalty.⁴⁹ Conditions of supervision allow case officers to closely regulate family association, cohabitation, and living spaces; restrict familial relationships; and impose obligations on families that interfere with family caretaking functions.⁵⁰ Modern approaches to supervision encourage officers to extract and leverage personal family information to control individuals and families.⁵¹

In order to extend family law rules and norms to Black family life and ameliorate the impact of criminal justice on Black families, Part IV proposes that community supervision officers adopt a traditional human services approach to supervision rather than the current crime control model.⁵² Doing so will ideally soften the negative impact of this criminal justice practice on Black family life.⁵³

The Article briefly concludes by calling on legal scholars to focus attention on the multiplicity of ways in which criminal law eliminates family law protections and norms for Black families.⁵⁴

46. *Id.*

47. *See infra* Part III.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; MULLINS & TONER, *supra* note 22.

52. *See infra* Part IV.

53. *Id.*

54. *See infra* Conclusion.

I. FAMILY LAW BLIND SPOTS: RACIAL AND CRIMINAL JUSTICE

A. *Color-Blindness and Family Law*

Scholars have critiqued the family law canon for its narrowness, including its failure to fully grapple with race. A legal canon defines the area of law and is commonly accepted within the legal community.⁵⁵ Generally, a canon includes the “foundational texts, stories, assumptions, problems, and narrative frameworks of successive generations.”⁵⁶ Identifying the canon can be made by reference to casebooks, scholarship, and jurisprudence.⁵⁷ Canons are not often challenged because they are considered intuitive, requiring no reappraisal.⁵⁸

Jill Hasday offered the first critique of the family law canon. According to Hasday, accurate description of family law canon is vital because the canon sets out the contours of the family law debate, defining what is at stake.⁵⁹ Hasday argued that “the family law canon misdescribes both the content of family law and its governing principles.”⁶⁰ Hasday identified and challenged three prominent themes of family law:

- (1) The relationship between family law and social inequality: She argued the canon fails to acknowledge that family law continues to perpetuate historical oppression based on status.⁶¹
- (2) The relationship between family law and federalism: She disputed the claim that family law has always been local and advanced the argument that federal family law has precedent and is appropriate.⁶²

55. King, *supra* note 43, at 580.

56. *Id.* at 581.

57. *Id.*

58. Jill Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 827 (2004) [hereinafter Hasday, *Canon*]. Hasday has since published a book-length work building upon that earlier article. JILL HASDAY, RE-IMAGINING FAMILY LAW (2014).

59. Hasday, *Canon*, *supra* note 58, at 827.

60. *Id.* at 830.

61. *Id.* at 830, 833–70.

62. *Id.* at 831–32, 870–92.

- (3) The relationship between family law and welfare law: She contested the long-standing distinction between family law and welfare law, thereby challenging authorities to explain why different rules and regulations apply to poor families versus other families.⁶³

Hasday momentarily acknowledged the lack of attention paid by the canon to race and sexual orientation,⁶⁴ but did not offer full discussion on these matters.

Since then, King has argued that family law and scholarship today are essentially color-blind, meaning the two rarely address the role of race in family law or the racial impacts of family law.⁶⁵ As described by King, the family law canon includes “the right to privacy, marriage, nonmarital families, adoption, domestic violence, divorce, division of marital property, alimony, child support, and child custody.”⁶⁶ King posits that race impacts the family law system, although most attention to racial issues occurs in the context of discussions of criminal justice, juvenile justice, education, and immigration.⁶⁷ Racial disparities affect substantive family law and procedures, as well as family outcomes.⁶⁸ However, according to King, these disparities are unexamined.⁶⁹ This omission contributes to society’s notion of a post-racial or colorblind era and shields race-based decision-making by family law stakeholders and practitioners, namely legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers.⁷⁰

In King’s estimation, the family law canon adheres to a vision of colorblindness because of the expansive reading of *Shelley v. Kraemer* and *Brown v. Board of Education*.⁷¹ While both cases clearly prohibit state-sponsored racial discrimination, they have been

63. *Id.* at 832, 892–98.

64. *Id.* at 854–60.

65. King, *supra* note 43, at 591.

66. *Id.* at 583.

67. *Id.* at 578–79.

68. *Id.* at 579.

69. *Id.*

70. *Id.*

71. King, *supra* note 43, at 634.

further read to demand colorblindness, in other words the complete elimination of distinctions based on race, including benign distinctions.⁷² Family law scholars and practitioners have accepted this premise uncritically.⁷³ Modern family law doctrine claims that families are autonomous, self-contained, legal entities.⁷⁴ Legal scholars, too, have advanced this proposition.⁷⁵ Leading family law texts mostly fail to discuss slavery, both generally and with respect to the evolution of the autonomous family and the familial right to privacy.⁷⁶ The evolution of the familial right to privacy is discussed in race neutral terms.⁷⁷

King argues that “the canon has not yet been subjected to enough sustained and consistent challenge to alter the notion of an autonomous family unit.”⁷⁸ For example, the autonomous family is a myth for Black families.⁷⁹ Historically, Black families had no control over family construction and autonomy and this status continues today.⁸⁰ As King states:

The law’s disproportionate intrusion into African-American family life began with the slave codes and continues today through the application of traditional family law rules, such as the best interest standard, and through other systems—such as the social welfare and child welfare systems—that are not traditionally included in the family law canon, but nonetheless should be, as they affect family autonomy and structure.⁸¹

72. *Id.* at 635.

73. *Id.* at 636.

74. *See* *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

75. King, *supra* note 43, at 590 nn.79–83.

76. *Id.* at 593.

77. *Id.*

78. *Id.* at 591.

79. *Id.* at 592.

80. *Id.*

81. King, *supra* note 43, at 592. For a fuller discussion of the myth of Black family autonomy, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 112 (1997).

He continues, the legacy of slavery “reflects both practical and logistical roadblocks to [B]lack family formation; asserts the incompetence and inherent unfitness of [B]lack parents and, in particular, [B]lack mothers; and reflects stories of family separation and the thwarting of attempts for [B]lack families to remain together.”⁸²

As with Black family autonomy during slavery and post-Civil War, the leading family law texts minimally discuss child welfare law and give only a passing nod to the system’s disproportionate impact on Black children.⁸³ In those same texts, discussions of race center on the Indian Child Welfare Act or interracial adoption.⁸⁴ Because the child welfare system was designed to address the needs and problems of the poor and because Black families are disproportionately poor, the child welfare system disproportionately impacts Black families.⁸⁵ However, given the extent of the impact, racial bias must also play a role.⁸⁶ As well, the law intentionally discriminates against Black families.⁸⁷ In the context of child welfare, Davis and Roberts point out that the state has not been protective of the autonomy of Black families.⁸⁸ The passage of the Multi-Ethnic Placement Adoption Act also represents an instance in which Black families were the subject of intentional discrimination.⁸⁹ As Roberts argued, poor, Black, undeserving, pathological mothers were unfit and adoption was the remedy to prevent intergenerational transmission of pathological tendencies.⁹⁰

(explaining that post-Civil War, the Reconstruction Congress was concerned about parental separations and the inalienable rights of family; yet, today the ability of Black families to organize their lives is not co-extensive with that of white families).

82. King, *supra* note 43, at 595.

83. *Id.* at 615.

84. *Id.*

85. *Id.* at 610.

86. *Id.* at 611.

87. *Id.* at 601.

88. ROBERTS, *supra* note 24, at v–vi; Peggy Cooper Davis, *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER J. 9, 14 (1987); King, *supra* note 43, at 590–92 nn.85–92. *Contra* ELIZABETH BARTHOLET, *NOBODY’S CHILDREN* (1999) (arguing that there is too little intervention).

89. King, *supra* note 43, at 622–24.

90. *Id.* at 623–24.

King asserts that what legal professors teach and write about family law's canonical cases contributes to the erasure problem by minimizing racial distinctions and impact, regardless of whether those scholars promote color consciousness or colorblindness.⁹¹ For example, constitutional law and legal scholars support the notion that family law is colorblind by reference to *Loving v. Virginia*, statutes on interracial adoption, and *Palmore v. Sidoti*.⁹²

To be fair, some legal scholars do expressly confront racial issues in family law. Perry has long been at the forefront of this discussion, tackling racial aspects of marriage, divorce, alimony, adoption, parenting, and family values.⁹³ Lenhardt has focused attention on race and marriage as well as interracial families.⁹⁴ So too has Onwuachi-Willig.⁹⁵ Brito has devoted attention to race, patriarchy, and families as well as race and racial inequality in family court.⁹⁶ Taking a historical approach to the intersection of family law and race, Koh Peters has noted that family law in early America consisted of three systems: one for non-poor whites, one for poor whites, and

91. *Id.* at 580.

92. *Id.* at 584–89.

93. See, e.g., Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2482 (1994) (discussing alimony); Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 346 (1996); Twila L. Perry, *Race, Color, and the Adoption of Biracial Children*, 17 J. GENDER RACE & JUST. 73, 73 (2014); Twila L. Perry, *Race Matters: Change, Choice, and Family at the Millennium*, 33 FAM. L.Q. 461, 462 (1999) [hereinafter Perry, *Race Matters*] (discussing cohabitation, marriage, and parenting).

94. See e.g., R.A. Lenhardt, *According to Our Hearts and Location: Toward A Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER RACE & JUST. 741, 745 (2013); R.A. Lenhardt, *Marriage As Black Citizenship?*, 66 HASTINGS L.J. 1317, 1317 (2015); R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 53 (2015).

95. ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY 20 (2013); Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 233–35 (2009) (interracial families); Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhineland v. Rhineland as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2401–02 (2007) (interracial intimacy and families); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1653 (2005) (marriage, welfare, and race).

96. Tonya L. Brito et al., *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3028 (2015) [hereinafter Brito, *I Do for My Kids*]; Tonya L. Brito, *What We Talk About When We Talk About Matriarchy*, 2013 MICH. ST. L. REV. 1263, 1263–1264 (2013) [hereinafter Brito, *What We Talk About*].

one for Blacks.⁹⁷ These scholars, however, have not been joined by many others.

King offers several credible explanations for family law's inattentiveness to issues of racial justice.⁹⁸ This article suggests one more explanation: family law's hesitancy to seriously consider the relationship between family matters and criminal law.⁹⁹ As King mentions, issues of racial justice feature prominently in criminal justice discourse.¹⁰⁰ Family law's resistance to considerations of criminal justice further explains why racial justice has not become front and center in family law, particularly when several of the iconic criminal law-family law cases involve Blacks.¹⁰¹

B. The Separate Sphere of Criminal Law

Along with a racial blind spot, family law and scholarship are also estranged from criminal law and scholarship. Family law and criminal justice are treated as separate spheres. Family law primarily concerns itself with recognition and regulation of family relationships, remediation and enforcement of private family ordering, and ensuring private familial support rather than public support.¹⁰² For the most part, government uses the civil regime to address these concerns.¹⁰³ However, in some instances government chooses criminal law as a means to regulate family life.¹⁰⁴ Notwithstanding, these instances are rarely discussed as meaningful in family law doctrine and scholarship.¹⁰⁵

97. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 545–63 (3d ed. 2007).

98. King, *supra* note 43, at 579.

99. See discussion *infra* Part II.

100. King, *supra* note 43, at 578.

101. See Brito, *I Do for My Kids*, *supra* note 96, at 3051; e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 509 (1977) (Frankfurter, J., dissenting); Loving v. Virginia, 388 U.S. 1, 4 (1967).

102. Perry, *Race Matters*, *supra* note 93, at 358.

103. Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L.Q. 227, 227 (2010).

104. *Id.*

105. *Id.*

Most legislative action in the family law context takes a civil approach to regulating family life and disputes.¹⁰⁶ Relatedly, much of the family law doctrine is civil in nature.¹⁰⁷ For example, premarital matters, such as gifts in contemplation of marriage or premarital agreements, are governed by contract or equitable principles.¹⁰⁸ Marriages may be deemed invalid on the basis of fraud or duress.¹⁰⁹ Contractual or equitable principles resolve conflicts arising from non-marital relationships, such as palimony.¹¹⁰ Civil courts and rules are used to determine parentage, divorce, property division, and child support cases.¹¹¹ In each of these contexts, modern family law doctrine tends to avoid the attribution of fault or wrongfulness, and primarily concerns itself with endorsing private agreements and remediating or preventing private harms.¹¹²

Despite the overwhelmingly civil law approach to family law matters, criminal law has played and continues to play a role in regulating family life.¹¹³ Historically, legislatures have imposed criminal penalties on family related behavior.¹¹⁴ Many of the most well-known Supreme Court cases in the family law context involve criminal laws, including prohibitions on miscegenation and certain types of sexual conduct, legal restrictions on abortions, and limits on family cohabitation.¹¹⁵ In each of these contexts, the Court has confronted the issue of whether a government regulation imposing criminal penalties is constitutionally permissible.¹¹⁶ In many

106. Hasday, *Canon*, *supra* note 58, at 850.

107. *Id.*

108. *Id.* at 834–35.

109. Robert C. Brown, *Duress and Fraud as Grounds for the Annulment of Marriage*, 10 IND. L.J. 473, 473 (1935).

110. *Maecker v. Ross*, 62 A.3d 310, 316 (N.J. Super Ct. App. Div. 2013).

111. Hasday, *Canon*, *supra* note 58, at 875.

112. Murray, *supra* note 103.

113. *Id.*

114. *Id.* at 232.

115. *E.g.*, *Lawrence v. Texas* 539 U.S. 558, 558 (2003) (intimate sexual conduct); *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986) (intimate sexual conduct); *Moore v. City of E. Cleveland*, 431 U.S. 494, 521–22 (1977) (family cohabitation); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (contraceptives access); *Loving v. Virginia*, 388 U.S. 1, 4 (1967) (anti-miscegenation); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (contraceptives access); *Reynolds v. United States*, 98 U.S. 145, 146 (1879) (polygamy).

116. *Lawrence*, 539 U.S. at 562; *Bowers*, 478 U.S. at 198; *Moore*, 431 U.S. at 494; *Eisenstadt*, 405

instances, but not all, the Court struck down these criminal law enactments.¹¹⁷ The Court has reviewed these laws from the perspective of privacy, liberty, and equality, rather than criminal justice, though on occasion, the Court has reflected on the use of criminal law to regulate these behaviors.¹¹⁸ Four examples make the case.

In *Griswold v. Connecticut*, the Supreme Court held unconstitutional a criminal law banning contraceptives and the Court established a right to privacy.¹¹⁹ The litigation and publicity leading up to the Court's consideration of the case situated the case in the criminal law context.¹²⁰ Yet the Court's decision focused on marriage, marital couples, the marital home, and privacy.¹²¹ The Court alluded to criminal justice concerns in its opinion.¹²² Near the end of the opinion, Justice Douglas wrote "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"¹²³ He wrote further: "The very idea [was] repulsive."¹²⁴ However, the decision was not rooted in criminal justice concerns and today remains isolated from criminal law.¹²⁵

In *Loving v. Virginia*, the Court declared unconstitutional longstanding restrictions on inter-racial marriage.¹²⁶ Such restrictions were often criminal in nature.¹²⁷ Mildred Jeter was Black and Gerald

U.S. at 448; *Loving*, 388 U.S. at 1; *Griswold*, 381 U.S. at 480; *Reynolds*, 98 U.S. at 162.

117. *Lawrence*, 539 U.S. at 578–79 (unconstitutional); *Bowers*, 478 U.S. at 196 (constitutional); *Moore*, 431 U.S. at 494 (unconstitutional); *Eisenstadt*, 405 U.S. at 456 (unconstitutional); *Loving*, 388 U.S. at 4 (unconstitutional); *Griswold*, 381 U.S. at 480 (unconstitutional); *Reynolds*, 98 U.S. at 166 (constitutional).

118. See, e.g., *Lawrence*, 539 U.S. at 570, 599; *Moore*, 431 U.S. at 546; *Loving*, 388 U.S. at 11; *Griswold*, 381 U.S. at 499.

119. *Griswold*, 381 U.S. at 499.

120. Melissa Murray, *Griswold's Criminal Law*, 47 CONN. L. REV. 1045, 1061–1065 (2015).

121. *Griswold*, 381 U.S. at 485.

122. *Id.* at 481.

123. *Id.* at 485.

124. *Id.* at 486.

125. Murray, *Griswold's Criminal Law*, *supra* note 120, at 1061–1065. See also *Eisenstadt*, 405 U.S. at 444.

126. *Loving v. Virginia*, 388 U.S. 1, 1 (1967).

127. *Id.* at 4.

Loving was white.¹²⁸ They married and ultimately both were convicted of violating Virginia's anti-miscegenation laws, sentenced to a suspended period of incarceration, and banished from the state.¹²⁹ The Court's decision overturning their convictions is grounded in equal protection and due process.¹³⁰ The decision barely mentions criminal justice concerns.¹³¹ The majority mentions and Justice Douglas writes in concurrence:

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, 379 U.S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.¹³²

Coming just two years after its comment in *Griswold*, the Court interestingly fails in *Loving* to remark upon what was likely a dramatic scene when law enforcement entered the home of Mildred and Gerald Loving at night, found them sleeping in their bedroom, and arrested them for violating Virginia's anti-miscegenation statute.¹³³

Inez Moore, who was Black, lived with her son and two grandsons in violation of a city ordinance limiting occupancy of a dwelling to members of a single family and narrowly defining "family."¹³⁴ The city advised Ms. Moore that one of her grandsons was "illegally" living in her home.¹³⁵ She refused to cast out her grandson.¹³⁶ In response, the city charged her with violating the ordinance.¹³⁷ She

128. *Id.*

129. *Id.*

130. *Id.* at 2.

131. *See id.* at 12.

132. *Loving*, 388 U.S. at 13.

133. Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. TIMES (May 6, 2008), <http://www.nytimes.com/2008/05/06/us/06loving.html>.

134. *Moore v. City of E. Cleveland*, 431 U.S. 494, 496-97 (1977).

135. *Id.*

136. *Id.*

137. *Id.*

was convicted, sentenced to five days incarceration, and ordered to pay a \$25 fine.¹³⁸ In *Moore v. City of East Cleveland*, the Supreme Court declared the ordinance unconstitutional as a violation of due process.¹³⁹ The Court characterized the regulation as “slicing deeply into the family itself” and “intrusive.”¹⁴⁰ The Court noted especially that the regulation made it a crime for a grandmother to live with her grandchild in the circumstances presented by the case.¹⁴¹ The decision made no other mention of the role of criminal law in the case. Today, *Moore* is part of the family law canon for its relevance to the legal understanding of “family” and the scope of family autonomy.¹⁴² The relationship of the case to criminal justice is unexplored.

Some forty years after *Griswold*, in *Lawrence v. Texas*, the Court directly confronted the use of criminal law to regulate private consensual sexual behavior by married couples and individuals.¹⁴³ John Lawrence, who is white, and Tyron Garner, who is Black, were engaged in intimate sexual conduct in Lawrence’s residence when police barged into the home to investigate a “911 call” regarding a weapons disturbance.¹⁴⁴ Instead, the police arrested the pair for violating Texas’s criminal law prohibiting two persons of the same sex from engaging in certain intimate sexual conduct.¹⁴⁵ They were convicted and appealed.¹⁴⁶ The Court held Texas’s criminal statute that prohibited private adult consensual sex unconstitutional.¹⁴⁷ The Court overruled *Bowers v. Hardwick* which had approved criminal regulation to channel sexual behavior.¹⁴⁸ The Court rejected both direct and collateral criminal consequences for adult, private

138. *Id.*

139. *Id.* at 499.

140. *Moore*, 431 U.S. at 498.

141. *Id.* at 499.

142. *See generally Moore*, 431 U.S. at 494.

143. *See Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

144. *Id.* at 562–63.

145. *Id.* at 563.

146. *Id.*

147. *Id.* at 578–79.

148. *Id.* at 578.

consensual sexual behavior.¹⁴⁹ In rejecting criminal regulation of family related matters, *Lawrence* stands in contrast to *Griswold* and other family law cases decided by the Court.

Notwithstanding *Lawrence*, there are still many circumstances in which states have criminalized family law matters, but the Supreme Court has not addressed the legitimacy of those legislative enactments.¹⁵⁰ Examples of these circumstances include adultery crimes, underage and incestuous marriage, family violence laws, and criminal child support non-compliance statutes.¹⁵¹

Despite the apparent intersection of family and criminal justice in legislative enactments and judicial decisions, family law texts do not devote attention to the choice of or implications arising from criminal regulation of family-related matters.¹⁵²

Certainly, textbooks discuss the above-mentioned criminal laws and the related Supreme Court cases regulating family life.¹⁵³ These are core aspects of family law courses and are part of the family law canon. Additionally, some texts do devote attention to the issue of family violence, which is heavily regulated using criminal justice measures.¹⁵⁴ Notwithstanding, the texts do not consider the import, if any, of the government's choice to use criminal rather than civil law to regulate aspects of family life.¹⁵⁵ Furthermore, the texts do not discuss the myriad of other ways in which criminal justice now regulates family life which have been earlier described.¹⁵⁶

149. See *Lawrence*, 539 U.S. at 578–79.

150. IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 74–75, 584–88 (5th ed. 2010).

151. *Id.*

152. See generally DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW (3d ed. 2012); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS (6th ed. 2016); ELLMAN ET AL., *supra* note 150.

153. E.g., ABRAMS ET AL., *supra* note 152, at 128–35, 320–68, 617–630; WEISBERG & APPLETON, *supra* note 152; ELLMAN ET AL., *supra* note 150, at 74–75, 584–88.

154. E.g., ABRAMS ET AL., *supra* note 152, at 320–68; WEISBERG & APPLETON, *supra* note 152; ELLMAN ET AL., *supra* note 150, at 228–54.

155. See generally ABRAMS ET AL., *supra* note 152; WEISBERG & APPLETON, *supra* note 152; ELLMAN ET AL., *supra* note 150.

156. To be fair, most criminal law texts likewise do not focus extensively on the criminal regulation of family life. E.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 476–477, 556–575, (3d ed. 2016) (domestic violence and immunity for marital rape); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 192–196, 222, 621–623, 356–359, 750–771, 772–773, 1015–1016 (8th ed. 2007) (child abuse, immunity for

Given the historical use of criminal law to regulate families and its continuing widespread use today, the failure of family law texts to address criminal law in any significant manner is notable. Criminal law theory and doctrine is particularly concerned with the distinction between criminal and civil law and the choice of government to regulate behavior using the criminal justice system.¹⁵⁷ The hallmarks of the criminal justice system include public condemnation, establishing culpability, and levying punishment.¹⁵⁸ Criminal law enactments express strong disapproval of particular types of conduct.¹⁵⁹ Criminal justice regulates wrongful behavior, aims to punish individuals for that behavior, and seeks to advance public safety and security.¹⁶⁰ When government chooses to regulate family matters using criminal law, what statements are being made? What are the implications of criminal justice for families?

In much the same way that family law texts provide coverage of employment law to describe how workplace laws and regulations express norms regarding and influencing family life and family law, so too texts should consider the role of criminal law on the same.¹⁶¹ Given the pervasiveness of criminal law today, its deployment serves to significantly impact family life and law in many unrecognized and unappreciated ways.

Not only has family law doctrine failed to give due consideration to the role of criminal law in shaping family law and family life, but so too has legal scholarship.¹⁶² Scholars have addressed aspects of the intersection of criminal law and family law.¹⁶³ Murray has

marital rape, domestic violence); WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, *DEFINING CRIMES* 716–717, 754–764 (2nd ed. 2014) (domestic violence).

157. See 1 CHARLES E. TORICIA, *WHARTON'S CRIMINAL LAW* § 1 (15th ed. 2016).

158. See *id.*

159. See *id.*

160. See *id.*

161. See generally ABRAMS ET AL., *supra* note 152; WEISBERG & APPLETON, *supra* note 152; ELLMAN ET AL., *supra* note 150.

162. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2008).

163. JEANNIE SUK, *AT HOME IN THE LAW: HOW DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* 35–54 (2009) [hereinafter SUK, *AT HOME*]; Murray, *Griswold's Criminal Law*, *supra* note 120, at 1048–49; Melissa Murray, *Marriage as Punishment*, 112 COLUMBIA L. REV. 1, 1 (2012) [hereinafter Murray, *Marriage*]; Melissa Murray, *Panopti-Moms*, 4 CALIF. L. REV. CIR. 165,

explored the use of criminal law to regulate marriage, sex, and intimacy,¹⁶⁴ as well as the use of criminal law and marriage to impose sexual discipline.¹⁶⁵ Suk has written of the ways in which criminal domestic violence laws restructure family relations.¹⁶⁶ Rich has considered how criminal child molestation statutes affect male caregiving for children,¹⁶⁷ and Murray expanded the claim to mothers.¹⁶⁸ Brito and Cammett have explored child support and incarceration.¹⁶⁹ Markel, Collins, and Lieb considered the role of a defendant's "family ties" in the criminal justice system.¹⁷⁰

Other scholars have drawn attention to the intersection of family law, criminal law, and racial justice.¹⁷¹ Meares and Roberts have

168 (2013) [hereinafter Murray, *Panopti*]; Murray, *supra* note 103, at 228; Murray, *Strange Bedfellows*, *supra* note 162, at 1273; Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. 609, 620–34 (2013); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 9–10 (2006) [hereinafter Suk, *Criminal Law*]. See generally DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009) [hereinafter MARKEL, PRIVILEGE OR PUNISH]; Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012); Ann Cammett, *Deadbeats, Deadbrokees, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127 (2011) [hereinafter Cammett, *Deadbeats*]; Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313 (2006) [hereinafter Cammett, *Collateral Sanctions*]; Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147 (2007) [hereinafter Markel, *Criminal Justice*].

164. Murray, *Griswold's Criminal Law*, *supra* note 120, at 1048–49; Murray, *supra* note 103, at 228; Murray, *Strange Bedfellows*, *supra* note 162, at 1273.

165. Murray, *Marriage*, *supra* note 163.

166. SUK, *AT HOME*, *supra* note 163; Suk, *Criminal Law*, *supra* note 163.

167. Rich, *supra* note 163.

168. Murray, *Panopti*, *supra* note 163.

169. See generally Brito, *supra* note 163; Cammett, *Deadbeats*, *supra* note 163; Cammett, *Collateral Sanctions*, *supra* note 163.

170. See generally MARKEL, PRIVILEGE OR PUNISH, *supra* note 164; Markel, *Criminal Justice*, *supra* note 163.

171. ROBERTS, *supra* note 24, at vi, ix; Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 363 (2016); King et al., *supra* note 23, at 1393–407; Meares, *supra* note 23, at 297–99; Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1239 (2012); Pinard, *supra* note 27, at 690; Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1483, 1484 (2012) [hereinafter Roberts, *Prison*]; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1440–41 (1991) [hereinafter Roberts, *Punishing Drug Addicts*]; Roberts, *supra* note 18, at 1282; Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post Racial" World*, 76 OHIO ST. L.J. 599, 656 (2015) [hereinafter Vázquez, *Crimmigration*]; Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 668–71 (2011) [hereinafter

opined on the effects of mass incarceration on Black families.¹⁷² Roberts has also uncovered the implications of criminal justice for child welfare matters which especially impact Black families.¹⁷³ Pinard has pointed out the impact of the collateral consequences of criminal convictions on Black families.¹⁷⁴ Vazquez has discussed the impact of “crimmigration” on Latino families.¹⁷⁵ Cammett has examined the criminalization of Black mothers in the era of neoliberalism.¹⁷⁶ Ocen has explored the shackling of pregnant prisoners and racial aspects of the practice.¹⁷⁷

These are important contributions. Yet, given the extensive ways in which modern criminal law now operates as a family law regime, particularly for Black families, there is more work to be done. This Article begins to draw a comprehensive picture of the scope of the intersection of family law, criminal law, and racial justice both generally and specifically.

II. THE SPREAD OF CRIMINAL JUSTICE INTO FAMILY LIFE

Using a historical lens to examine the intersection of family law and race, Koh Peters long ago noted that family law in early America consisted of three systems: one for non-poor whites, one for poor whites, and one for Blacks.¹⁷⁸ She described this third system as consisting of the regulation and prohibition against Black family formation during pre-Civil War America and post-Reconstruction.¹⁷⁹ According to Koh Peters, the pre-Civil War “system of family law

Vázquez, *Marginalization*]. See also MICHELE ALEXANDER, *THE NEW JIM CROW* 175–176 (2010); Maddali, *supra* note 26, at 650; Erin McGrath, *Reentry Courts: Providing A Second Chance for Incarcerated Mothers and Their Children*, 50 *FAM. CT. REV.* 113, 115–17 (2012).

172. Roberts, *supra* note 18, at 1282; Meares, *supra* note 23, at 297–99. See also ALEXANDER, *supra* note 171 (attributing “disappearance” of Black men and fathers from community to mass incarceration); King et al., *supra* note 23, at 1393–407.

173. ROBERTS, *supra* note 24, at vi, ix; Roberts, *Prison*, *supra* note 171; Roberts, *Punishing Drug Addicts*, *supra* note 171.

174. Pinard, *supra* note 27, at 690. See also McGrath, *supra* note 171.

175. Vázquez, *Marginalization*, *supra* note 171. See also Maddali, *supra* note 26, at 650.

176. Cammett, *supra* note 171.

177. Ocen, *supra* note 171.

178. PETERS, *supra* note 97, at 545–63.

179. *Id.* at 555–59.

can be summarized in painfully simple terms. The law not only did not recognize [B]lack families, but it also actively worked to prevent the formation of [B]lack families”¹⁸⁰ She opined that post-Reconstruction, this circumstance abated, but only minimally.¹⁸¹ The Black Codes seriously restricted the economic prospects of Blacks and Black families, encouraging the development of extended kinship networks.¹⁸² Subsequently, in response to the Thirteenth and Fourteenth Amendments, family law began to treat Black families more like poor white families, subjecting them to significant state intervention.¹⁸³ However, Black families did not achieve full equality in the realm of family law.¹⁸⁴

Today, full racial equality in family law remains elusive due to extensive criminal justice interference in virtually every aspect of Black family life.¹⁸⁵ During the last half century, both the federal and state governments have expanded dramatically the reach of the criminal justice system.¹⁸⁶ This trend arguably began in the 1970s with the advent of the War on Drugs.¹⁸⁷ Early manifestations of the movement included the significant expansion of federal crimes, particularly drug crimes, and the nationwide increase in sentence lengths for convictions.¹⁸⁸ Over the decades, each of these trends has continued and new aspects have emerged.¹⁸⁹

At present, the breadth of the criminal justice system is unprecedented.¹⁹⁰ More behavior now potentially forms the basis for criminal charges than ever before, resulting in the term “overcriminalization.”¹⁹¹ More individuals are under the control of the criminal justice system for longer periods of time and subject to a

180. *Id.* at 557.

181. *Id.* at 557–58.

182. *Id.* at 558–59.

183. PETERS, *supra* note 97, at 559.

184. *Id.*

185. King et al., *supra* note 23, at 1387.

186. NAT’L RESEARCH COUNCIL, *supra* note 8, at 3; Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 542 (2012).

187. NAT’L RESEARCH COUNCIL, *supra* note 8, at 119–20.

188. *Id.* at 3.

189. *Id.* at 13–14.

190. Smith, *supra* note 186, at 591 n.22.

191. *Id.* at 538–39.

wider array of negative consequences even after completing supervision.¹⁹² These phenomena have generated the terms “mass incarceration” and “collateral consequences,” respectively.¹⁹³ Multiple enforcement regimes—sometimes working cooperatively—can impose criminal and quasi-criminal penalties for the same behavior.¹⁹⁴ Government surveillance of individuals is pervasive and includes both human forms of surveillance and technology-based means.¹⁹⁵ Juveniles are shunted at record pace into the criminal justice system, giving rise to the term “school-to-prison pipeline.”¹⁹⁶

Traditionally, the criminal justice system did not reach into family or family life, though there have been exceptions.¹⁹⁷ Further, although individuals grow, live, and operate throughout their lifespan in family networks, the criminal justice system historically has not imposed liability or obligations upon the family for the criminal behavior of a family member.¹⁹⁸

Today, however, tradition has been abandoned.¹⁹⁹ The criminal justice system now intrudes deeply into family life.²⁰⁰ Virtually every aspect of family-related behavior is regulated by criminal justice means.²⁰¹ In addition, the criminal justice system directly and indirectly holds the family responsible for the offending behavior of individual family members.²⁰²

This Part generally charts the modern terrain of the extended criminal justice system. Additionally, this Part identifies specific instances in which criminal justice now reaches into family life. The effort is by no means exhaustive in either respect. Nonetheless, the descriptions offer insight into the breadth of the concern. Currently,

192. NAT’L RESEARCH COUNCIL, *supra* note 8, at 338.

193. Klingele, *supra* note 34, at 1017.

194. Cammett, *supra* note 171, at 364.

195. Klingele, *supra* note 34, at 1040.

196. LAURA W. MURPHY & DEBORAH J. VAGINS, ACLU, ENDING THE SCHOOL-TO-PRISON PIPELINE 2 (2012).

197. Suk, *Criminal Law*, *supra* note 163, at 5 n.2.

198. *Id.*

199. *Id.* at 6.

200. *Id.*

201. Markel, *Criminal Justice*, *supra* note 163, at 1200.

202. MARKEL, PRIVILEGE OR PUNISH, *supra* note 163, at xiii.

Black families operate under a distinct family law regime, one in which the criminal law completely undermines the usual family law rules and norms of familial autonomy, support, stability, and loyalty.²⁰³ Just as public law rewrote family life and autonomy for Blacks during slavery and post-Reconstruction, criminal law continues to do so today.²⁰⁴

A. Over-Criminalization

The last fifty years have been described as an era of over-criminalization or mass criminalization in which the enactment of crimes has occurred at a frenzied pace.²⁰⁵ Scholars have offered various examples of the multiplication of crimes. According to Beale, the concept includes: (1) laws punishing conduct that should be exclusively the province of individual morality—morals crimes or morals legislation; (2) legislation that criminalizes “relatively trivial conduct” that should be dealt with by civil sanctions or left unregulated; (3) regulatory, or white collar crime, that can be addressed by specific areas of civil law such as corporate governance, environmental, or election finance law; and (4) federal enactment of criminal laws over matters once left to the province of states, in other words, over-federalization.²⁰⁶ To this list, Podgor adds statutes that are broadly constructed and statutes that diminish culpability and *mens rea* elements.²⁰⁷

Both scholars²⁰⁸ and interest groups²⁰⁹ have offered critiques of the over-criminalization trend.²¹⁰ In recent terms, the United States

203. See Brewer, *supra* note 28.

204. PETERS, *supra* note 97, at 557–58; King, *supra* note 43, at 583–84.

205. For a history of the overcriminalization trend, see Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform – Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 597 (2011). For enactment numbers of federal crimes since 1790, see Susan R. Klein & Ingrid B. Grobey, *Debunking the Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 11–16 (2012).

206. Beale, *supra* note 11, at 748–749.

207. Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 531–32 (2012). See also John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 689–690 (2012); BRYAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 3 (2010), www.nacdl.org/report/withoutintent/PDF.

208. See, e.g., Beale, *supra* note 11, at 749; Steven D. Clymer, *Unequal Justice: The Federalization*

Supreme Court has overturned two convictions occurring during the over-criminalization trend.²¹¹

Family life and behavior has not been immune from the criminalization wave of the last many decades.²¹² During this timeframe, many new crimes concerning family life have been enacted and prosecutors have exercised discretion to charge individuals for family-related behavior that previously went unregulated.²¹³

One major criminalization trend directly affecting families has been the enactment of criminal prohibitions on family violence.²¹⁴ Historically, family violence was unaddressed by the justice system.²¹⁵ Slowly over time, this circumstance changed nationwide.²¹⁶ First, jurisdictions made physical violence involving marital partners subject to civil redress, then eventually criminal punishment.²¹⁷ Next, jurisdictions broadened criminal laws to cover other forms of violence or maltreatment, and violence between other family members.²¹⁸ Today, family violence statutes prohibit physical, sexual, and emotional abuse; harassment; neglect; and exploitation;

of Criminal Law, 70 S. CAL. L. REV. 643, 647 (1997); Podgor, *supra* note 207, at 532; Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1578 (2010); Smith, *supra* note 186, at 537; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510–11 (2001).

209. See, e.g., WALSH & JOSLYN, *supra* note 207, at 21; Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1 (1998).

210. *But see* Klein & Grobey, *supra* note 205, at 5.

211. *Bond v. United States*, No. 12–158, slip op. at 18 (3d Cir. June 2, 2014) (holding the prohibited possession or use of “chemical weapons,” does not reach a wife’s conviction for simple assault for spreading chemicals on, among other things, the doorknob of her husband’s mistress, causing only a minor burn that was easily treated with water); *Yates v. United States*, No. 13–7451, slip op. at 2 (11th Cir. Feb. 25, 2015) (holding that a “tangible object” is one used to record or preserve information under 18 U.S.C. § 1519 imposing criminal liability on anyone who “knowingly . . . destroys . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States”).

212. Suk, *Criminal Law*, *supra* note 163, at 6.

213. Markel, *Criminal Justice*, *supra* note 163, at 1158.

214. *Id.* at 1161.

215. *Id.*

216. *Id.*

217. *Id.*; Andrea L. Dennis & Carol E. Jordan, *Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes*, 15 NEV. L.J. 1, 9 (2014).

218. Lynn Zinser, *Adrian Peterson Agrees to Plea Deal in Child Abuse Case*, N.Y. TIMES (Nov. 4, 2014), http://www.nytimes.com/2014/11/05/sports/football/vikings-adrian-peterson-reaches-plea-deal-in-child-abuse-case.html?_r=0.

further, individuals subject to or protected by family violence statutes include marital partners, cohabiting non-marital partners, parents, and children.²¹⁹ One very recent aspect of the criminalization of family violence has been legislatures enacting elder abuse statutes allowing prosecutors to file criminal charges against adult children who act as caretakers for their elder parents.²²⁰

Criminal law also now significantly regulates a myriad of parental child-rearing decisions and actions, including caretaking, discipline, education, and support.²²¹ Parental maltreatment of children has long been subject to civil abuse and neglect proceedings.²²² As already discussed, criminal statutes penalizing child abuse and neglect have since been enacted.²²³ Going a step further, some jurisdictions have passed statutes imposing criminal penalties on pregnant women for drug related activities, and prosecutors have exercised discretion to charge pregnant women with these crimes.²²⁴ In addition, prosecutors have criminally charged parents for abandonment, even in circumstances where parents have been in the vicinity of their children but were engaged in other activities.²²⁵ Child abuse and neglect statutes capture parental physical discipline that parents believe—rightly or wrongly—necessary and appropriate for child-rearing.²²⁶ Physical discipline is not prohibited per se, but must be

219. See Dennis & Jordan, *supra* note 217.

220. JOYCE CRAM, NATIONAL CENTER FOR STATE COURTS, TRENDS IN STATE COURT 2014, ELDER COURT: ENHANCING ACCESS TO JUSTICE FOR SENIORS 77 (2014), http://www.ncsc.org/~media/Microsites/Files/Future%20Trends%202014/Elder%20Court-Enhancing%20Access%20to%20Justice%20for%20Sr_Cram.ashx.

221. Office of Juvenile Justice and Delinquency Prevention, *Parental Responsibility Laws*, http://www.ojjdp.gov/pubs/reform/ch2_d.html (last visited Aug. 30, 2016).

222. John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 449 (2008).

223. *Id.*

224. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF, SUBSTANCE ABUSE DURING PREGNANCY (2016), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf; Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 307-308 (2013); Daniela Silva, *Shackled and Pregnant: Wis. Case Challenges 'Fetal Protection' Law*, N.B.C. NEWS (Oct. 24, 2013), <http://www.nbcnews.com/news/other/shackled-pregnant-wis-case-challenges-fetal-protection-law-f8C11457748>.

225. Stephen A. Crockett, Jr., *Texas Mom Charged with Abandoning Kids at Food Court, Says She Was Nearby on Job Interview*, THE ROOT (July 20, 2015), http://www.theroot.com/articles/news/2015/07/texas_mom_charged_with_abandoning_kids_at_food_court_says_she_was_nearby.html.

226. Amy Green, *Acceptable Discipline or Criminal Abuse? What if Adrian Peterson Was a New*

“reasonable.”²²⁷ Parents who have excessively punished a child have been criminally prosecuted.²²⁸

Parental decisions and actions concerning a child’s education can be regulated by criminal charges.²²⁹ Parents are entitled to choose the institution that will provide the child’s education, whether public or private, religious or secular.²³⁰ Jurisdictions, however, have penalized parents who send their children to a school outside of the designated school district.²³¹

Not only have parental decisions and behavior regarding their children been criminalized, but parents are also now subject to liability for the decisions and actions of their children.²³² Some jurisdictions now impose parental liability on parents whose children are truant from school.²³³ Jurisdictions have also created statutes making parents liable for their children’s delinquent or criminal behavior.²³⁴

Lastly, jurisdictions have criminalized intrafamilial financial malfeasance.²³⁵ Parents are obligated to financially support their

England Patriot? RUBIN AND RUDMAN LLP (Sept. 24, 2014), <http://www.rubinrudman.com/wp-content/uploads/2014/09/ACCEPTABLE-DISCIPLINE-PDF.pdf>.

227. *Id.*

228. Zinser, *supra* note 218; William Thornton, *Joyce Garrard Sentenced to Life in Savannah Hardi Running Death Case*, AL.COM (May 11, 2015), http://www.al.com/news/anniston-gadsden/index.ssf/2015/05/joyce_garrard_sentenced_in_sav.html.

229. *Schools Get Tough with Enrollment Address Fraud*, RICHMOND TIMES – DISPATCH (Feb. 26, 2011, 12:00 AM), http://www.richmond.com/news/schools-get-tough-with-enrollment-address-fraud/article_a062279b-4dcf-57e6-bd56-5981c5c236d0.html.

230. *School Choices for Parents*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/nclb/choice/index.html> (last visited Aug. 30, 2016).

231. *See Schools Get Tough With Enrollment Address Fraud*, *supra* note 229; Neal Conan, *Parents Cross Lines to Get Kids Into Good Schools*, NPR (Jan. 26, 2011), <http://www.npr.org/2011/01/26/133246495/Parents-Cross-Lines-To-Get-Kids-Into-Good-Schools>; AMER. BAR ASSN., EDUCATIONAL CONSENT AND/OR SCHOOL ENROLLMENT (last visited Aug. 30, 2016), http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/educational_consent.authcheckdam.pdf.

232. Kathryn J. Parsley, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of their Children*, 44 VAND. L. REV. 441, 446 (1991).

233. Ronald Smothers, *Schools Prosecute Parents for Children’s Truancy*, N.Y. TIMES (Apr. 18, 1994), <http://www.nytimes.com/1994/04/18/us/schools-prosecute-parents-for-children-s-truancy.html?pagewanted=all>; MD. CODE ANN., EDUC. § 7-301(e) (West 2017); FLA. STAT. § 232.19 (2016); ALA. CODE § 16-28-12 (2016).

234. FLA. STAT. § 784.05(3) (2016).

235. *Criminal Nonsupport and Child Support*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx> (last updated

children.²³⁶ Failure to satisfy this obligation can lead to civil penalties such as interest accrual, suspension of driving privileges or professional licenses, or contempt findings.²³⁷ In extreme cases, prosecutors file criminal charges for non-support of a child.²³⁸ With respect to public monies, prosecutors charge parents who unlawfully obtain family welfare benefits with welfare fraud.²³⁹

B. Increased Sanctions

Jurisdictions not only significantly increased the number of crimes, but also the length of punishments and the variety of potential punishments.²⁴⁰ As part of the “get tough on crime” era, legislatures nationwide increased the maximum possible sentences for some custodial offenses, created mandatory minimum sentences for others, and established sentencing enhancements for others.²⁴¹ Officials also lengthened sentences by restricting or eliminating early release and parole for inmates.²⁴²

Recent years have also seen the expansion of punishment options.²⁴³ Three common approaches emerged. First, governments

June 2015).

236. Deborah A. Batts, *I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1265 (1990); *How Long Do Parents' Legal Obligations to Their Children Continue?*, FINDLAW, <http://family.findlaw.com/emancipation-of-minors/how-long-do-parents-legal-obligations-to-their-children-continue.html>. (last visited Sep. 4, 2016).

237. *2012 Child Support and Family Law Legislative Enactment Summaries*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated May 2013), <http://www.ncsl.org/research/human-services/2012-child-support-and-family-law-legislative-enac.aspx>; N.Y.C. HUMAN RES. ADMIN., CHILD SUPPORT HANDBOOK FOR NONCUSTODIAL PARENTS 21 (2015), http://www1.nyc.gov/assets/hra/downloads/pdf/services/child_support/noncustodial_parents.pdf.

238. *Criminal Nonsupport and Child Support*, *supra* note 235.

239. Matthew Wallin, *Federal Welfare Fraud Attorneys Explain What You and Octomom Need to Know about Committing Welfare Fraud (Welfare & Institutions Code 10980)*, <https://www.wklaw.com/federal-welfare-fraud-attorneys-explain-welfare-fraud> (last visited Aug. 31, 2016). Richelle S. Swan et al., *The Untold Story of Welfare Fraud*, 35 W. MICH. U. J. SOC. & SOC. WELFARE 133, 135 (2008).

240. NAT'L RESEARCH COUNCIL, *supra* note 8, 70–71.

241. *Id.* at 73.

242. *Id.* at 123 (traditionally, inmates could earn early release for good conduct, demonstrated rehabilitation, or participation in a variety of inmate programs. Most jurisdictions now require inmates to serve the vast majority of their sentences, often 85%).

243. *Project Description, The National Inventory of Collateral Consequences*, AM. BAR ASS'N, <http://www.abacollateralconsequences.org/description/> (last visited Aug. 31, 2016).

expanded the types of collateral consequences for conviction.²⁴⁴ Traditional examples of collateral consequences include voter disenfranchisement, prohibitions on possession of firearms, and denial of some professional licenses.²⁴⁵ Recently created collateral consequences include geographic or residential restrictions, offender registry requirements for sex offenders, and bars from receiving educational financial aid or welfare aid for drug offenders.²⁴⁶ By last count, the American Bar Association had identified some 45,000 collateral consequences nationwide.²⁴⁷ Both adults and juveniles face collateral consequences for their criminal behavior.²⁴⁸

Second, legislatures increased the use of community-based supervision as punishment for conviction.²⁴⁹ Officials may place offenders under the supervision of the state as part of a diversionary program, or for service of sentence after conviction, or for the completion of a sentence after having been incarcerated.²⁵⁰ Finally, jurisdictions increased the use of fines and fees as punishment.²⁵¹ This expansion arose partly in connection with the enactment of

244. Pinard, *supra* note 27, at 634–37 (collateral consequences are those restrictions or prohibitions that arise as a function of conviction. They come into effect whether or not they are part of or referenced in the court’s sentencing order. They are not deemed punitive but rather supporting some other permissible government aim).

245. *User Guide Frequently Asked Questions, The National Inventory of Collateral Consequences*, AM. BAR ASS’N, http://www.abacollateralconsequences.org/user_guide/ (last visited Aug. 31, 2016).

246. Pinard, *supra* note 27, at 635–36.

247. *The National Inventory of Collateral Consequences*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/events/criminal_justice/annual14_Barriers_Reentry.authcheckdam.pdf (last visited Aug. 31, 2016).

248. *E.g., The National Inventory of Collateral Consequences*, AM. BAR ASS’N, <http://www.abacollateralconsequences.org/map/> (last visited Aug. 31, 2016) (person convicted of felony not entitled to vote in Minnesota unless restored to civil rights; arrest or conviction of youth detention facility staff reported to Alabama Department of Youth Services Licensing and Standards Division; Georgia applicant or recipient convicted of a serious violent felony ineligible for cash assistance from the Temporary Assistance for Needy Families program); *Understanding Juvenile Collateral Consequences*, AM. BAR ASS’N, <http://www.beforeyouplead.com/> (last visited Aug. 31, 2016) (click “Understanding Juvenile Collateral Consequences”).

249. Klingele, *supra* note 34, at 1018.

250. JASON ZINDENBERG, NAT’L INST. OF CORR., COMMUNITY CORRECTIONS COLLABORATIVE NETWORK: SAFE AND SMART WAYS TO SOLVE AMERICA’S CORRECTIONAL CHALLENGES 1 (2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028317.pdf>.

251. Joseph Shapiro, *As Court Fees Rise, the Poor are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

additional low level offenses as part of over-criminalization.²⁵² Courts sentence individuals convicted of low-level offenses to pay fines and fees, often substantial amounts.²⁵³ At times, the order to pay fines and fees is coupled with supervisory sentences, for example, individuals convicted of low-grade offenses often are sentenced to community supervision and ordered to pay fines and court fees while on supervision.²⁵⁴

Each of these changes to the traditional sentencing regime has impacted family life and autonomy. Collateral consequences can restrict where families live, prevent families from living together, and challenge family loyalty.²⁵⁵ For example, convicted sex offenders may be subject to geographic living restrictions preventing them from residing near schools or daycares.²⁵⁶ In the public housing context, jurisdictions have established a “one-strike rule.”²⁵⁷ Under this rule, an individual or family can be excluded from public housing if another family member is involved in criminal activity, usually drug-related criminal behavior.²⁵⁸ Residential limits can force families to move from a prohibited location to a permissible location.²⁵⁹ Limits also require family members to bar or expel family members from the home or face repercussions.²⁶⁰ Finally, limits create a heightened state of awareness in individuals and families because they constantly monitor their own behavior and those of their family members to avoid attracting the attention of government officials.²⁶¹

252. *Id.*; COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (Dec. 2013), https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

253. ALEXANDER, *supra* note 171, at 151; COUNCIL OF ECON. ADVISERS, *supra* note 252, at 2.

254. Ga. State Bd. of Pardons and Paroles, *supra* note 31.

255. Camila Domonoske, *Denying Housing over Criminal Record may be Discrimination, Feds Say*, NPR (Apr. 4, 2016), <http://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say>.

256. Amber L. Bagley, “An Era of Human Zoning”: *Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1348–49, 1382 (2008).

257. 42 U.S.C. § 1437d(l)(6) (2013).

258. Dept of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 127 (2002).

259. Bagley, *supra* note 256, at 1384.

260. Lisa Weil, *Drug-Related Evictions in Public Housing: Congress’ Addiction to a Quick Fix*, 9 YALE L. POL’Y REV. 161, 166 (1991).

261. *Id.* at 171.

Other collateral consequences prevent individuals from obtaining government financial benefits which in turn diminish their abilities to provide family support.²⁶² An individual previously convicted of certain enumerated offenses may not receive Temporary Aid to Needy Families or other government benefits.²⁶³ Moreover, the bar may extend to innocent family members who would ordinarily be entitled to receive benefits.²⁶⁴ For example, a beneficiary receiving government benefits as a result of a family relationship can be cut-off if the recipient has a criminal history.²⁶⁵

Collateral consequences impact family life by barring individuals from acting as caretaker of a family member who is in foster care or state custody.²⁶⁶ In the extreme, a parent whose criminal history includes serious child abuse or absence from a child's life due to lengthy incarceration may face termination of parental rights.²⁶⁷

The imposition of fines and fees as punishment can stress families. An individual who has financial obligations as part of a criminal case will have to make choices about where to devote resources.²⁶⁸ Providing financial support to family may have to give way to the criminal justice obligation, which can result in incarceration if unsatisfied.²⁶⁹ As well, family members may tax their own financial abilities in order to help another family member with monetary

262. *Id.* at 178.

263. 21 U.S.C. § 862a(a) (2014).

264. 21 U.S.C. § 862a(b). Individuals convicted of felonies, and thus excluded from Temporary Assistance for Needy Families, are “not [considered] to be a member of such household [to determine the amount of benefits], except that the income and resources of the individual shall be considered to be income and resources of the household.” *Id.* Thus, families whom were previously eligible for benefits could be deemed ineligible when their family is considered to have one less dependent.

265. *Id.*

266. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILDREN’S BUREAU, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS 3 (2015), <https://www.childwelfare.gov/pubPDFs/background.pdf> (“If a State is placing a child in foster, adoptive, or relative guardianship home . . . approval of the home may not be granted if a criminal records check reveals [applicant has ever been convicted of] . . . felony child abuse or neglect; spousal abuse; a crime against children (including child pornography); or a crime involving violence . . . [or] a felony for physical assault, battery or a drug related offense within the past five years.”).

267. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILDREN’S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>.

268. ALEXANDER, *supra* note 171, at 151.

269. *Id.*

obligations.²⁷⁰ The impact of community supervision on families will be explored later as a case study revealing the depths to which this criminal justice practice now influences family life.²⁷¹

C. Coextensive Enforcement

A trend in recent decades has been for governments to employ overlapping or hybrid enforcement regimes for criminal justice purposes.²⁷² Civil asset forfeiture is exemplary of this trend. In civil asset forfeiture, law enforcement agents seize assets allegedly involved in or the proceeds of criminal behavior.²⁷³ Prosecutors can also initiate civil asset forfeiture claims as their criminal cases develop.²⁷⁴ Asset forfeiture is deemed remedial, not punitive in nature.²⁷⁵ The individual from whom the assets are seized need not be suspected, arrested, or convicted of a crime.²⁷⁶ The seizure becomes permanent after a hearing or default.²⁷⁷ Given the long-term negative repercussions and the strong connection to criminal systems, the conception of asset forfeiture as civil has been seriously challenged.²⁷⁸

Another version of this trend involves the creation of problem-solving, specialty or accountability courts, as they have been alternatively labeled.²⁷⁹ The juvenile justice system is an historical

270. *Here's How Much it Costs to Have a Family Member in Prison*, THINK PROGRESS (Sept. 15, 2015), <https://thinkprogress.org/heres-how-much-it-costs-to-have-a-family-member-in-prison-64cd7c3a37dd#.m7vvmrod5> (More than two-thirds of respondents said their family's financial stability was damaged when a member was incarcerated. Two out of three families had trouble meeting basic needs thanks to their loved one's conviction and incarceration, including about half who struggled to afford food and another 48 percent who had trouble paying for housing).

271. *See infra* Part III.

272. *See* Cammett, *supra* note 171, at 364.

273. *United States v. Ursery*, 518 U.S. 267, 291 (1996) (finding that the forfeiture of property involved in illegal money laundering transactions was proper).

274. CHARLES DOYLE, CONG. RESEARCH SERV., 97-139, CRIME AND FORFEITURE, 5-12 (2015).

275. *Ursery*, 518 U.S. at 267 (1996).

276. *Bennis v. Michigan*, 516 U.S. 442, 455 (1996).

277. *See* Doyle, *supra* note 274, at 25.

278. Tim Walberg, *Stopping the Abuse of Civil Forfeiture*, WASH. POST (Sept. 4, 2014), https://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/e7b9d07a-3395-11e4-9e92-0899b306bbea_story.html.

279. *Problem Solving Courts*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Problem-Solving-Courts.aspx> (last visited Sept. 10, 2016).

example. Modern incarnations include family courts, community courts, drug courts, mental health courts, fathering courts, peer courts, reentry courts, and courts for the homeless and veterans.²⁸⁰ Whether civil or criminal in nature, these court systems often have the authority to impose criminal consequences or quasi-criminal punishments for violations and non-compliance.²⁸¹ For example, individuals can be placed on community supervision or sentenced to incarceration for failure to follow the conditions of the program.²⁸² Additionally, unsuccessful resolution of these court matters can lead to the reinstatement of criminal cases.²⁸³

A last version is the merging of previously separate regimes.²⁸⁴ The modern concept of “cimmigration” is particularly relevant here.²⁸⁵ Immigration violations historically were dealt with through the administrative process.²⁸⁶ Over time, the criminal justice process has been deployed in its place.²⁸⁷ New immigration crimes imposing serious penalties have been created, significantly more law enforcement resources have been devoted to immigration matters, and criminal courts have developed practices to speed the conviction and removal of individuals.²⁸⁸

Each of these transformations has significantly impacted families. In the case of civil asset forfeiture, the government can permanently

280. *Id.*

281. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1487 (2004) (punitive nature of drug courts); *see also* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008) (drug court sentences can be longer than traditional sentences).

282. Miller, *supra* note 281, at 1499 (sanctions for not following program guidelines results in potential termination from the program and imprisonment).

283. *Id.*

284. *See generally* PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 (2011), <http://www.pewhispanic.org/files/reports/133.pdf>.

285. *Id.* at 11 (“Mexicans make up the majority of the unauthorized immigrant population, 58%, or 6.5 million. Other nations in Latin America account for 23% of unauthorized immigrants, or 2.6 million. Asia accounts for 11%, or about 1.3 million, and Europe and Canada account for 4%, or 500,000. African countries and other nations represent about 3%, or 400,000”).

286. *See* Vázquez, *Cimmigration*, *supra* note 171, at 630–32. (detailing the history from “immigration enforcement officials” handling immigration violations to Congress enacting legislation “increasing the amount of crimes that made noncitizens subject to immigration consequences.”).

287. *See id.* at 644 (commenting on immigration law reform resulting in the “enforcement of immigration law through the criminal justice system.”).

288. *See id.* at 651–54.

seize the assets of innocent family members based on the actions of other family members.²⁸⁹ In *Bennis v. Michigan*, law enforcement seized a vehicle from a man who had been convicted of engaging in prostitution using the vehicle.²⁹⁰ The court ordered forfeiture of the vehicle.²⁹¹ The man's wife objected arguing that she was an innocent owner.²⁹² Michigan did not permit a defense of innocent owner.²⁹³ The Supreme Court upheld the forfeiture, concluding the innocent owner defense is not constitutionally required.²⁹⁴ In 2013, it was revealed that Philadelphia had seized residential property from innocent family members based on drug related crimes committed by sons, husbands, and brothers.²⁹⁵

Problem solving courts impact families in many ways. Problem-solving courts have long been used to resolve child abuse and neglect matters, as well as delinquency matters.²⁹⁶ Courts addressing these concerns reach into the home and interfere with parents' decisions and conduct with respect to child-rearing.²⁹⁷ Civil abuse and neglect proceedings can operate in tandem with or subsequent to criminal proceedings, allowing the state to impose conditions on families and caretakers that would not be permitted in the criminal case.²⁹⁸ Delinquency matters, too, can result in government agents significantly controlling parental child-rearing decisions, even though it is the child who is subject to the court's jurisdiction.²⁹⁹

289. *See Bennis*, 516 U.S. at 453.

290. *Id.* at 443–44.

291. *Id.*

292. *Id.* at 444.

293. *Id.*

294. *Id.* at 453.

295. Alyssa Hazelwood & Andrew Kloster, *Innocent People Have their Homes Seized in Philadelphia*, DAILY SIGNAL (Dec. 21, 2013), <http://dailysignal.com/2013/12/21/innocent-people-homes-seized-philadelphia/>.

296. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056–58 (2002).

297. *Id.* at 1058.

298. *Criminal and Civil Justice*, THE NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/criminal-and-civil-justice> (last visited Sept. 10, 2016).

299. Kathleen Michon, *Juvenile Court Sentencing Options*, NOLO, <https://www.nolo.com/legal-encyclopedia/juvenile-court-sentencing-options-32225.html> (last visited Sept. 7, 2016).

The recent movement to develop new problem solving courts has extended the state's reach into the home.³⁰⁰ In most large jurisdictions and many other smaller ones, courts that handle family violence cases have been erected.³⁰¹ Most recently, a small number of governments have created reentry courts that target mothers and fathers re-integrating into the community after incarceration to promote the development of their child-parent relationships.³⁰² Lastly, the few elder courts that have been established address concerns at the other end of the life spectrum, including abuse and exploitation of older persons.³⁰³ These courts also permit the state to dictate the conditions under which families and family members operate, and impose penalties for non-compliance.³⁰⁴

Many criticisms have been lodged against crimmigration for its harsh impact on individuals and families.³⁰⁵ As individual family members are taken into custody and ultimately removed from the country, families are separated, sometimes permanently.³⁰⁶ Further, it is not uncommon for a parent to be removed from the country, leaving behind children to be cared for by other family members, social networks, or foster care.³⁰⁷ Beginning in January 2016, federal agents have taken parents and their children into custody for removal.³⁰⁸ Crimmigration poses an emotional, social, and financial burden. Families—including children—live in a state of fear that

300. Miller, *supra* note 281, at 1481.

301. *Domestic Violence Courts*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/courts/domestic-violence-courts/pages/welcome.aspx> (last modified June 30, 2011).

302. JANE MACOUBRIE & DANIEL J. HALL, ACHIEVING THE FULL POTENTIAL OF REENTRY AND FATHERS' COURTS 2 (2010); *Fathering Court*, D.C. CHILD SUPPORT SRVS. DIV., <http://cssd.dc.gov/page/fathering-court> (last visited Sept. 10, 2016).

303. *Programs and Guidelines*, CTR. FOR ELDER AND THE COURTS, <http://www.eldersandcourts.org/Elder-Abuse/Programs-and-Guidelines.aspx> (last visited Sept. 10, 2016); CRAM, *supra* note 220, at 77.

304. CRAM, *supra* note 220, at 78–79.

305. See Vázquez, *supra* note 171, at 599; JOANNA DREBY, CTR. FOR AM. PROGRESS, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND 2 (2012), <https://cdn.americanprogress.org/wpcontent/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>.

306. See DREBY, *supra* note 305, at 2.

307. See *id.*

308. Press Release, U.S. Dep't. of Homeland Sec., Statement by Secretary Jeh C. Johnson on Southwest Border Security (Jan. 4, 2016), <http://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security>.

government authorities will enter their home and arrest individuals, leading to removal and separation.³⁰⁹ As with incarceration, the actual loss of a family member due to deportation disrupts social and financial networks.³¹⁰

D. Juvenile Inclusion

The criminal justice system is primarily reserved for adult offenders.³¹¹ Over the last fifty years, however, legislators, police, and prosecutors have targeted children for criminal justice treatment in large numbers.³¹² They have focused on youth behavior—both serious and low grade—whether in school, in public, or in the home.³¹³

During the early decades of the War on Drugs, the government focused on schools to prevent youth from engaging in drug use, detect juvenile drug use, and rid schools of drugs.³¹⁴ To further these goals, schools began to search students for contraband, drug test students, and implement strict discipline policies.³¹⁵ Students and their parents challenged many of these policies in courts, including the United States Supreme Court, and often failed to prevail.³¹⁶

In 1996, Princeton Professor John DiIulio predicted a serious criminal justice problem was coming in the form of the juvenile “super predator.”³¹⁷ These super predators were violent, irrational,

309. See DREBY, *supra* note 305, at 2, 12.

310. See *id.* at 13.

311. AM. BAR ASS’N, DIV. FOR PUB. EDUC., *DIALOGUE ON YOUTH AND JUSTICE* 4 (2007), <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>.

312. *Id.* at 5; NAT’L CRIMINAL JUSTICE REFERENCE SERV., *JUVENILE JUSTICE: A HISTORY OF CHANGE* (1999), https://www.ncjrs.gov/html/ojdp/9912_2/juv1.html.

313. AM. BAR ASS’N, *supra* note 311, at 5.

314. J. David Hawkins, *Preventing Substance Abuse*, 19 *CRIME & JUST.* 343, 358 (1995).

315. Lorna Hermosura, *School-to-Prison Pipeline is a Direct Policy Descendant of Nixon’s War on Drugs*, *UNIV. OF TEX. NEWS* (Apr. 25, 2016), <http://news.utexas.edu/2016/04/25/school-to-prison-pipeline-caused-by-war-on-drugs-policy>; Patricia J. Williams, *The War on Drugs Is a War on Kids*, *THE NATION* (Feb. 13, 2013), <https://www.thenation.com/article/war-drugs-war-kids/>.

316. *New Jersey v. T.L.O.*, 469 U.S. 325, 325–26 (1985); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 646 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822, 822 (2002).

317. Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, *N.Y. TIMES* (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html>; John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, *CITY J.* (Spring 1996), <http://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html>.

impulsive Black teen males who would engage in serious violent crime and terrorize communities, particularly Black communities.³¹⁸ In response, DiIulio advocated for increased penalties for—and incarceration of—youth.³¹⁹ Jurisdictions took DiIulio's prediction seriously, enacting criminal justice practices and policies that increased the number of juveniles subject to criminal prosecution and imposed harsh penalties.³²⁰ Their actions included reducing the minimum age for prosecution in criminal court and easing restrictions on transferring juveniles from juvenile to criminal court to face adult prosecution.³²¹

In more recent decades, school systems have enacted new policies and strategies for school safety and discipline, mirroring the tough-on-crime policies adopted for the public generally and creating what has been labeled the school-to-prison pipeline.³²² The trend is attributable to continued concern about youth misconduct generally, but also concern surrounding mass school shootings by students and others.³²³ Administrators have adopted zero-tolerance policies applying to drug-related activities, violent behavior, and behavior that in times before would not have even formed the basis for school discipline.³²⁴ More student behavior now supports immediate

318. DiIulio, *supra* note 317.

319. WILLIAM J. BENNETT ET AL., *BODY COUNT* 16 (1996).

320. Haberman, *supra* note 317.

321. Brief for Fagan et. al. as Amici Curiae Supporting Petitioners at 16, 37, *Miller v. Alabama*, 567 U.S. (Jan. 2012) (Nos. 10-9647, 10-9646), 2012 WL 174240, at *16, 30.

322. NATHAN JAMES & GAIL MCCALLION, *CONG. RESEARCH SERV.*, R43126, *SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2* (2013) <https://www.fas.org/sgp/crs/misc/R43126.pdf>; DANIEL J. LOSEN & RUSSELL J. SKIBA, *SUSPENDED EDUCATION URBAN MIDDLE SCHOOLS IN CRISIS 2* (2010), http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf; U.S. Dep't of Justice & U.S. Dep't of Educ., *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, U.S. DEP'T OF EDUC. (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>; TONY FABELO ET AL., *COUNCIL OF STATE GOV'TS JUSTICE CTR.*, *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 7* (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf; *Suspended Childhood*, TEXAS APPLESEED (2015), <https://slate.adobe.com/a/6dvQB/>.

323. Office of Pub. Affairs, *Department of Justice Awards Hiring Grants for Law Enforcement and School Safety Officers*, U.S. DEP'T OF JUSTICE (Sept. 27, 2013), <http://www.justice.gov/opa/pr/departments-justice-awards-hiring-grants-law-enforcement-and-school-safety-officers>.

324. See LOSEN & SKIBA, *supra* note 322, at 9.

suspension and expulsion from school, even for a first offense.³²⁵ Along with zero tolerance policies, systems adopted additional policing tactics such as physically searching students before entering school premises, scanning students with metal detectors and hand-held wands, deploying drug sniffing dogs, and installing surveillance cameras campus-wide.³²⁶ Many large school districts have police forces that operate on campus, whether as independent entities or a unit of the local police force.³²⁷ These officers issue tickets to students, investigate alleged misconduct, and refer matters to the juvenile and adult criminal justice systems for prosecution.³²⁸

Prosecutors have also targeted youth for criminal prosecution based on behavior occurring within the home.³²⁹ For example, prosecutors are now filing family violence charges against youth.³³⁰ Whether in delinquency court or criminal court, prosecutors are charging kids with abusing their parents, siblings, or other family members.³³¹

Black youth are disproportionately involved in every aspect of the funneling of youth into the criminal justice system, including the school discipline process, juvenile justice system, and criminal justice system.³³² Data from 2013 indicates that 35,246 youth today

325. FABELO ET AL., *supra* note 322.

326. *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985); Office of the Attorney Gen., S.C., Informal Opinion Letter on Use of Canines as Drug Detection Devices in Schools (Feb. 22, 1996) at 1; Sarah Jane Forman, *Ghetto Education*, 40 WASH. U.J.L. & POL'Y 67, 97–98 (2012).

327. Emma Brown, *Police in Schools: Keeping Kids Safe, or Arresting Them for No Good Reason?*, WASH. POST (Nov. 8, 2015), https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddf0-816c-11e5-9afb-0c971f713d0c_story.html.

328. Brown, *supra* note 327; Justin Jouvenal, *Private Police Carry Guns and Make Arrests, and Their Ranks are Swelling*, WASH. POST (Feb. 28, 2016), https://www.washingtonpost.com/local/crime/private-police-carry-guns-and-make-arrests-and-their-ranks-are-swelling/2015/02/28/29f6e02e-8f79-11e4-a900-9960214d4cd7_story.html.

329. Amanda Emery, *15-Year-Old Girl Arrested for Allegedly Hitting Sister with Combination Lock in Flint*, MLIVE (Jan. 4, 2014, 9:00 PM), http://www.mlive.com/news/flint/index.ssf/2014/01/15-year-old_girl_arrested_for_1.html; Jill Glavan, *Girl, 9, Arrested for Hitting Younger Sister in the Head*, FOX 59 (Nov. 24, 2014, 9:51 PM), <http://fox59.com/2014/11/24/nine-year-old-girl-arrested-for-hitting-younger-sister>.

330. *State in the Interest of R.W.*, 2013-CA-1197 (La. App. 4 Cir. 4/9/2014); 140 So. 3d 189, 190.

331. *Id.* at 192.

332. JOSHUA ROVNER, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 1 (2014); Lisa Chiu, *After Decades of Spending, Minority Youth Still Overrepresented in System*, JUV. JUST. INFO. EXCHANGE (Feb. 26, 2014), <http://jjie.org/after-decades-of-spending-minority-youth-still>.

were held in juvenile corrections facilities.³³³ In 2014, 5,235 youth were in adult jails and prisons.³³⁴ Black youth comprise the majority of those in custody.³³⁵ Data also indicates that Black youth are more likely to be subject to school discipline policies.³³⁶

The funneling of youth into the criminal justice system impacts families in several ways. First, to the extent that juvenile or criminal justice system prosecution results in a custodial sentence, children are physically separated from their families.³³⁷ The separation means that children are not reared in family settings and communities by their parents and other prosocial networks.³³⁸ Instead, they are raised by corrections officials and other inmates.³³⁹ Second, for parents whose children who remain in the home or community but are subject to criminal justice supervision, their ability to make child-rearing decisions is restricted by the state which imposes requirements upon the child that the family must adhere to in order to support the child.³⁴⁰ At times, these requirements may be contrary to the family's preference and autonomy.

E. Widespread Surveillance

The modern expanded criminal justice system includes wide-ranging government surveillance of individuals and families. Governments conduct surveillance using human-based and technology-facilitated means.

In today's regime, governments have obligated many lay citizens to report suspected crime or misconduct, supplementing the

overrepresented-in-system/106398.

333. THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 6 (2015), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

334. *Id.*

335. *Id.*

336. U.S. Dep't of Justice & U.S. Dep't of Educ., *supra* note 322, at 2; *Suspended Childhood*, *supra* note 322.

337. King et al., *supra* note 23, at 1394.

338. *Id.* at 1406.

339. *Id.* at 1406–1407.

340. Note, *Juvenile Miranda Waiver and Parental Rights*, 126 HARV. L. REV. 2359, 2359 (2013), http://harvardlawreview.org/wp-content/uploads/pdfs/vol126_juvenile_miranda_waiver_and_parental_rights.pdf.

responsibilities of law enforcement.³⁴¹ Laws have long-existed that require professionals working with children to report suspected child abuse and neglect.³⁴² Jurisdictions, however, have expanded those laws and enacted new laws mandating that a wide array of individuals—professional and non-professional—report not only possible child abuse, but also other behaviors to government authorities.³⁴³

The list of mandated reporters now includes, in part, children’s educators or caretakers, medical treatment providers, mental health providers, religious officials, financial institutions, and social workers.³⁴⁴ The range of suspicious conduct that must be reported includes serious offenses such as child abuse and neglect, elder abuse and neglect, domestic violence, gunshot wounds, and drug overdoses.³⁴⁵ On the other end of the spectrum, in the course of their work, government officials report far less serious, non-violent matters such as school truancy, residency fraud, and public benefits fraud.³⁴⁶

341. KY. REV. STAT. ANN. § 620.030 (West 2013); MISS. CODE ANN. § 43-21-353 (West 2016); N.C. GEN. STAT. ANN. § 115C-400 (West 2016); OHIO REV. CODE ANN. § 2151.421 (West 2015).

342. KY. REV. STAT. ANN. § 620.030; MISS. CODE ANN. § 43-21-353; N.C. GEN. STAT. ANN. § 115C-400; OHIO REV. CODE ANN. § 2151.421.

343. KY. REV. STAT. ANN. § 620.030; MISS. CODE ANN. § 43-21-353; N.C. GEN. STAT. ANN. § 115C-400; OHIO REV. CODE ANN. § 2151.421; Breanna Trombley, *Criminal Law—No Stiches for Snitches: The Need for a Duty-to-Report Law in Arkansas*, 34 U. ARK. LITTLE ROCK L. REV. 813, 818 (2012).

344. KY. REV. STAT. ANN. § 620.030; MISS. CODE ANN. § 43-21-353; N.C. GEN. STAT. ANN. § 115C-400; OHIO REV. CODE ANN. § 2151.421.

345. NANCY DURBOROW ET AL., COMPENDIUM OF STATE STATUTES AND POLICIES ON DOMESTIC VIOLENCE AND HEALTH CARE 2–3 (2010), <http://www.postandcourier.com/tilldeath/assets/d1-38.pdf> (health care reporting of family violence); N.Y.C. DIST. ATTY’S OFFICE & NAPSA ELDER FIN. EXPLOITATION ADVISORY BD., 2013 NATIONWIDE SURVEY OF MANDATORY REPORTING REQUIREMENTS FOR ELDERLY AND/OR VULNERABLE PERSONS 1–40 (2013), <http://www.napsa-now.org/wp-content/uploads/2012/04/Mandatory-Reporting-Chart.pdf>; U.S. DEP’T OF HEALTH AND HUM. SERVS., CHILDREN’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2014), <https://www.childwelfare.gov/pubPDFs/manda.pdf>; U.S. DEP’T OF HEALTH AND HUM. SERVS., CHILDREN’S BUREAU, CLERGY AS MANDATED REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2014), <https://www.childwelfare.gov/pubPDFs/clergymandated.pdf>.

346. See KAARYN GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 51–68 (2012) (case agents report welfare fraud); *TNT - Tolerate No Truancy*, CATAWBA COUNTY N.C., <http://www.catawbacountync.gov/sheriff/tnt.asp> (last visited Sept. 18, 2016) [hereinafter *TNT*] (report suspected truants); *How to Report a Possible Residence Fraud*, VERIFY RESIDENCE, <http://www.verifyresidence.com/residency-fraud-tipsline.html> (last visited Sept. 18, 2016) [hereinafter *How to Report*] (report possible school enrollment residence fraud).

In addition to extending mandatory reporting obligations, government also encourages individuals to monitor others and report suspicious, potentially criminal, behavior.³⁴⁷ Such encouragement extends not only to serious or violent criminal conduct but much less serious behavior leading to quasi-criminal sanctions.³⁴⁸ For example, North Carolina asks individuals to notify authorities of possible truants, the federal government provides a means for individuals to report marriage fraud and immigration violations, and nationwide child abuse and residency fraud tip lines have been established.³⁴⁹

Governments do not solely rely on individuals to report potential misconduct of others.³⁵⁰ Governments have turned to technology to surveil all manner of activities of citizens to detect unlawful behavior that might have otherwise gone unnoticed.³⁵¹ Camera-based surveillance is ubiquitous. Constantly recording cameras placed in public spaces are not uncommon.³⁵² Many jurisdictions use cameras or other technology to detect traffic violators. Schools are filled with metal detectors and cameras.³⁵³ Using cameras, government agencies

347. *TNT*, *supra* note 346; Office of Inspector Gen., *Reporting Immigration Irregularities or Violations (Not Involving DHS Employees)*, U.S. DEP'T OF HOMELAND SEC., https://www.oig.dhs.gov/index.php?option=com_content&id=152&Itemid= (last visited Sept. 18, 2016) (immigration violations); U.S. IMMIGR. & CUSTOMS ENFORCEMENT, MARRIAGE FRAUD IS A FEDERAL CRIME, <https://www.ice.gov/sites/default/files/documents/Document/2014/marriageFraudBrochure.pdf> [hereinafter MARRIAGE FRAUD] (marriage fraud); *How to Report*, *supra* note 346.

348. Cammett, *supra* note 171, at 369.

349. See *TNT*, *supra* note 346; Office of Inspector Gen., *supra* note 347; MARRIAGE FRAUD, *supra* note 347, *How to Report*, *supra* note 345.

350. Brad Heath, *Police Secretly Track Cellphones to Solve Routine Crimes*, USA TODAY (Aug. 24, 2015, 7:51 AM), <http://www.usatoday.com/story/news/2015/08/23/baltimore-police-stingray-cell-surveillance/31994181/>; Justin Jouvenal, *The New Way Police are Surveilling You: Calculating your Threat 'Score'*, WASH. POST (Jan. 10, 2016), https://www.washingtonpost.com/local/public-safety/the-new-way-police-are-surveilling-you-calculating-your-threat-score/2016/01/10/e42bccac-8e15-11e5-baf4-bdf37355da0c_story.html; Craig Timberg, *New Surveillance Technology Can Track Everyone in an Area for Several Hours at a Time*, WASH. POST (Feb. 5, 2014), https://www.washingtonpost.com/business/technology/new-surveillance-technology-can-track-everyone-in-an-area-for-several-hours-at-a-time/2014/02/05/82f1556e-876f-11e3-a5bd-844629433ba3_story.html.

351. Heath, *supra* note 350; Jouvenal, *supra* note 350; Timberg, *supra* note 350.

352. Steve Henn, *In More Cities, a Camera on Every Corner, Park and Sidewalk*, NAT'L PUB. RADIO (June 20, 2013, 2:57 AM), <http://www.npr.org/sections/alltechconsidered/2013/06/20/191603369/The-Business-Of-Surveillance-Cameras>.

353. Alyssa Morones, *Surveillance Cameras Gain Ground in Schools*, EDUCATION WEEK (May 31, 2013), <http://www.edweek.org/ew/articles/2013/05/31/33cameras.h32.html>; Inst. of Educ. Scis., *School Safety and Security Measures*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=334> (last visited Sept. 18, 2016); *School Metal Detectors*, NAT'L SCH. SAFETY & SEC.

constantly monitor public housing communities—of which Blacks constitute the largest percentage of the population.³⁵⁴ Governments can continuously monitor recordings or review on an as needed basis to uncover criminal activity.

Medical surveillance is long-standing. Health officials test pregnant women for unlawful drug use and report those results to government officials.³⁵⁵ Students, criminal suspects, and individuals convicted of crimes are drug tested.³⁵⁶ Criminal suspects and individuals convicted of crimes are ordered to submit DNA samples to government-maintained databases.³⁵⁷

Modern technological advances in surveillance continue to be developed. Cities now use software to monitor, track, and pinpoint gunfire.³⁵⁸ Law enforcement officers routinely monitor social media to detect possible criminal activity.³⁵⁹ Data analytics have been

SERVS., <http://www.schoolsecurity.org/trends/school-metal-detectors> (last visited Sept. 18, 2016); VIDEO SURVEILLANCE, <http://www.videosurveillance.com> (last visited Sept. 18, 2016).

354. According to the 2010 American Community Survey, across all public housing, about 45% of residents are Black, while 32% are white and a little over 20% are Hispanic. NAT'L LOW INCOME HOUSING COAL., *Who Lives in Federally Assisted Housing?* 3 (Housing Spotlight Vol. 2, Issue 2, 2012), <http://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>.

355. *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001); Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1676–77 (2008); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1433 (1991); Oren Yaniv, *WEED OUT: More Than a Dozen City Maternity Wards Regularly Test New Moms for Marijuana and Other Drugs*, N.Y. DAILY NEWS, (Dec. 29, 2012, 5:25 AM), <http://www.nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mothers-marijuana-drugs-article-1.1227292#ixzz31hXS2sUE>.

356. *Bd. of Educ. v. Earls*, 536 U.S. 822, 826 (2002); D. Alan Henry & John Clark, *Pretrial Drug Testing: An Overview of Issues and Practices 2* (Bureau of Just. Assistance July 1999), <https://www.ncjrs.gov/pdffiles1/176341.pdf>.

357. *Maryland v. King*, 133 S. Ct. 1958, 1979–80 (2013); MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2011).

358. Alicia Nieves, *High-Tech Tool to Track Gunfire*, WNEP (May 5, 2016, 4:21 PM), <http://wnep.com/2016/05/05/high-tech-tool-to-track-gunfire/>; David Salisbury, *Tracking Gunfire with a Smart Phone*, VANDERBILT UNIV. (Apr. 25, 2016, 11:49 AM), <http://news.vanderbilt.edu/2013/04/tracking-gunfire-with-smartphone/>.

359. Martin Kaste, *As Police Monitor Social Media, Legal Lines Become Blurred*, NAT'L PUB. RADIO (Feb. 28, 2014, 8:39 PM), <http://www.npr.org/sections/alltechconsidered/2014/02/28/284131881/as-police-monitor-social-media-legal-lines-become-blurred>; Vernon M. Keenan et al., *Developing Policy on Using Social Media for Intelligence and Investigations*, POLICE CHIEF (June 28, 2013), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2951&issue_id=62013; *Police Departments Invest in Social Media Tracking to Prevent Crimes and Catch Criminals*, NC4 BLOG, <http://www.nc4.com/Pages/Police-departments-invest-in-social-media-tracking-to-prevent-crimes-and-catch-criminals.aspx> (last visited Sept. 18, 2016).

applied to criminal justice concerns.³⁶⁰ By testing DNA specimens, government can identify possible suspects in kinship networks.³⁶¹

This mass surveillance extends directly into family life, for instance when it targets intrafamilial caretaking or seeks to connect family members for criminal justice purposes.³⁶² The surveillance also indirectly impacts families. Individuals who reside in public housing report negative feelings of being continually surveilled, and children in schools report similar feelings.³⁶³ These feelings are brought to bear on family life. Questions have been raised concerning whether child abuse hotlines actually help children.³⁶⁴ Familial DNA searching has also been criticized.³⁶⁵

F. Mass Incarceration

The expansion of the criminal justice system has contributed to mass incarceration.³⁶⁶ As of 2014, 2.2 million individuals were incarcerated in American jails and prisons.³⁶⁷ Black males are disproportionately represented in this population, and Black females are a fast growing portion of the population.³⁶⁸

Incarceration negatively impacts more than just the incarcerated individual.³⁶⁹ Incarceration removes individuals from communities

360. Nate Berg, *Predicting Crime, LAPD-Style*, GUARDIAN (June 25, 2014, 5:19 AM), <https://www.theguardian.com/cities/2014/jun/25/predicting-crime-lapd-los-angeles-police-data-analysis-algorithm-minority-report>.

361. Debra Cassens Weiss, *Cops Seek DNA Information from Ancestry.com and 23andMe*, A.B.A. J. (Oct. 20, 2015, 6:15 AM), http://www.abajournal.com/news/article/cops_seek_dna_information_from_ancestry.com_and_23andme; *CODIS and NDIS Fact Sheet, Partial Matches and Familial Searches*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Sept. 19, 2016).

362. Cassens Weiss, *supra* note 361; *CODIS and NDIS Fact Sheet*, *supra* note 361.

363. TORIN MONAHAN & RODOLFO TORRES, CRITICAL ISSUES IN CRIME AND SOCIETY 34 (2010).

364. Dale Margolin Cecka, *How Child Abuse Hotlines Hurt the Very Children They're Trying to Protect*, THE WASH. POST (May 6, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/06/how-child-abuse-hotlines-hurt-the-very-children-theyre-trying-to-protect/>.

365. Dorothy E. Roberts, *Collateral Consequences, Genetic Surveillance, the New Biopolitics of Race*, 54 HOW. L.J. 567, 574 (2011).

366. ALEXANDER, *supra* note 171, at 175.

367. DANIELLE KAEBLE ET AL., CORRECTIONAL POPULATIONS IN THE U.S., 2014 2 (2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>.

368. See THE SENTENCING PROJECT, *supra* note 333, at 5.

369. Hedwig Lee, Lauren C. Porter, & Megan Comfort, *Consequences of Family Member Incarceration*, ANNALS. AM. ACAD. POL. & SOC. SCI., Jan. 2014, at 44, 47,

and families, which causes disruption of relationships and emotional trauma.³⁷⁰ Inmates and families may try to maintain their relationships through letters, phone calls, and visits, but significant barriers stand in their way.³⁷¹ Inmate letters and phone calls are monitored.³⁷² Corrections facilities charge excessive rates for phone calls.³⁷³ Inmates are often assigned to facilities far from their home.³⁷⁴ Families must spend large amounts of time and money to travel to visit their loved ones.³⁷⁵ When visits do occur, like letters and phone calls, they are heavily regulated.³⁷⁶ Physical contact is restricted, conversations are not private, and visits are limited in length.³⁷⁷

Parent-child relationships are especially impacted by incarceration. Recent data indicates that more than five million children have had a parent who lived with them be incarcerated at some point in the child's life, and Black children are disproportionately affected.³⁷⁸ Most incarcerated parents are fathers, but the rate of maternal incarceration has been increasing.³⁷⁹ Children's well-being is negatively impacted by the incarceration of a parent.³⁸⁰ Additionally, incarceration has intergenerational effects on economic

<http://ann.sagepub.com/content/651/1/44.short#cited-by>.

370. *Id.*

371. JEREMY TRAVIS ET AL., FAMILIES LEFT BEHIND: THE HIDDEN COST OF INCARCERATION AND REENTRY 1 (2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310882-Families-Left-Behind.PDF>.

372. Alice Ollstein, *The Power of Family*, CORRECTIONS.COM (Aug. 1, 2011), <http://www.corrections.com/news/article/28886-the-power-of-family>.

373. *Intercepting Prisoner Communications*, POINT OF VIEW (Alameda Cty. Dist. Attorney's Office, Alameda County, Cal.), Winter 2005, at 15, 18, http://le.alcoda.org/publications/point_of_view/files/IPC.pdf.

374. TRAVIS ET AL., *supra* note 371.

375. *See* Meares, *supra* note 23, at 297.

376. Ollstein, *supra* note 372.

377. JEREMY TRAVIS & MICHELLE WAUL, PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES 207 (2003); Meares, *supra* note 23, at 297.

378. DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS 1 (2015), <http://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>. *See also*, LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010) (by mid-year 2007, 1.7 million minor children had an incarcerated parent).

379. MURPHEY & COOPER, *supra* note 378, at 2.

380. *Id.* at 2–3.

opportunity.³⁸¹ Finally, as a legal matter, incarceration can lead to the termination of parent-child relationships.³⁸² Facility regulations limit the ability of children of inmates to visit based on age of the child and closeness of the relationship.³⁸³ If the inmate is unsuccessful at maintaining a child-parent relationship or providing for the care of the child by a third-party, it is not just the social relationship that is lost.³⁸⁴ In the extreme, an inmate's parental rights may be terminated for lack of contact or relationship maintenance.³⁸⁵

When criminal laws intrude into family life, family-related privacy and liberty interests are implicated.³⁸⁶ As this Part reveals, the modern expanded criminal justice system now implicates many aspects of family life and family law previously left untouched, including intrafamilial behavior, decision-making, and privacy. Ultimately, the criminal justice regime operates as a *de facto* family law system. The next Part uses the practice of community-based criminal justice supervision to reveal the extent to which and manner in which criminal justice intrudes into and reshapes family life and family law.

III. COMMUNITY SUPERVISION AND THE INFILTRATION OF FAMILY LIFE AND AUTONOMY

In the last several decades, the modern criminal justice regime has rewritten family law and family life, especially for Black families.³⁸⁷ Community supervision represents one facet of the contemporary

381. REBECCA VALLAS ET AL., REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN 2 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

382. 32 AM. JUR. 3D 83 *Proof of Facts* § 7.2 (2016); *In re Audrey S.*, 182 S.W.3d 838, 849 (Tenn. Ct. App. 2005). *But see In re Welfare of K.B.*, No. A09-0124, 2009 WL 2928561, at *1 (Minn. Ct. App. Sept. 15, 2009).

383. CONN. DEP'T OF CORR., INMATE VISITING RULES (2013), <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad1006atta.pdf>.

384. TRAVIS ET AL., *supra* note 371.

385. *See sources cited supra*, note 267.

386. Beale, *supra* note 11, at 767–68.

387. Samuel V. Schoonmaker, IV, *Criminal Law of Family Law: The Overlapping Issues*, 44 FAM. L.Q. 155, 160 (2010); *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited Sept. 28, 2016).

criminal justice system that significantly impacts family law and racial justice.³⁸⁸ Community supervision has three common purposes: protecting the public, rehabilitating supervisees, and promoting the fair administration of justice.³⁸⁹ Community supervision is designed to be beneficial to all involved parties.³⁹⁰ Whether it is used pending trial or for satisfaction of a sentence, community supervision serves as an alternative to detention, allowing individuals to remain in the community.³⁹¹ By using community supervision, jurisdictions are able to reduce their criminal justice expenditures per individual and overall.³⁹² This Part examines the criminal justice practice to reveal, despite its potential benefits, the breadth of ways in which the practice can negatively reshape family autonomy and destabilize family networks.

A. The Basics of Community Supervision

1. What It Is and Who Is On It

Three forms of community-based criminal justice supervision exist: pretrial release, probation, and parole.³⁹³ In each form, the philosophies and mechanics of supervision are similar.³⁹⁴

Pretrial release occurs in the early stages of a criminal case.³⁹⁵ When the government charges an individual with a criminal offense, the court determines whether or not the individual will be detained or

388. PEGGY MCGARRY ET AL., VERA INST. OF JUSTICE, THE POTENTIAL OF COMMUNITY CORRECTIONS TO IMPROVE SAFETY AND REDUCE INCARCERATION 4–5 (Mary Crowley et al. eds., 2013), <http://www.vera.org/sites/default/files/resources/downloads/potential-of-community-corrections.pdf>.

389. *See, e.g.*, 18 U.S.C. § 3603(3) (2016); U.S. COURTS, GUIDE TO JUDICIARY POLICY, VOL 8, PT E, §§ 140(A), 150(A), https://wvn.fd.org/pdf/Part_E%20109.pdf.

390. MCGARRY ET AL., *supra* note 388, at 4.

391. *Probation and Pretrial Services - Supervision*, U.S. COURTS, <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-supervision> (last visited Sept. 14, 2016).

392. MCGARRY ET AL., *supra* note 388, at 9.

393. *Id.* at 5–6.

394. *Id.* at 6.

395. *Glossary of Legal Terms*, U.S. COURTS, <http://www.uscourts.gov/glossary> (last visited Sept. 14, 2016) (definition of “pretrial services”).

released pending adjudication of the case.³⁹⁶ For those released into the community, a court officer supervises the individual and ensures compliance with any conditions of release.³⁹⁷

During fiscal years 2008–2010, federal courts in the seventy-five most populous counties released pre-trial 280,000 individuals.³⁹⁸ Individuals released faced mostly drug charges (30%), immigration charges (35%), and property crimes charges (16%).³⁹⁹

Probation and parole occur during the final stages of a criminal matter when a convicted individual serves his sentence.⁴⁰⁰ Probation occurs when the court sentences an individual convicted of a crime to a term of supervision within the community in lieu of incarceration.⁴⁰¹ Often, the court will order the individual to report to a probation officer and comply with certain conditions.⁴⁰² The individual remains in the community so long as the probationary conditions are satisfied.⁴⁰³ Parole occurs when a corrections inmate is released from incarceration after completing a portion or all of a court-imposed sentence of imprisonment.⁴⁰⁴ Parole includes those “released through discretionary or mandatory supervised release from prison, those released through other types of post-custody conditional supervision, and those sentenced to a term of supervised release.”⁴⁰⁵ Like probationers, parolees are supervised by a government agent, whether called a probation officer or parole officer.⁴⁰⁶

According to the Department of Justice, 4.7 million individuals were on probation and parole at the end of 2014.⁴⁰⁷ The number of

396. Monrad G. Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 110 (1966).

397. U.S. COURTS, *supra* note 395 (definition of “pretrial services”).

398. THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008-2010 4 (Jill Thomas & Morgan Young eds., 2012), <http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf>.

399. *Id.*

400. DANIELLE KAEBLE, LAURA M. MARUSCHAK, & THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2014 2 (2015), <http://www.bjs.gov/content/pub/pdf/ppus14.pdf>.

401. *Id.*; U.S. COURTS, *supra* note 395 (definition of “probation”).

402. U.S. COURTS, *supra* note 395 (definition of “probation”).

403. *Id.*

404. KAEBLE ET AL., *supra* note 400, at 2; U.S. COURTS, *supra* note 395 (definition of “parole”).

405. KAEBLE ET AL., *supra* note 400, at 2.

406. *Id.*

407. *Id.* at 1.

individuals on probation and parole has declined annually in recent years.⁴⁰⁸ Notwithstanding this decline, during the last thirty-plus years the population of those on supervision grew from approximately 1.2 million in 1980.⁴⁰⁹

Of those on probation at the end of 2014, 75% were male and 25% were female.⁴¹⁰ Fifty-four percent were white, 30% were Black, and 13% were Latino.⁴¹¹ Individuals convicted of felony crimes constituted 56% of probationers while 42% of probationers had been convicted of misdemeanors.⁴¹² Of the most serious offenses for which individuals were on probation, 28% were property offenses, 25% were drug offenses, and 19% were violent crimes.⁴¹³ Four percent of the most serious offenses were domestic violence.⁴¹⁴

Of those on parole at the end of 2014, males comprised 88% and females 12%.⁴¹⁵ Respecting race, 43% were white, 39% Black, and 14% Latino.⁴¹⁶ Fifty-six percent of parolees had been convicted of felony crimes while 42% for misdemeanors.⁴¹⁷ The most serious offenses for which individuals were on parole included drug offenses and violent offenses (each at 31%) followed by property crime (22%).⁴¹⁸

According to the Substance Abuse and Mental Health Services Administration (SAMHSA), of the estimated 5.3 million individuals on probation or parole from 2005 to 2008, an estimated 1.5 million lived with a child aged seventeen years or younger.⁴¹⁹

408. *Id.* at 2.

409. LAURA M. MARUSCHAK & ERIKA PARKS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2011 1 (2012), <http://www.bjs.gov/content/pub/pdf/ppus11.pdf>.

410. KAEBLE ET AL., *supra* note 400, at 5.

411. *Id.*

412. *Id.*

413. *Id.* at 5.

414. *Id.*

415. *Id.* at 7.

416. KAEBLE ET AL., *supra* note 400, at 7.

417. *Id.*

418. *Id.*

419. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., THE NSDUH REPORT: PARENTS ON PROB. OR PAROLE 1 (2010).

Slightly more than half (54.4 percent) of parents on probation or parole living with children were white, 23.8 percent were Hispanic, and 18.3 percent were [B]lack. . . . Parents on probation or parole tended to be younger and to have less education and lower incomes than their counterparts who were not on probation or parole.⁴²⁰

Parents on probation or parole were more likely to engage in binge alcohol use and illicit drug use and be dependent on alcohol or illicit drugs as compared to those parents not on probation or parole.⁴²¹

2. *How It Works*

Routinely, supervisees must comply with conditions during the term of supervision.⁴²² Supervising officers are charged with monitoring compliance with conditions, have authority to modify some conditions and request judicial modification of others, and can request that the court revoke supervision and order incarceration.⁴²³

Statutory mandatory conditions apply to all defendants, as appropriate. Mandatory conditions of federal probation include the following: do not commit another crime during probation; do not unlawfully possess a controlled substance; do not use a controlled substance and submit to drug testing unless there is a documented low risk of future substance abuse; pay restitution to victims or perform community service; for a domestic violence conviction participate in an approved offender rehabilitation program; pay court assessments; “notify the court of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution, fines, or special assessments;” comply with sex offender registration and DNA collection requirements; and adhere to a schedule for payment of court-ordered fines.⁴²⁴

420. *Id.* at 2.

421. *Id.*

422. KAEBLE ET AL., *supra* note 400, at 4.

423. *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973).

424. 18 U.S.C. § 3563(a) (2008).

Statutory discretionary conditions are individualized, meaning the court imposes them when appropriate to the circumstances of a particular case.⁴²⁵ Discretionary conditions of federal probation include the following: support dependents and satisfy family obligations; make restitution; maintain employment or pursue education or vocational training; refrain from occupations related to the conviction; do not associate with specified persons or frequent specified places; refrain from excessive use of alcohol or any use of controlled substances without prescription; refrain from possessing weapons; undergo mental health or substance abuse treatment; spend nights or weekends in custody as appropriate; reside at a halfway house as ordered; participate in community service; reside in or refrain from residing in a specific place; not leave the court's jurisdiction unless granted permission; report to a probation officer; allow the probation officer to visit at home or elsewhere the court specifies; promptly notify the probation officer of changes in address or employment, or arrest or questioning by law enforcement; answer the probation officer's questions; comply with a curfew which may be enforced by monitoring; satisfy child support obligations; be deported; consent to searches if a registered sex offender; and any other condition the court may impose.⁴²⁶

Inmates released from federal custody are also subject to mandatory and discretionary conditions for supervised release or parole, although the numbers of conditions are fewer than for probation.⁴²⁷ Statutory mandatory conditions of federal supervised release, or parole, include: not to commit another crime during probation; for a domestic violence conviction, to participate in an approved offender rehabilitation program; to comply with sex offender registration and DNA collection requirements; not to use a controlled substance; and to submit to drug testing unless there is a documented low risk of future substance abuse.⁴²⁸ Statutory discretionary conditions of federal supervised release include any

425. 18 U.S.C. § 3563(b).

426. *Id.*

427. U.S. COURTS, *supra* note 389, at 3.

428. 18 U.S.C. § 3583(d) (2015).

discretionary probation condition that can be ordered; deportation; and consent to searches if a registered sex offender.⁴²⁹

In its discretion, the federal judiciary also imposes additional conditions on all supervisees.⁴³⁰ These standard conditions establish basic behavioral expectations for the offender and minimum tools required by officers to adequately monitor the conduct and condition of all offenders under supervision.⁴³¹ These conditions include the following: report to a probation officer; promptly notify the probation officer of changes in address or employment, or arrest or questioning by law enforcement; do not leave the court's jurisdiction unless granted permission; support dependents and satisfy family obligations; maintain employment or pursue education or vocational training unless excused; for felonies, refrain from possessing weapons; allow the probation officer to visit at home or elsewhere at any time and permit seizure of contraband observed in plain view; refrain from excessive use of alcohol and the purchase, distribution, administration or use of controlled substances without prescription; do not visit places where controlled substances are illegally sold, distributed, administered, or used; do not associate with those engaged in criminal activities; do not associate with felons, unless granted permission; do not become a government informant without the permission of the court; pay any unpaid fine or restitution; and notify third parties of risks, permit the probation officer to make such notifications, and to confirm compliance.⁴³²

B. Conditioning Family Autonomy and Stability

Families are uniquely situated in the law, operating under special rules dictating family rights and responsibilities.⁴³³ In general terms, families are especially protected from public intervention, unless exceptional circumstances exist, and families are expected to operate

429. *Id.*

430. 18 U.S.C. § 3563(a).

431. U.S. COURTS, *supra* note 389, at 6.

432. 18 U.S.C. § 3563(b).

433. Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999).

like a discrete, self-sufficient entity and support members without benefit of market and public input, also with limited exception.⁴³⁴

Federal constitutional law recognizes the right of a family unit to privately and freely make decisions and conduct activities of daily living.⁴³⁵ State constitutional law, as well, recognizes family privacy.⁴³⁶ The protection of family actions and decision-making extends to such matters as who will live in the household, with whom family members will associate, what behavior occurs in private family space, and how the family will perform mutual caretaking functions.⁴³⁷ The privacy protection is designed to promote family harmony and stability by excluding interveners.⁴³⁸

In addition to constitutional familial privacy and liberty, the notion of family law privacy also captures the idea of privatization, meaning “the use of internal rather than external norms, and thus, the legal ability to control the rights and responsibilities that attach to any familial relationship.”⁴³⁹ The state prefers that family members privately support and care for each other rather than turning to the public for assistance.⁴⁴⁰ Thus, the state generally defers to family members’ choices and abilities respecting caretaking unless the public’s interest significantly outweighs the private interests of the family.

The expanded use of community supervision for individuals facing criminal charges and those serving supervisory sentences injects the state into the home causing tension with these family law rules and norms. Conditions of community supervision interfere with (1) family choices regarding cohabitation, (2) private family living spaces, (3) family relationships and caretaking efforts, (4) family stability, and (5) family loyalty. Similarly, family-based theories of

434. *Id.* at 1213.

435. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 464 (1972); Fineman, *supra* note 433, at 1213.

436. *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (marital living standards are familial matters inappropriate for judicial intervention and determination, so long as the household is maintained at a minimal level even if the marital couple is in disagreement); Fineman, *supra* note 433, at 1215.

437. Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1239, 1244 (1999).

438. Fineman, *supra* note 433, at 1216.

439. Cahn, *supra* note 437, at 1225.

440. *Id.* at 1227–30.

community supervision also significantly encroach upon these aspects of family life and family law.⁴⁴¹

1. Family Cohabitation: Residential (Dis)Approval

Constitutional law broadly protects—if not encourages—the choices of family members to live together and engage in mutual caretaking. In *Moore v. City of East Cleveland*, the United States Supreme Court declared unconstitutional a city ordinance limiting the ability of multi-generational, extended family members to live together in one house and providing criminal penalties for violations of the ordinance.⁴⁴² The Court stated that the choice of family members to live together is a fundamental right and that the right is not limited to nuclear families. The Court found the regulation to be intrusive and rejected the city's asserted interests in preventing overcrowding, congestion, excessive noise, increase in family strife, and strain on the public infrastructure as lawful bases on which to interfere with family living arrangement decisions.⁴⁴³

Individuals on community supervision, however, cannot freely choose to live with family. Supervision officials have authority to investigate a home—including its location and members—and approve or disapprove whether a supervisee may live in the residence during the period of supervision.⁴⁴⁴ Although an officer cannot remove a family member from a potential home, the officer can unilaterally deny a supervisee the right to live in a particular household based on the future possibility that residing in the home will pose problems of supervision.⁴⁴⁵

In some instances, an agent's decision to deny a supervisee the choice to live in a particular household can have negative repercussions.⁴⁴⁶ For example, Paul wanted to live with either his mother or his girlfriend in his old neighborhood, but his supervision

441. Klingele, *supra* note 34, at 1046, 1053; MULLINS & TONER, *supra* note 22, at 57.

442. *Moore v. City of E. Cleveland*, 431 U.S. 494, 497 (1977).

443. *Id.* at 513.

444. W. VA. R. JUV. P. 19; TEX. CODE CRIM. PROC. ANN. art. 42.12 (repealed 2017).

445. W. VA. R. JUV. P. 19.

446. Scott-Hayward, *supra* note 1, at 426.

officer told him he could not live in the neighborhood because that is where he would get into trouble.⁴⁴⁷ Instead, Paul lived in a three-quarter house, hoping his mom or girlfriend would soon move so he could live with one of them.⁴⁴⁸ This living circumstance separated Paul from positive family support, placed him in an unfamiliar location, and exposed him to individuals who could undermine his success.⁴⁴⁹ By refusing to let him live where he was comfortable, the officer might have actually placed Paul in a more precarious situation.

2. Family Living Spaces: Home Visits, Inspections, and Searches

The sanctity of the physical space occupied by families is constitutionally recognized. In *Griswold v. Connecticut*, Justice Douglas deemed “repulsive” the idea that we “[w]ould . . . allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.”⁴⁵⁰ In *Loving v. Virginia*, the Supreme Court declared unconstitutional longstanding restrictions on inter-racial marriage after law enforcement entered the home of Mildred and Gerald Loving at night, found them sleeping in their bedroom, and arrested them for violating Virginia’s anti-miscegenation statute.⁴⁵¹

Despite the legally recognized notion of a family sanctuary, community supervision may permissibly violate that space. As a condition of community supervision, officers can inspect and search homes without a warrant and may do so unannounced.⁴⁵² When agreeing to supervision conditions, often supervisees expressly relinquish the right to be free from searches.⁴⁵³ Additionally, they may also agree that officers can seize any contraband observed in plain view.⁴⁵⁴ Supreme Court doctrine authorizes warrantless

447. *Id.* at 448.

448. *Id.*

449. *Id.*

450. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)

451. *Martin*, *supra* note 133.

452. *Scott-Hayward*, *supra* note 1, at 435.

453. *Id.*

454. *Id.*

searches of persons on supervision when reasonable and related to supervision.⁴⁵⁵

For a period of time during the 1990s, police and probation agencies in some jurisdictions formed partnerships to perform home visits.⁴⁵⁶ The program in Boston was labeled Operation Night Light.⁴⁵⁷ Kansas City also developed a program by the same name.⁴⁵⁸ Probation officers and police officers conducted evening home visits when the probationers' immediate family also was home.⁴⁵⁹ The police officer was present to deal with safety and security issues that might arise.⁴⁶⁰ This partnership allowed law enforcement to enter homes without warrants and avoid the usual constraints.⁴⁶¹

Originally, home visits were designed to allow an officer to foster a close relationship with the individual being supervised.⁴⁶² Through visits, officers gained insight into offenders' lives and needs.⁴⁶³ Today, visits provide both the opportunity for an officer to offer rehabilitative services to a supervisee and to monitor behavior.⁴⁶⁴ "The assumption of home visits is that they help probation officers more readily detect probationers who are not following the conditions of their probation, so that they can act much faster to revoke probation in order to prevent a probation violator from future criminal conduct."⁴⁶⁵

Ultimately, home inspections and searches may result in criminal justice consequences not only for the supervisee but also for others

455. *Samson v. California*, 547 U.S. 843, 847 (2006) (authorizing suspicionless search of parolee who was subject to search as a condition of parole); *United States v. Knights*, 534 U.S. 112, 117 (2001) (permitting warrantless search of probationer); *Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987) (permitting warrantless search of probationer's residence).

456. Leanne Fiftal Alarid, *Perceptions of Probation and Police Officer Home Visits During Intensive Probation Supervision*, 79 FED. PROB. 11, 11 (2015).

457. *Id.*

458. *Id.* at 12.

459. *Id.* at 11.

460. *Id.*

461. *Id.*

462. Eileen M. Ahlin et al., *A Review of Probation Home Visits: What Do We Know?*, 77 FED. PROB. 32, 33 (2013) ("[M]odern probation originated as a means for law-abiding citizens to develop personal relationships with offenders and provide social services using a casework management model.")

463. *Id.* at 33–34.

464. *Id.* at 33.

465. Fiftal Alarid, *supra* note 456, at 11.

residing in the same home.⁴⁶⁶ Based on information or items an agent uncovers during an inspection or search, a supervisee may be charged with new criminal offenses or face the prospect of having supervision revoked.⁴⁶⁷ The family of supervisees may also face criminal charges for conduct observed within the home.⁴⁶⁸ Finally, when law enforcement is on the scene during a visit or inspection, police may immediately arrest and charge an individual for a criminal or supervision violation.⁴⁶⁹

3. Family Association: Prohibited Relationships and Travel Restrictions

Federal constitutional decisions implicitly endorse the rights and interests of family members to associate with each other.⁴⁷⁰ In *Moore v. East Cleveland*, the Supreme Court established the fundamental right of extended families to live together in one residence.⁴⁷¹ In *Troxel v. Granville*, the Court declared unconstitutional a broad third-party child visitation statute, but implicit in the Court's decision was that extended family members have an interest in establishing and developing relationships with each other.⁴⁷²

More expressly, constitutional law firmly establishes the rights of a parent to be involved in and make decisions concerning a child.⁴⁷³ In a series of cases, the United States Supreme Court has held that non-marital fathers who have established a substantial relationship with a child are entitled to be involved in the child's life and receive constitutional protection.⁴⁷⁴ Additionally, a non-custodial parent has

466. *Id.* at 16.

467. Scott Hayward, *supra* note 1, at 436.

468. Fiftal Alarid, *supra* note 456, at 11.

469. CAL. PENAL CODE § 3453(s) (West 2015); *see* Ballard v. State, 126 S.W.3d 919, 921 (Tex. Crim. App., 2004).

470. *See* Troxel v. Granville, 530 U.S. 57, 72–73 (2000); *Moore*, 431 U.S. at 499, 502.

471. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499, 502 (1977).

472. *See Troxel*, 530 U.S. at 72–73.

473. *Lehr v. Robertson*, 463 U.S. 248, 265–67 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392–93 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 257 (1978); *Stanley v. Illinois*, 405 U.S. 645, 648 (1972).

474. *Lehr*, 463 U.S. at 265–67; *Caban*, 441 U.S. at 392–93; *Quilloin*, 434 U.S. at 257; *Stanley*, 405 U.S. at 648.

a constitutional right to visit with a child.⁴⁷⁵ These protections extend even to parents who are under the control of the criminal justice system.⁴⁷⁶

Notwithstanding constitutional protections for family association, community supervision can at times limit these relationships. Conditions of probation restrict with whom a person can associate.⁴⁷⁷ Generally, individuals are barred from associating with individuals who have a felonious criminal history or who are engaged in criminal activities, unless granted permission.⁴⁷⁸ Additionally, depending on context, individuals can be barred from interacting with specific individuals.⁴⁷⁹

Officers must approve an individual's travel outside of the area of supervision.⁴⁸⁰ Factors warranting disapproval at the early stage of supervision are the security risks posed by the travel, non-compliance with conditions of supervision, and unmet case-related or family-related financial obligations.⁴⁸¹ These factors are to be balanced against the individual's need for travel to maintain or secure employment, acquire education, and strengthen family ties.⁴⁸² Similarly, in certain circumstances, conditions can prohibit a supervisee from traveling in certain neighborhoods or communities, even within the jurisdiction.⁴⁸³

Association and travel restrictions can prevent supervisees from establishing and maintaining family relationships.⁴⁸⁴ With respect to prohibitions on association, supervisees may be prevented from

475. See *Michael H. v. Gerald D.*, 491 U.S. 110, 112 (1989) (Stevens, J., concurring).

476. Cf. *Santosky v. Kramer*, 455 U.S. 745, 745 (1982).

477. 18 U.S.C. § 3563(b)(6) (2016); *United States v. Roy*, 438 F.3d 140, 144 (1st Cir. 2006) (special conditions of one's probation prohibiting contact or association with certain persons does not violate a defendant's First Amendment right of free association).

478. 18 U.S.C. § 3563(b)(6); *United States v. Craig*, 642 Fed. Appx. 632, 635–36 (8th Cir. 2016) (explaining that conditions prohibiting a defendant from associating with convicted felons are valid and merely modify the standard condition prohibiting contact or association with specific persons).

479. 18 U.S.C. § 3563(b)(6).

480. 18 U.S.C. § 3563(b)(14).

481. U.S. COURTS, *supra* note 389, § 460.55.30(d).

482. *Id.* § 460.55.30(b).

483. See *id.* § 460.20.

484. Maya Schenwar, *The Quiet Horrors of House Arrest, Electronic Monitoring, and Other Alternative Forms of Incarceration*, MOTHER JONES (Jan. 22, 2015, 7:21 PM), <http://www.motherjones.com/politics/2015/01/house-arrest-surveillance-state-prisons>.

visiting a family member, including a child, because of prohibitions on visiting certain neighborhoods or coming into contact with certain individuals.⁴⁸⁵ This is not uncommon in family violence cases.⁴⁸⁶ A no-contact order concerning parents may prevent a parent from visiting a mutual child unless special arrangements are made.⁴⁸⁷ Outside of the family violence context, an order to stay away from a particular neighborhood or area may prevent a supervisee from visiting the home of any family member who lives in that area.⁴⁸⁸ With respect to travel restrictions, one parolee wanted to spend time with her sister over the Thanksgiving holiday, but the sister lived outside of the jurisdiction and the officer would not authorize travel outside of the area.⁴⁸⁹ Similarly, another parolee wanted to visit a child who lived out of state but his supervising officer would not authorize the travel.⁴⁹⁰

4. Family Support: In-Office Reporting and Financial Penalties

Family law promotes intrafamilial caretaking of financial, physical, and social needs.⁴⁹¹ The United States Supreme Court has implicitly recognized that families share resources, responsibilities, and burdens not merely space and the costs of living.⁴⁹² Particularly respecting financial interdependence, legislative enactments and case

485. *United States v. Roy*, 438 F.3d 140, 142 (1st Cir. 2006) (condition of convicted sex offender's probation prohibited contact with his girlfriend who had a young child, unless given permission from probation officer).

486. Toolsi Gowin Meisner & Diana Korn, *Protecting Children of Domestic Violence Victims with Criminal No-Contact Orders*, STRATEGIES (AEquitas, Washington, DC), Apr. 2011, at 2; Catherine F. Klein & Leslye E. Orloff, *Providing Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 925–31 (1993).

487. *See id.*

488. Schenwar, *supra* note 484.

489. Jeffrey Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 774–75 (1987).

490. Scott-Hayward, *supra* note 1, at 448–449.

491. *See generally* William J. Howe & Elizabeth Potter Scully, *Redesigning the Family Law System to Promote Healthy Families*, 53 FAM. CT. REV. 361 (2015).

492. *See* U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (concluding that unrelated groups of individuals living together and arguably operating like a family did not satisfy the relevant definition of family for public benefits access). *Cf.* Moore v. City of E. Cleveland, 431 U.S. 494, 509 (1977) (endorsing ability of extended families to live together and care for each other).

law require interspousal support,⁴⁹³ parental child support,⁴⁹⁴ and familial support.⁴⁹⁵ With respect to caring for the physical needs of family members, federal law requires employers provide employees with leave, employment protections, and benefits to care for seriously ill spouses, children, and parents.⁴⁹⁶ Family law recognizes not only financial and physical support between family members, but also intrafamilial social support.⁴⁹⁷ State recognition of marriage endorses the view that spouses socially and emotionally support each other.⁴⁹⁸ Marital privilege laws are aimed at encouraging interspousal communication and harmony.⁴⁹⁹ Laws concerning child custody, parenting time, and parental visitation recognize that social interactions with children are a significant aspect of parenting.⁵⁰⁰

Community supervision stresses the legally enshrined norm of intrafamilial support. Community supervision routinely requires the payment of fines, fees, and court costs.⁵⁰¹ A court may impose a fine as part of a probationary sentence, or a probationary sentence may be ordered to allow an individual to pay a fine over time.⁵⁰² Whether an individual is on pretrial supervision, probation, or parole, fees and costs are often associated with case administration and with supervision.⁵⁰³ For example, an individual may be required to pay

493. *E.g.*, *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (spousal support during marriage); OHIO REV. CODE ANN. § 3103.03(C) (West 2008) (spousal support during marriage); *Alimony, Maintenance, and Other Spousal Support*, 50 *State Statutory Surveys: Family Law: Divorce and Dissolution*, 0080 SURVEYS 11 (West 2015).

494. *Turner v. Rogers*, 564 U.S. 431, 443 (2011); Thomas Reuters, *Determination of Child Support Required for High and Low Income Families*, 50 *State Statutory Surveys: Family Law: Child Custody and Support*, 0080 SURVEYS 4 (West 2015).

495. OR. REV. STAT. § 108.040(2) (2015).

496. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601(b)(2), 2612(a)(1)(C), 2614(a) (2016).

497. Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FLA. L.Q. 1, 28 (1990).

498. See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 230 (2004).

499. *Trammel v. United States*, 445 U.S. 40, 53 (1980); *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

500. Laurie S. Kohn, *Money Can't Buy Love: Valuing Contributions of Nonresidential Fathers*, 81 BROOK. L. REV. 53, 100–01 (2015).

501. Shapiro, *supra* note 251.

502. 18 U.S.C. § 3563(a) (2016).

503. Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 227 (2006); Shapiro, *supra* note 251.

fees for electronic monitoring, drug testing, or court-ordered program participation.⁵⁰⁴ Finally, interest and penalties accrue on unpaid fines, fees, and court costs.⁵⁰⁵ Ultimately, a fine that started relatively small may grow into thousands of dollars over time and can be converted into an enforceable debt if unpaid.⁵⁰⁶

Individuals on supervision—who are often low-income—face a difficult choice between paying financial obligations for their court cases and contributing financially to family caretaking.⁵⁰⁷ They may be able to make only minimal payments to the supervising agency.⁵⁰⁸ This circumstance may result in an extension of time on supervision and accrual of penalties for late or no payment.⁵⁰⁹ The end result is that families may have to forgo the financial contributions of a family member who has to make payments for community supervision.⁵¹⁰ Additionally, families may choose to contribute to the supervision costs of a family member, thereby further diminishing family resources.⁵¹¹

The Supreme Court has held that a court cannot revoke a probationary sentence and incarcerate an individual merely because that individual is genuinely unable to pay a fine.⁵¹² However, not all supervision officers adhere to or advise individuals of this rule.⁵¹³ According to a Human Rights Watch study, private probation officers have approached probationers' families—spouses, parents, and

504. Heller, *supra* note 503, at 277; Shapiro, *supra* note 251.

505. Shapiro, *supra* note 251.

506. Carrie Teegardin, *Georgia Probation Systems Ensnare Those Too Poor to Pay Traffic Fines*, SOUTHERN CTR. FOR HUM. RTS., https://www.schr.org/resources/georgia_probation_systems_ensnares_those_too_poor_to_pay_traffic_fines (last visited Sep. 21, 2016); Laurie Welch, *Probation Fees Show the High Cost of Being Poor*, WASH. TIMES (Aug. 30, 2014), <http://www.washingtontimes.com/news/2014/aug/30/probation-fees-show-the-high-cost-of-being-poor>; Shapiro, *supra* note 251.

507. Teegardin, *supra* note 506; Welch, *supra* note 506; Shapiro, *supra* note 251.

508. Teegardin, *supra* note 506.

509. *Id.*; Shapiro, *supra* note 251.

510. Teegardin, *supra* note 506; Welch, *supra* note 506.

511. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prison*, NAT'L PUB. RADIO NEWS (May 21, 2014, 5:01 AM), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>.

512. *Bearden v. Georgia*, 461 U.S. 660, 661 (1983).

513. HUMAN RIGHTS WATCH, *PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY* 68 (2014).

relatives—and coerced them into raising money to pay what the probationer owes.⁵¹⁴ The probation officer arranges for the arrest of a probationer who is behind on payments and then negotiates with family members to pay a good faith amount before the probationer is released.⁵¹⁵

Lastly, individuals on supervision must satisfy the condition of in-office reporting while also meeting ordinary activities of daily life such as work and family caretaking.⁵¹⁶ Individuals who are poor or on fixed incomes may be caught in a bind because they do not have the ability to hire childcare to allow for an in-office visit with a caseworker or take leave from work to make a required in-office visit.⁵¹⁷ Additionally, individuals who are able to make the visit may lose wages from work, or have less time to spend meeting family and other personal obligations.⁵¹⁸

5. Family Stability: Revocation and Incarceration

Family law rules aim to promote family stability, particularly when children are involved.⁵¹⁹ The Supreme Court has declared the marital family a stable family structure, an ideal situation in which to rear children.⁵²⁰ Statutory rules prefer that children remain in the custody of the parent who has continuously cared for the child and who is most stable,⁵²¹ and discourage changes in child custody in order to prevent disruption to the child's life.⁵²² Parental rights can be terminated when the parent has been absent from the child's life for an extended period of time.⁵²³

514. *Id.* at 51–52.

515. *Id.*

516. See Scott-Hayward, *supra* note 1, at 448–49.

517. Mark Osler, *Intensive Parenting and Banishment as Sentencing: Alternatives for Defendant Parents*, 22 FED. SENT'G REP. 44, 45 (2009) (proposing probation condition of “intensive parenting” in appropriate cases).

518. Scott-Hayward, *supra* note 1, at 448–49; Osler, *supra* note 517.

519. See *Obergefell v. Hodges*, 132 S. Ct. 2584, 2590 (2015).

520. See *id.* at 2600.

521. *E.g.*, O.C.G.A. § 19-9-3(a)(3)(G) (West 2016); O.C.G.A. § 19-9-3(a)(3)(H).

522. *E.g.*, O.C.G.A. § 19-9-3(b).

523. *E.g.*, O.C.G.A. § 19-8-11(a)(3) (West 2010) (parental rights may be terminated when a parent abandons a child or cannot be found).

Family destabilization is ubiquitous in the community supervision context. Individuals and families subject to community supervision continually face the threat that the caseworker will request that the court revoke the supervision because of non-compliance with a condition and sentence the supervisee to incarceration.⁵²⁴ When such a request is made, the court may issue a warrant allowing for the immediate, unannounced arrest of the individual.⁵²⁵ When the court orders revocation, the incarceration—which will likely begin immediately—may be for a short or an extended period of time, and the individual may be returned to supervision only to face the same threat again.⁵²⁶

The threat of incarceration looms over the family and the supervisee, causing stress.⁵²⁷ The supervisee has to continually be mindful to avoid possible violations of supervision conditions.⁵²⁸ Family members may worry that they have revealed information to an agent, leading to a violation.⁵²⁹ Everyone is concerned that a violation will result in incarceration and the supervisee's immediate removal from the family.⁵³⁰ Families affected by the lost wages of the incarcerated family member also bear the cost of legal fees; exorbitant phone bills; transportation, childcare and food expenses to visit an incarcerated family member; and money contributed to an inmate's jail or prison account.⁵³¹ Another family member might be forced to step into the absent parent's shoes.⁵³²

The stress of possible and actual incarceration is particularly damaging to children. Supervisees may avoid their children's homes or activities for fear of arrest.⁵³³ Children worry about the prospect of the arrest of a parent or family member, and their wellbeing is

524. Timothy P. Lydon, *Probation*, 87 GEO. L.J. 1734, 1741–42 (1999).

525. *Id.*

526. See 18 U.S.C. § 3565(a) (2002); Heller, *supra* note 503, at 227.

527. Klingele, *supra* note 34, at 1065.

528. *Id.* at 1035.

529. MULLINS & TONER, *supra* note 22, at 35.

530. Klingele, *supra* note 34, at 1035.

531. Meares, *supra* note 23, at 297.

532. Susan Phillips et al., *Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks*, 5 CRIM. & PUB. POL'Y 677, 679 (2006).

533. See GOFFMAN, *supra* note 3, at 31.

negatively affected by the observation of arrest.⁵³⁴ The actual incarceration of a parent poses additional harms. Government officials estimate that more than 50% of parents in state prison provided the primary financial support for their minor children.⁵³⁵ Children with at least one incarcerated parent are three times more likely to suffer from depression, two times more likely to suffer from anxiety and learning disabilities, and have higher rates of language problems, obesity, asthma, and seizure disorders.⁵³⁶ Some children suffer attachment difficulties, developmental regression, traumatic stress, and rejection of limits on behavior.⁵³⁷ These children are more often expelled or suspended from school⁵³⁸ and more likely to enter the juvenile justice system.⁵³⁹ The state may take into custody a child whose parent is incarcerated.⁵⁴⁰ Children who enter the foster care system suffer harms. They are more likely to have severe educational deficiencies,⁵⁴¹ show significant behavioral problems during and after placement, and internalize problems at higher levels.⁵⁴²

534. Susan D. Phillips & Jian Zhao, *Witnessing Arrests and Elevated Symptoms of Posttraumatic Stress: Findings from a National Study of Children Involved in the Child Welfare System*, 32 CHILD. AND YOUTH SERVICES REV. 1246, 1246 (2010); Yvonne Humanay Roberts et al., *Children Exposed to the Arrest of a Family Member: Associations with Mental Health*, 23 J. CHILD FAM. STUDIES 214, 215 (2014); Anthony Advincula, *Children Who Witness Parent's Immigration Arrest May Suffer Lifetime Health Consequences*, <http://www.centerforhealthjournalism.org/children-who-witness-parents-immigration-arrest-may-suffer-lifetime-health-consequences> (last visited Sept. 22, 2016).

535. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS: PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 (2008, rev. 2010).

536. Kristen Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 308 (2014).

537. DENISE JOHNSTON, CHILDREN OF INCARCERATED PARENTS 68, tbl5.6 (Katherine Gabel & Denise Johnston eds., 1995).

538. BRUCE WESTERN & BECKY PETTIT, THE ECONOMIC MOBILITY PROJECT & THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 5 (2010).

539. *Id.* at 18.

540. CREASIE FINNIE HAIRSTON, ANNIE E. CASEY FOUNDATION, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE 26 (2007).

541. See U.S. GEN. ACCT. OFFICE, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN 3 (1999), <http://www.gao.gov/assets/230/228309.pdf>.

542. Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 57 (2006).

C. *Commandeering Family Loyalty*

In recent years advocates and service providers have called for reform of community supervision to embrace a strengths-based, holistic, human services approach.⁵⁴³ Notably, Family Justice and the American Probation and Parole Association have partnered to propose the Family Support Approach for Community Supervision (FSA or Family Approach).⁵⁴⁴ A number of agencies have implemented the proposal.⁵⁴⁵

The FSA leverages a supervisee's family and social networks to prevent recidivism.⁵⁴⁶ "Family" is defined to include "blood relatives, friends, and other significant individuals who share a long-standing mutual sense of commitment and responsibility."⁵⁴⁷ The Family Approach acknowledges that those under supervision usually remain in or return to their communities and live with their families who can serve as informal mechanisms of control.⁵⁴⁸ Because families are familiar with supervisees, the Family Approach assumes that families can detect and react quickly to positive and negative behavior of supervisees.⁵⁴⁹

Implementation of the FSA requires that officers do more than simply talk with the family members of supervisees.⁵⁵⁰ Officers must (1) recognize that their clients are part of a larger network of family and adapt their lives depending on context, (2) build on a family's self-awareness and influence over family members, and (3) adopt a strengths-based perspective to bring about long-term change.⁵⁵¹

543. See, e.g., VERA INST., WHY ASK ABOUT FAMILY? A GUIDE FOR CORRECTIONS 1 (2011); CENTER FOR EFF. PUB. POL'Y, ENGAGING OFFENDERS' FAMILIES IN REENTRY 4 (2010).

544. MULLINS & TONER, *supra* note 22, at 7.

545. E.g., MULLINS & TONER, *supra* note 22, at 66–67 (Oklahoma Department of Corrections); TRIBAL LAW AND POLICY INSTITUTE, <http://www.wellnesscourts.org/events/?a=500> (last visited Sept. 26, 2016) (tribal probation personnel); U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, FAMILY INVOLVEMENT IN THE IMPROVING CHILD WELFARE OUTCOMES THROUGH SYSTEMS OF CARE INITIATIVE 7 (2010), https://www.childwelfare.gov/pubPDFs/FamilyInvolvement_Report.pdf (Children's Bureau Systems of Care Initiative).

546. MULLINS & TONER, *supra* note 22, at 2–3.

547. *Id.* at 29.

548. *Id.* at 2–3.

549. *Id.*

550. *Id.* at 5–7.

551. *Id.*

Supervision agents are instructed to learn as much as possible about a family and to use family members to determine compliance and noncompliance of those under supervision.⁵⁵²

The Family Approach deems information gathering necessary to facilitate risk level assessment, set case planning, and enforce obligations.⁵⁵³ Agents are instructed to gather information about family members including information such as who resides in the home, specific personal information about the residents,⁵⁵⁴ criminal history of each person, and information about the relationships between members of the household and family.⁵⁵⁵ The inquiry may also extend outside the home to gather information relating to communal social relationships and affiliations, including names of organizations and contact information.⁵⁵⁶ Finally, families are also asked to share information “about old hangouts or undesirable peers that should be avoided” and suggest motivational and counseling strategies.⁵⁵⁷

The creators of the Family Approach recognize that when gathering information about the family, agents should maintain confidentiality and privacy.⁵⁵⁸ Officers are reminded that families are not under supervision, so different privacy and confidentiality rules may apply to families in comparison to the individual under supervision.⁵⁵⁹ Officers are advised to let individuals and their families know what information may be shared, with whom, and how it might be used.⁵⁶⁰ Officers are told they can ask family members to sign releases to “ease information sharing issues.”⁵⁶¹ Officers are warned that external parties can subpoena supervision records

552. MULLINS & TONER, *supra* note 22, at 11.

553. *Id.* at 14.

554. *Id.* at 21 (names, gender, age, health status, marital status, educational background, alcohol and substance use/abuse, and occupation).

555. *Id.* at 30.

556. *Id.* at 31.

557. *Id.* at 33–34.

558. MULLINS & TONER, *supra* note 22, at 12.

559. *Id.* at 44.

560. *Id.*

561. *Id.* at 44, 51.

containing information about family members and use the information against family members.⁵⁶²

With this broad array of family information in hand, caseworkers make assessments about whether a family member-supervisee relationship is damaging, unhelpful, or “in need of repair.”⁵⁶³ Family members may be involved in gang activities or criminal behavior, addicted to drugs, have been victimized or mistreated previously by the supervisee, or may be emotionally taxed from trying to help on earlier occasions.⁵⁶⁴ In light of what is learned about the supervisee’s family, caseworkers predict whether a relationship will undermine success.⁵⁶⁵ Even if a supervisee is attached to a family member, the agent may encourage the elimination of the relationship if the individual is viewed as potentially jeopardizing supervision success.⁵⁶⁶

Finally, beyond information sharing, the Family Approach expects that families and other social networks will be involved in monitoring and enforcement.⁵⁶⁷ Family involvement may constitute simply being aware of the conditions of supervision, noticing warning signs of potential violations, and reminding the family member of the conditions.⁵⁶⁸ Though observing that some families may not want to share information with officers out of concern for the ultimate use of the information,⁵⁶⁹ the approach endorses caseworkers looking to family members to report possible or actual violations to supervision officers.⁵⁷⁰

The FSA creators recognize that involving families in monitoring and enforcement can pose loyalty concerns. Officers are warned to avoid creating scenarios in which the officer and the family are aligned against the supervisee.⁵⁷¹ Further, they are cautioned to avoid

562. *Id.* at 45.

563. *Id.* at 29.

564. MULLINS & TONER, *supra* note 22, at 17–18, 35–36.

565. *Id.* at 29–30.

566. *Id.* at 17–18, 35.

567. *Id.* at 38.

568. *Id.*

569. *Id.* at 39.

570. MULLINS & TONER, *supra* note 22, at 39.

571. *Id.*

situations in which the family uses the officer to “solve the family’s problems for them,”⁵⁷² or a family member asks the officer to share confidential information about the individual under supervision.⁵⁷³ In these circumstances, supervisees may grow to distrust family members rather than view or utilize them positively.

At first glance, the FSA seems entirely beneficial and benign; however, close inspection reveals otherwise. Drawing families into the supervision process invades family privacy, undermines family relationships, and destabilizes family loyalties.⁵⁷⁴ Agents gather large amounts of family information which may not remain private, discourage relationships that are negatively characterized, and encourage intrafamilial surveillance and external reporting.

IV. PROTECTING FAMILY LIFE AND AUTONOMY FROM COMMUNITY SUPERVISION

Scholars critiquing and seeking to reform community supervision have already proposed shorter terms, early release through good conduct or satisfaction of obligations, and individualized condition setting.⁵⁷⁵ Altering the theoretical approach of supervision officers should be added to that group of recommendations. Caseworkers presently adopt a crime control model of supervision.⁵⁷⁶ Traditionally, however, supervising agents employed a human services approach.⁵⁷⁷ Officials should return to that model in order to avoid undermining Black family life, promote the application of family law norms to Black families, and potentially enhance the situation of Black families in need.

Probation was originally conceived as an alternative to incarceration and as a means of rehabilitation; thus, probation

572. *Id.*

573. *Id.* at 44.

574. *Id.* at 39.

575. See Klingele, *supra* note 34, at 1015, 1061–63.

576. Andrew Horwitz, *The Costs of Abusing Probationary Sentences*, 75 BROOK. L. REV. 753, 759 (2010); Klingele, *supra* note 34, at 1028.

577. Scott-Hayward, *supra* note 1, at 431–32; Klingele, *supra* note 34, at 1022–30.

officers traditionally came from social work backgrounds.⁵⁷⁸ Like social workers, officers were trained to investigate and assess the factors contributing to a supervisee's criminal behavior, prepare reports to aid the court, and counsel and treat individuals.⁵⁷⁹ In contrast to prosecutors, judges viewed officers as objective government agents whose aim was to assist defendants.⁵⁸⁰

Beginning in the 1980s, a shift occurred.⁵⁸¹ Rather than approaching probation from a human services perspective—for example, social work, mental health, or education—many probation officers began to employ a criminal justice or crime control model of supervision.⁵⁸² Officers focused on the offense not the offender, strict adherence to the law, control and surveillance.⁵⁸³

Many explanations can be offered for the shift.⁵⁸⁴ The change in backgrounds of supervisees may be one reason for the shift. In the early era of probation, only a select population was afforded the opportunity for community supervision.⁵⁸⁵ Based on risk assessments, courts only placed on probation individuals who were deemed amenable to community supervision and close-contact rehabilitation programs.⁵⁸⁶ Over time, courts ordered probation for individuals with lengthier and more serious criminal histories, as well as significant substance abuse histories.⁵⁸⁷ These individuals were at greater risk of unsuccessfully completing probation.⁵⁸⁸ As a consequence, probation authorities may have shifted to a law enforcement model for personal and public safety reasons.⁵⁸⁹

578. Ahlin, *supra* note 462, at 33 (describing the history of probation and probation officers).

579. Williams v. New York, 337 U.S. 241, 549–50 (1949); Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 NO. 1 CRIM. LAW BULLETIN ART 2 (2010).

580. Williams, 337 U.S. at 549–50.

581. Ahlin, *supra* note 462, at 32 (describing the history of probation and probation officers).

582. Glass, *supra* note 579.

583. Ahlin, *supra* note 462, at 33 (describing the history of probation and probation officers).

584. Glass, *supra* note 579.

585. Ahlin, *supra* note 462, at 33.

586. *Id.* (describing the history of probation and probation officers).

587. Glass, *supra* note 579.

588. *Id.*

589. *Id.*

Another reason for the change may be negative research on the efficacy of corrections programs.⁵⁹⁰ In the late 1970s, researchers claimed corrections programs were not working.⁵⁹¹ The social services approach to probation was a predictable casualty of these research findings.⁵⁹²

Another factor precipitating change may have been an increase in caseloads.⁵⁹³ Over time, caseloads for supervision offices increased, while budgets did not.⁵⁹⁴ The result was higher caseloads per agent.⁵⁹⁵ Officers with higher caseloads had less time to devote to counseling and treatment, and consequently targeted their efforts on control and surveillance.⁵⁹⁶

A shift in the backgrounds of those who became probation officers offers some additional rationale for the shift in philosophy. Formerly, probation officers were trained in or worked in human services.⁵⁹⁷ Over time, more agents studied criminal justice, or previously worked as corrections or law enforcement agents.⁵⁹⁸

Another possible explanation is an official shift in the professional responsibilities of probation officers. Over time, Congress and federal agencies reclassified the responsibilities of officers.⁵⁹⁹ Probation officers were categorized as law enforcement officers charged with investigating, arresting, and detaining convicted individuals.⁶⁰⁰ They were granted authority to carry firearms, authorized to make arrests, and trained in law enforcement tactics.⁶⁰¹

A final explanation may be the “get tough on crime” era which shifted sentencing regimes from individualized, discretionary, indeterminate, rehabilitative sentences to mandatory, determinate,

590. See Ahlin, *supra* note 462, at 36.

591. *Id.*

592. *Id.*

593. Andrew Horwitz, *The Costs of Abusing Probationary Sentences*, 75 BROOK. L. REV. 753, 761 (2010).

594. *Id.*

595. *Id.*

596. Ahlin, *supra* note 462, at 33 (describing the history of probation and probation officers).

597. Glass, *supra* note 579.

598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.*

custodial sentences, particularly evidenced by the adoption of sentencing guidelines.⁶⁰² Under the guidelines, the facts underlying the offense and a defendant's criminal history were dispositive as to the sentence the court must impose.⁶⁰³ Judges were not to consider individual offender characteristics or the causes of criminal offending.⁶⁰⁴ Consequently, probation officers did not conduct extensive background investigations for the court.⁶⁰⁵ Relatedly, probation officers were no longer devoted to helping offenders; rather, they were focused on application of the guidelines and advising the court.⁶⁰⁶

Today, the federal probation system is configured as a hybrid system focusing on managing offender risks and rehabilitating offenders.⁶⁰⁷ Most state systems are likewise viewed.⁶⁰⁸ Officers simultaneously use skills from multiple disciplines including law enforcement and social work.⁶⁰⁹ Officers are instructed to use their investigative skills to plan for success rather than document failure.⁶¹⁰ Treatment and service are aimed at factors linked with criminal behavior such as substance abuse, mental health, employment, education and social networks.⁶¹¹

Even if the theoretical approach to community supervision has moved to a hybrid approach, additional pressure should be exerted to return it even closer to its human services roots. Legislatures should increase funding to supervision offices to hire more caseworkers and decrease individual agent caseloads. Agencies should hire officers trained extensively in human services not law enforcement. Policies and practices should promote rehabilitation of individuals or families,

602. See Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellow*, 104 YALE L.J. 933, 951 (1995).

603. *Id.* at 953.

604. *Id.*

605. *Id.* at 958.

606. *Id.*

607. U.S. COURTS, *supra* note 389, at § 140(c).

608. See *Supra* Part II.B.

609. U.S. COURTS, *supra* note 389, at § 140(d).

610. See Glass, *supra* note 579.

611. *Id.*

not surveillance and control. Services should be offered in a holistic manner focusing on individual and family needs.

Ideally, officers with greater resources and training to focus on rehabilitation and improvement in the human condition might feel less need to be restrictive. If agents adopt a positive approach to supervision rather than a negative one, they may not need to impose conditions and limitations that interfere with the ability of a supervisee to interact with family and engage in family caretaking. Additionally, agents may not need to rely on the family to help monitor and control the supervisee. In turn, individual and familial autonomy, caretaking, stability and loyalty may be improved, thereby reducing the stress on the family network.

Adoption of a human services approach will not necessarily cure the problem of significant intrusion into the lives of Black families. The child welfare system, juvenile delinquency system, domestic violence courts, and other accountability courts are all founded on human services and rehabilitative notions.⁶¹² These systems have all been critiqued for facilitating excessive intrusion into individual and family life, operating in punitive and quasi-punitive ways, and applying disproportionately to people of color.⁶¹³ Yet arguably these systems are the lesser evil to pure criminal justice oversight. Although supervision officers adopting a human services model may not be a panacea, it at least provides an opportunity to ameliorate the level of criminal justice intrusion into family life. A human services model used by officers is particularly useful when coupled with shorter sentences of supervision, individualized determinations of necessary conditions, and early release from supervision.

CONCLUSION

Legal scholarship exploring the intersection of family law and criminal and racial justice processes is underdeveloped. This neglect is surprising. Historically, public law has been a significant tool in

612. *See supra* Part I.

613. *Id.*

the regulation of families, especially Black families.⁶¹⁴ Over the last fifty years, government expansion of the criminal justice system has created circumstances in which criminal law, procedure, and policy once again directly and deeply intrude into Black family life.⁶¹⁵ The intrusion is so deep that Black families today find that family law for them has advanced very little in 300 years.

Family law teachers, scholars, and policymakers must acknowledge the substantial ways in which criminal justice intervenes in modern family law and family life. They must actively initiate conversations with students, practitioners, lawmakers, and policymakers regarding the myriad ways in which the modern criminal justice machinery significantly thwarts the aims of family law. Focusing on the entire regime, rather than isolated aspects such as mass incarceration or domestic violence or re-entry, reveals a far more troubling circumstance for family law and Black families.

The damage done to Black families by the criminal justice system is undeniable and the failure of family law to prevent or ameliorate that damage is unquestioned. That the system of family law for Black families has come full circle suggests that the system must be abolished and rebuilt. Incremental reform resulting in a repetition of history will be insufficient to eliminate any unfairness and inequality.

For many, however, the path of abolition and rebuilding is unacceptable. Thus, should the usual path of incremental reform be chosen, the ideal starting point is to focus on criminal justice matters most significantly affecting Black families. To that end, conversations on mass incarceration and Black families are well underway. Conversations attending to the impact of collateral consequences, crimmigration, and prisoner reentry on families have also begun.⁶¹⁶ Millions of individuals—a large portion of them Black—are on supervision, and millions more family members—including children—are substantially impacted by supervision.⁶¹⁷

614. See generally Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135 (1985) (explaining that public laws became a tool to regulate family life in the nineteenth century).

615. See *supra* Part II.A and Part II.F.

616. See *supra* Part II.

617. *Supra* Part III.A.1.

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This Article urges that interested parties should also pay serious attention to remediating the impact of community supervision on Black families and offers a modest proposal for reform. Finally, this Article calls for evaluation of other aspects of criminal justice expansion including over-criminalization of family matters, heavy use of fines and fees which redistribute monies from individuals and families to the state, the inclusion of juveniles in the criminal justice system which undermines family-centric child-rearing, and the impact of mass surveillance on family networks.