CRIMINAL LAW AS FAMILY LAW

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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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2. Id. at 449.
4. Id. at 31.
5. Id. at 31, 34; Scott-Hayward, supra note 1, at 448–49.
individuals than ever before. The expansion began with the proliferation of criminal statutes, generating the now-well-known concept of over-criminalization. The expansion also encompassed increasing the range of possible sanctions for criminal misbehavior and creating overlapping enforcement regimes. 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. A product of the expansion has been mass incarceration; more individuals than at any point in American history are now housed in correctional facilities.

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. 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. Legislatures have enacted new criminal laws targeting behavior between family members. Law enforcement and prosecutors directly and indirectly punish family members for the behavior of other family members. Courts can obtain jurisdiction over families who are the subject or target of criminal and quasi-criminal court proceedings. Corrections officials separate

6. Cf. Scott-Hayward, supra note 1, at 422.
12. Id.
13. Scott-Hayward, supra note 1, at 448–449.
14. Id.
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

19. Id. at 1274.
20. Id.
21. See id. at 1281.
between criminal justice and child welfare for Black mothers and families. Morrison has considered the racial aspects of intimate partner violence discourse and regulation. 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. Finally, reentry scholars examining the relationship between offender reintegration and family life focus on Black families. 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. 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. 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.
completes a custodial sentence.\textsuperscript{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.\textsuperscript{31} Agents and courts enforce compliance with these conditions by imposing sanctions for violations, including incarceration.\textsuperscript{32}

Policymakers have offered community corrections as a panacea to mass incarceration, freeing both individuals and governments from the costs of confinement.\textsuperscript{33} Community supervision is not without cost, though, and may not be the ideal solution it is portrayed to be.\textsuperscript{34} Community supervision disrupts family networks and restructures families in ways that are counter to preferences regarding family autonomy, stability, and loyalty.\textsuperscript{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.\textsuperscript{36} They make unannounced home visits and conduct warrantless searches of homes.\textsuperscript{37} Agents monitor whether or not supervisees are complying with obligations unrelated to their offense, such as familial and child support.\textsuperscript{38} To surveil and control individuals, officials gather personal family information collateral to the offense and rely on family members to report misbehavior.\textsuperscript{39} If ever an agent determines an individual is not in

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\item \textsuperscript{33} Michelle S. Phelps, The Paradox of Probation: Community Supervision in the Age of Mass Incarceration, 35 L. & Pol’y 51, 52 (2013).
\item \textsuperscript{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).
\item \textsuperscript{35} See infra Part III.
\item \textsuperscript{36} Scott-Hayward, supra note 1, at 426, 448.
\item \textsuperscript{38} 18 U.S.C. § 3563(b)(20) (2012).
\item \textsuperscript{39} Klingele, supra note 34, at 1037.
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compliance with conditions, the agent can ask the court to incarcerate and remove the individual from family life.  
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. 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. 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. 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. 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. This Part both generally maps the new criminal justice landscape and specifically identifies points

41. Roberts, supra note 18, at 1282.
42. See infra Part I.
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.\textsuperscript{46}

Part III uses community supervision as a case study to reveal the substantial way in which criminal justice intrudes into everyday family life.\textsuperscript{47} This Part begins by describing the practice of community supervision, including the various forms of supervision, numerical data, and the mechanics of supervision.\textsuperscript{48} This Part then specifically identifies how community supervision infiltrates family life and family autonomy and undermines family stability and loyalty.\textsuperscript{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.\textsuperscript{50} Modern approaches to supervision encourage officers to extract and leverage personal family information to control individuals and families.\textsuperscript{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.\textsuperscript{52} Doing so will ideally soften the negative impact of this criminal justice practice on Black family life.\textsuperscript{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.\textsuperscript{54}

\textsuperscript{46} Id.
\textsuperscript{47} See infra Part III.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.; MULLINS & TONER, supra note 22.
\textsuperscript{52} See infra Part IV.
\textsuperscript{53} Id.
\textsuperscript{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

56. Id. at 581.
57. Id.
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.\(^6^3\)

Hasday momentarily acknowledged the lack of attention paid by the canon to race and sexual orientation,\(^6^4\) 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.\(^6^5\) 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.”\(^6^6\) 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.\(^6^7\) Racial disparities affect substantive family law and procedures, as well as family outcomes.\(^6^8\) However, according to King, these disparities are unexamined.\(^6^9\) 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.\(^7^0\)

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*.\(^7^1\) While both cases clearly prohibit state-sponsored racial discrimination, they have been

\(^6^3\) Id. at 832, 892–98.
\(^6^4\) Id. at 854–60.
\(^6^5\) King, *supra* note 43, at 591.
\(^6^6\) Id. at 583.
\(^6^7\) Id. at 578–79.
\(^6^8\) Id. at 579.
\(^6^9\) Id.
\(^7^0\) Id.
\(^7^1\) 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. Family law scholars and practitioners have accepted this premise uncritically. Modern family law doctrine claims that families are autonomous, self-contained, legal entities. Legal scholars, too, have advanced this proposition. 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. The evolution of the familial right to privacy is discussed in race neutral terms.

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.” For example, the autonomous family is a myth for Black families. Historically, Black families had no control over family construction and autonomy and this status continues today. 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.

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72. Id. at 635.
73. Id. at 636.
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.
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.”

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. In those same texts, discussions of race center on the Indian Child Welfare Act or interracial adoption. 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. However, given the extent of the impact, racial bias must also play a role. As well, the law intentionally discriminates against Black families. In the context of child welfare, Davis and Roberts point out that the state has not been protective of the autonomy of Black families. The passage of the Multi-Ethnic Placement Adoption Act also represents an instance in which Black families were the subject of intentional discrimination. As Roberts argued, poor, Black, undeserving, pathological mothers were unfit and adoption was the remedy to prevent intergenerational transmission of pathological tendencies.

(72) (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.
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.¹¹ 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.¹²

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, matriarchy, 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

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¹¹ Id. at 580.
¹² Id. at 584–89.
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).
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.
104. Id.
105. Id.
Most legislative action in the family law context takes a civil approach to regulating family life and disputes.\textsuperscript{106} Relatedly, much of the family law doctrine is civil in nature.\textsuperscript{107} For example, premarital matters, such as gifts in contemplation of marriage or premarital agreements, are governed by contract or equitable principles.\textsuperscript{108} Marriages may be deemed invalid on the basis of fraud or duress.\textsuperscript{109} Contractual or equitable principles resolve conflicts arising from non-marital relationships, such as palimony.\textsuperscript{110} Civil courts and rules are used to determine parentage, divorce, property division, and child support cases.\textsuperscript{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.\textsuperscript{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.\textsuperscript{113} Historically, legislatures have imposed criminal penalties on family related behavior.\textsuperscript{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.\textsuperscript{115} In each of these contexts, the Court has confronted the issue of whether a government regulation imposing criminal penalties is constitutionally permissible.\textsuperscript{116}

\textsuperscript{106} Hasday, \textit{Canon}, supra note 58, at 850.  
\textsuperscript{107} Id.  
\textsuperscript{108} Id. at 834–35.  
\textsuperscript{111} Hasday, \textit{Canon}, supra note 58, at 875.  
\textsuperscript{112} Murray, \textit{supra} note 103.  
\textsuperscript{113} Id.  
\textsuperscript{114} Id. at 232.  
\textsuperscript{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

\(^{117}\) 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 162 (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.


\(^{121}\) *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. 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. The Court’s decision overturning their convictions is grounded in equal protection and due process. The decision barely mentions criminal justice concerns. 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.

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.

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.” The city advised Ms. Moore that one of her grandsons was “illegally” living in her home. She refused to cast out her grandson. In response, the city charged her with violating the ordinance.

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128. Id.
129. Id.
130. Id. at 2.
131. See id. at 12.
135. Id.
136. Id.
137. Id.
was convicted, sentenced to five days incarceration, and ordered to pay a $25 fine. In *Moore v. City of East Cleveland*, the Supreme Court declared the ordinance unconstitutional as a violation of due process. The Court characterized the regulation as “slicing deeply into the family itself” and “intrusive.” 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. 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. 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. 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. 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. They were convicted and appealed. The Court held Texas’s criminal statute that prohibited private adult consensual sex unconstitutional. The Court overruled *Bowers v. Hardwick* which had approved criminal regulation to channel sexual behavior. The Court rejected both direct and collateral criminal consequences for adult, private

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138. Id.
139. Id. at 499.
141. Id. at 499.
144. Id. at 562–63.
145. Id. at 563.
146. Id.
147. Id. at 578–79.
148. Id. at 578.
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. Examples of these circumstances include adultery crimes, under-age and incestuous marriage, family violence laws, and criminal child support non-compliance statutes.

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. Certainly, textbooks discuss the above-mentioned criminal laws and the related Supreme Court cases regulating family life. 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. 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. Furthermore, the texts do not discuss the myriad of other ways in which criminal justice now regulates family life which have been earlier described.

149. See Lawrence, 539 U.S. at 578–79.
151. id.
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.
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. The hallmarks of the criminal justice system include public condemnation, establishing culpability, and levying punishment. Criminal law enactments express strong disapproval of particular types of conduct. Criminal justice regulates wrongful behavior, aims to punish individuals for that behavior, and seeks to advance public safety and security. 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. 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. Scholars have addressed aspects of the intersection of criminal law and family law. Murray has...
explored the use of criminal law to regulate marriage, sex, and intimacy, as well as the use of criminal law and marriage to impose sexual discipline. Suk has written of the ways in which criminal domestic violence laws restructure family relations. Rich has considered how criminal child molestation statutes affect male caregiving for children, and Murray expanded the claim to mothers. Brito and Cammett have explored child support and incarceration, and Markel, Collins, and Lieb considered the role of a defendant’s “family ties” in the criminal justice system.

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


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.


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 164.

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

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 . . . .”

She opined that post-Reconstruction, this circumstance abated, but only minimally. The Black Codes seriously restricted the economic prospects of Blacks and Black families, encouraging the development of extended kinship networks. 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. However, Black families did not achieve full equality in the realm of family law.

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

At present, the breadth of the criminal justice system is unprecedented. More behavior now potentially forms the basis for criminal charges than ever before, resulting in the term “overcriminalization.” 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.
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. These phenomena have generated the terms “mass incarceration” and “collateral consequences,” respectively. Multiple enforcement regimes—sometimes working cooperatively—can impose criminal and quasi-criminal penalties for the same behavior. Government surveillance of individuals is pervasive and includes both human forms of surveillance and technology-based means. Juveniles are shunted at record pace into the criminal justice system, giving rise to the term “school-to-prison pipeline.”

Traditionally, the criminal justice system did not reach into family or family life, though there have been exceptions. 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.

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

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,
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.\(^\text{203}\) Just as public law rewrote family life and autonomy for Blacks during slavery and post-Reconstruction, criminal law continues to do so today.\(^\text{204}\)

### 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.\(^\text{205}\) 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.\(^\text{206}\) To this list, Podgor adds statutes that are broadly constructed and statutes that diminish culpability and \textit{mens rea} elements.\(^\text{207}\)

Both scholars\(^\text{208}\) and interest groups\(^\text{209}\) have offered critiques of the over-criminalization trend.\(^\text{210}\) 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.


\(^{206}\) Beale, supra note 11, at 748–749.


\(^{208}\) See, e.g., Beale, supra note 11, at 749; Steven D. Clymer, \textit{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;

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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.


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.


223. Id.


226. Amy Green, Acceptable Discipline or Criminal Abuse? What if Adrian Peterson Was a New
Parents who have excessively punished a child have been criminally prosecuted. Parental decisions and actions concerning a child’s education can be regulated by criminal charges. Parents are entitled to choose the institution that will provide the child’s education, whether public or private, religious or secular. Jurisdictions, however, have penalized parents who send their children to a school outside of the designated school district.

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. Some jurisdictions now impose parental liability on parents whose children are truant from school. Jurisdictions have also created statutes making parents liable for their children’s delinquent or criminal behavior.

Lastly, jurisdictions have criminalized intrafamilial financial malfeasance. Parents are obligated to financially support their...
children. Failure to satisfy this obligation can lead to civil penalties such as interest accrual, suspension of driving privileges or professional licenses, or contempt findings. In extreme cases, prosecutors file criminal charges for non-support of a child. With respect to public monies, prosecutors charge parents who unlawfully obtain family welfare benefits with welfare fraud.

B. Increased Sanctions

Jurisdictions not only significantly increased the number of crimes, but also the length of punishments and the variety of potential punishments. 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. Officials also lengthened sentences by restricting or eliminating early release and parole for inmates. Recent years have also seen the expansion of punishment options. Three common approaches emerged. First, governments

June 2015).


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%).

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).


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


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.


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.\textsuperscript{252} Courts sentence individuals convicted of low-level offenses to pay fines and fees, often substantial amounts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{255} For example, convicted sex offenders may be subject to geographic living restrictions preventing them from residing near schools or daycares.\textsuperscript{256} In the public housing context, jurisdictions have established a “one-strike rule.”\textsuperscript{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.\textsuperscript{258} Residential limits can force families to move from a prohibited location to a permissible location.\textsuperscript{259} Limits also require family members to bar or expel family members from the home or face repercussions.\textsuperscript{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.\textsuperscript{261}

\begin{footnotesize}
\begin{enumerate}
\item Id.; \textsc{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/1215cea_fine_fee_bail_issue_brief.pdf.
\item \textsc{Alexander, supra} note 171, at 151; \textsc{Council of Econ. Advisers, supra} note 252, at 2.
\item \textsc{Ga. State Bd. of Pardons and Paroles, supra} note 31.
\item Camila Domonoske, \textit{Denying Housing over Criminal Record may be Discrimination, Feds Say}, NPR (Apr. 4, 2016), http://www.npr.org/sections/thetwo-way/2016/04/04/472877872/denying-housing-over-criminal-record-may-be-discrimination-feds-say.
\item Amber L. Bagley, \textit{“An Era of Human Zoning” : Banishing Sex Offenders from Communities Through Residence and Work Restrictions}, 57 \textsc{Emory L.J.} 1347, 1348–49, 1382 (2008).
\item 42 U.S.C. \textsection 1437d(l)(6) (2013).
\item Bagley, \textit{supra} note 256, at 1384.
\item Id. at 171.
\end{enumerate}
\end{footnotesize}
Other collateral consequences prevent individuals from obtaining government financial benefits which in turn diminish their abilities to provide family support. An individual previously convicted of certain enumerated offenses may not receive Temporary Aid to Needy Families or other government benefits. Moreover, the bar may extend to innocent family members who would ordinarily be entitled to receive benefits. 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.

Collateral consequences impact family life by barring individuals from acting as caretaker of a family member who is in foster care or state custody. 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.

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. Providing financial support to family may have to give way to the criminal justice obligation, which can result in incarceration if unsatisfied. As well, family members may tax their own financial abilities in order to help another family member with monetary

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262. Id. at 178.
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.”).
268. ALEXANDER, supra note 171, at 151.
269. Id.
obligations.\textsuperscript{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.\textsuperscript{271}

C. Coextensive Enforcement

A trend in recent decades has been for governments to employ overlapping or hybrid enforcement regimes for criminal justice purposes.\textsuperscript{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.\textsuperscript{273} Prosecutors can also initiate civil asset forfeiture claims as their criminal cases develop.\textsuperscript{274} Asset forfeiture is deemed remedial, not punitive in nature.\textsuperscript{275} The individual from whom the assets are seized need not be suspected, arrested, or convicted of a crime.\textsuperscript{276} The seizure becomes permanent after a hearing or default.\textsuperscript{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.\textsuperscript{278}

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

\textsuperscript{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-64cd7e5a37dd#.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).

\textsuperscript{271} See infra Part III.

\textsuperscript{272} See Cammett, supra note 171, at 364.

\textsuperscript{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).

\textsuperscript{274} CHARLES DOYLE, CONG. RESEARCH SERV., 97–139, CRIME AND FORFEITURE, 5–12 (2015).

\textsuperscript{275} Ursery, 518 U.S. at 267 (1996).


\textsuperscript{277} See Doyle, supra note 274, at 25.


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. 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. For example, individuals can be placed on community supervision or sentenced to incarceration for failure to follow the conditions of the program. Additionally, unsuccessful resolution of these court matters can lead to the reinstatement of criminal cases.

A last version is the merging of previously separate regimes. The modern concept of “crimmigration” is particularly relevant here. Immigration violations historically were dealt with through the administrative process. Over time, the criminal justice process has been deployed in its place. 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.

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

280. Id.
282. Miller, supra note 281, at 1499 (sanctions for not following program guidelines results in potential termination from the program and imprisonment).
283. Id.
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, Crimmigration, 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. In *Bennis v. Michigan*, law enforcement seized a vehicle from a man who had been convicted of engaging in prostitution using the vehicle. The court ordered forfeiture of the vehicle. The man’s wife objected arguing that she was an innocent owner. Michigan did not permit a defense of innocent owner. The Supreme Court upheld the forfeiture, concluding the innocent owner defense is not constitutionally required. 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.

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. Courts addressing these concerns reach into the home and interfere with parents’ decisions and conduct with respect to child-rearing. 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. 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.

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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.
297. *Id.* at 1058.
The recent movement to develop new problem solving courts has extended the state’s reach into the home. In most large jurisdictions and many other smaller ones, courts that handle family violence cases have been erected. 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. 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. These courts also permit the state to dictate the conditions under which families and family members operate, and impose penalties for non-compliance.

Many criticisms have been lodged against crimmigration for its harsh impact on individuals and families. As individual family members are taken into custody and ultimately removed from the country, families are separated, sometimes permanently. 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. Beginning in January 2016, federal agents have taken parents and their children into custody for removal. 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.
304. Cram, supra note 220, at 78–79.
306. See Dreby, supra note 305, at 2.
307. See id.
government authorities will enter their home and arrest individuals, leading to removal and separation.\footnote{309} As with incarceration, the actual loss of a family member due to deportation disrupts social and financial networks.\footnote{310}

\section*{D. Juvenile Inclusion}

The criminal justice system is primarily reserved for adult offenders.\footnote{311} Over the last fifty years, however, legislators, police, and prosecutors have targeted children for criminal justice treatment in large numbers.\footnote{312} They have focused on youth behavior—both serious and low grade—whether in school, in public, or in the home.\footnote{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.\footnote{314} To further these goals, schools began to search students for contraband, drug test students, and implement strict discipline policies.\footnote{315} Students and their parents challenged many of these policies in courts, including the United States Supreme Court, and often failed to prevail.\footnote{316}

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

\begin{footnotes}
\item[309] See Dreby, supra note 305, at 2, 12.
\item[310] See id. at 13.
\item[313] AM. BAR ASS’N, supra note 311, at 5.
\end{footnotes}
impulsive Black teen males who would engage in serious violent crime and terrorize communities, particularly Black communities.\textsuperscript{318} In response, DiIulio advocated for increased penalties for—and incarceration of—youth.\textsuperscript{319} Jurisdictions took Dilullo’s prediction seriously, enacting criminal justice practices and policies that increased the number of juveniles subject to criminal prosecution and imposed harsh penalties.\textsuperscript{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.\textsuperscript{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.\textsuperscript{322} The trend is attributable to continued concern about youth misconduct generally, but also concern surrounding mass school shootings by students and others.\textsuperscript{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.\textsuperscript{324} More student behavior now supports immediate

\begin{footnotesize}
\begin{itemize}
\item 318. DiIulio, \textit{supra} note 317.
\item 319. \textit{William J. Bennett et al., Body Count} 16 (1996).
\item 320. Haberman, \textit{supra} note 317.
\item 324. See \textit{Losen & Skiba, supra} note 322, at 9.
\end{itemize}
\end{footnotesize}
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

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325. FABELO ET AL., supra note 322.
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.
were held in juvenile corrections facilities. In 2014, 5,235 youth were in adult jails and prisons. Black youth comprise the majority of those in custody. Data also indicates that Black youth are more likely to be subject to school discipline policies.

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. The separation means that children are not reared in family settings and communities by their parents and other prosocial networks. Instead, they are raised by corrections officials and other inmates. 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. 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

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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.
responsibilities of law enforcement. Laws have long-existed that require professionals working with children to report suspected child abuse and neglect. 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.

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. 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. 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.

In addition to extending mandatory reporting obligations, government also encourages individuals to monitor others and report suspicious, potentially criminal, behavior. Such encouragement extends not only to serious or violent criminal conduct but much less serious behavior leading to quasi-criminal sanctions. 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.

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

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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.


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


constantly monitor public housing communities—of which Blacks constitute the largest percentage of the population.\textsuperscript{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.\textsuperscript{355} Students, criminal suspects, and individuals convicted of crimes are drug tested.\textsuperscript{356} Criminal suspects and individuals convicted of crimes are ordered to submit DNA samples to government-maintained databases.\textsuperscript{357}

Modern technological advances in surveillance continue to be developed. Cities now use software to monitor, track, and pinpoint gunfire.\textsuperscript{358} Law enforcement officers routinely monitor social media to detect possible criminal activity.\textsuperscript{359} Data analytics have been used to "predict" crime and prevent violence.\textsuperscript{360} The collection of personal information for surveillance purposes is vast.\textsuperscript{361} The question remains whether citizens have the right to privacy, and if so, when it is permissible to invade that right.
applied to criminal justice concerns. By testing DNA specimens, government can identify possible suspects in kinship networks.

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. 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. These feelings are brought to bear on family life. Questions have been raised concerning whether child abuse hotlines actually help children. Familial DNA searching has also been criticized.

F. Mass Incarceration

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

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


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).


366. ALEXANDER, supra note 171, at 175.


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.\textsuperscript{370} Inmates and families may try to maintain their relationships through letters, phone calls, and visits, but significant barriers stand in their way.\textsuperscript{371} Inmate letters and phone calls are monitored.\textsuperscript{372} Corrections facilities charge excessive rates for phone calls.\textsuperscript{373} Inmates are often assigned to facilities far from their home.\textsuperscript{374} Families must spend large amounts of time and money to travel to visit their loved ones.\textsuperscript{375} When visits do occur, like letters and phone calls, they are heavily regulated.\textsuperscript{376} Physical contact is restricted, conversations are not private, and visits are limited in length.\textsuperscript{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.\textsuperscript{378} Most incarcerated parents are fathers, but the rate of maternal incarceration has been increasing.\textsuperscript{379} Children’s well-being is negatively impacted by the incarceration of a parent.\textsuperscript{380} Additionally, incarceration has intergenerational effects on economic
opportunity. Finally, as a legal matter, incarceration can lead to the termination of parent-child relationships. Facility regulations limit the ability of children of inmates to visit based on age of the child and closeness of the relationship. 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. In the extreme, an inmate’s parental rights may be terminated for lack of contact or relationship maintenance.

When criminal laws intrude into family life, family-related privacy and liberty interests are implicated. 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. Community supervision represents one facet of the contemporary

384. TRAVIS ET AL., supra note 371.
385. See sources cited supra, note 267.
386. Beale, supra note 11, at 767–68.
criminal justice system that significantly impacts family law and racial justice.\textsuperscript{388} Community supervision has three common purposes: protecting the public, rehabilitating supervisees, and promoting the fair administration of justice.\textsuperscript{389} Community supervision is designed to be beneficial to all involved parties.\textsuperscript{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.\textsuperscript{391} By using community supervision, jurisdictions are able to reduce their criminal justice expenditures per individual and overall.\textsuperscript{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.\textsuperscript{393} In each form, the philosophies and mechanics of supervision are similar.\textsuperscript{394} Pretrial release occurs in the early stages of a criminal case.\textsuperscript{395} When the government charges an individual with a criminal offense, the court determines whether or not the individual will be detained or


\textsuperscript{390} McGarry et al., supra note 388, at 4.


\textsuperscript{392} McGarry et al., supra note 388, at 9.

\textsuperscript{393} Id. at 5–6.

\textsuperscript{394} Id. at 6.

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

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

Probation and parole occur during the final stages of a criminal matter when a convicted individual serves his sentence. Probation occurs when the court sentences an individual convicted of a crime to a term of supervision within the community in lieu of incarceration. Often, the court will order the individual to report to a probation officer and comply with certain conditions. The individual remains in the community so long as the probationary conditions are satisfied. Parole occurs when a corrections inmate is released from incarceration after completing a portion or all of a court-imposed sentence of imprisonment. 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.”

Like probationers, parolees are supervised by a government agent, whether called a probation officer or parole officer. According to the Department of Justice, 4.7 million individuals were on probation and parole at the end of 2014.

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397. U.S. COURTS, supra note 395 (definition of “pretrial services”).
399. Id.
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.\footnote{408} Notwithstanding this decline, during the last thirty-plus years the population of those on supervision grew from approximately 1.2 million in 1980.\footnote{409}

Of those on probation at the end of 2014, 75% were male and 25% were female.\footnote{410} Fifty-four percent were white, 30% were Black, and 13% were Latino.\footnote{411} Individuals convicted of felony crimes constituted 56% of probationers while 42% of probationers had been convicted of misdemeanors.\footnote{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.\footnote{413} Four percent of the most serious offenses were domestic violence.\footnote{414}

Of those on parole at the end of 2014, males comprised 88% and females 12%.\footnote{415} Respecting race, 43% were white, 39% Black, and 14% Latino.\footnote{416} Fifty-six percent of parolees had been convicted of felony crimes while 42% for misdemeanors.\footnote{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%).\footnote{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.\footnote{419}

\footnote{408} Id. at 2.
\footnote{410} KAEBLE ET AL., supra note 400, at 5.
\footnote{411} Id.
\footnote{412} Id.
\footnote{413} Id. at 5.
\footnote{414} Id.
\footnote{415} Id. at 7.
\footnote{416} KAEBLE ET AL., supra note 400, at 7.
\footnote{417} Id.
\footnote{418} Id.
\footnote{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 Black. . . . 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.
Statutory discretionary conditions are individualized, meaning the court imposes them when appropriate to the circumstances of a particular case.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{428} Statutory discretionary conditions of federal supervised release include any

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{425} 18 U.S.C. § 3563(b).
\item \textsuperscript{426} Id.
\item \textsuperscript{427} U.S. COURTS, supra note 389, at 3.
\item \textsuperscript{428} 18 U.S.C. § 3583(d) (2015).
\end{enumerate}
\end{footnotesize}
discretionary probation condition that can be ordered; deportation; and consent to searches if a registered sex offender.\footnote{429}

In its discretion, the federal judiciary also imposes additional conditions on all supervisees.\footnote{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.\footnote{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.\footnote{432}

B. Conditioning Family Autonomy and Stability

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

\begin{itemize}
\item \footnote{429}{Id.}
\item \footnote{430}{18 U.S.C. § 3563(a).}
\item \footnote{431}{U.S. COURTS, supra note 389, at 6.}
\item \footnote{432}{18 U.S.C. § 3563(b).}
\item \footnote{433}{Martha Albertson Fineman, What Place for Family Privacy?, 67 GEO. WASH. L. REV. 1207, 1207 (1999).}
\end{itemize}
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.
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.
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.  
443. Id. at 513.  
444. W. VA. R. JUV. P. 19; TEX. CODE CRIM. PROC. ANN. art. 42.12 (repealed 2017).  
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. Instead, Paul lived in a three-quarter house, hoping his mom or girlfriend would soon move so he could live with one of them. 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. 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.” 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.

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. When agreeing to supervision conditions, often supervisees expressly relinquish the right to be free from searches. Additionally, they may also agree that officers can seize any contraband observed in plain view.

447. *Id.* at 448.
448. *Id.*
449. *Id.*
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.

457. Id.
458. Id. at 12.
459. Id. at 11.
460. Id.
461. Id.
463. Id. at 33–34.
464. Id. at 33.
residing in the same home. 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. The family of supervisees may also face criminal charges for conduct observed within the home. 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.

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. In Moore v. East Cleveland, the Supreme Court established the fundamental right of extended families to live together in one residence. 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.

More expressly, constitutional law firmly establishes the rights of a parent to be involved in and make decisions concerning a child. 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. 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.
472. See Troxel, 530 U.S. at 72–73.
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. These protections extend even to parents who are under the control of the criminal justice system.

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

Officers must approve an individual’s travel outside of the area of supervision. 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. These factors are to be balanced against the individual’s need for travel to maintain or secure employment, acquire education, and strengthen family ties. Similarly, in certain circumstances, conditions can prohibit a supervisee from traveling in certain neighborhoods or communities, even within the jurisdiction.

Association and travel restrictions can prevent supervisees from establishing and maintaining family relationships.
visiting a family member, including a child, because of prohibitions on visiting certain neighborhoods or coming into contact with certain individuals. A no-contact order concerning parents may prevent a parent from visiting a mutual child unless special arrangements are made. 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. 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. Similarly, another parolee wanted to visit a child who lived out of state but his supervising officer would not authorize the travel.

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

Family law promotes intrafamilial caretaking of financial, physical, and social needs. The United States Supreme Court has implicitly recognized that families share resources, responsibilities, and burdens not merely space and the costs of living. 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).
487. See id.
488. Schenwar, supra note 484.
490. Scott-Hayward, supra note 1, at 448–449.
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,\textsuperscript{493} parental child support,\textsuperscript{494} and familial support.\textsuperscript{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.\textsuperscript{496} Family law recognizes not only financial and physical support between family members, but also intrafamilial social support.\textsuperscript{497} State recognition of marriage endorses the view that spouses socially and emotionally support each other.\textsuperscript{498} Marital privilege laws are aimed at encouraging interspousal communication and harmony.\textsuperscript{499} Laws concerning child custody, parenting time, and parental visitation recognize that social interactions with children are a significant aspect of parenting.\textsuperscript{500}

Community supervision stresses the legally enshrined norm of intrafamilial support. Community supervision routinely requires the payment of fines, fees, and court costs.\textsuperscript{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.\textsuperscript{502} Whether an individual is on pretrial supervision, probation, or parole, fees and costs are often associated with case administration and with supervision.\textsuperscript{503} For example, an individual may be required to pay

\textsuperscript{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).


\textsuperscript{495} OR. REV. STAT. § 108.040(2) (2015).

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

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


\textsuperscript{501} Shapiro, supra note 251.

\textsuperscript{502} 18 U.S.C. § 3563(a) (2016).

fees for electronic monitoring, drug testing, or court-ordered program participation.\textsuperscript{504} Finally, interest and penalties accrue on unpaid fines, fees, and court costs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{507} They may be able to make only minimal payments to the supervising agency.\textsuperscript{508} This circumstance may result in an extension of time on supervision and accrual of penalties for late or no payment.\textsuperscript{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.\textsuperscript{510} Additionally, families may choose to contribute to the supervision costs of a family member, thereby further diminishing family resources.\textsuperscript{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.\textsuperscript{512} However, not all supervision officers adhere to or advise individuals of this rule.\textsuperscript{513} According to a Human Rights Watch study, private probation officers have approached probationers’ families—spouses, parents, and

\begin{itemize}
\item \textsuperscript{504} Heller, supra note 503, at 277; Shapiro, supra note 251.
\item \textsuperscript{505} Shapiro, supra note 251.
\item \textsuperscript{507} Id.; Teegardin, supra note 506; Welch, supra note 506, Shapiro, supra note 251.
\item \textsuperscript{508} Id.; Teegardin, supra note 251.
\item \textsuperscript{509} Id.; Shapiro, supra note 251.
\item \textsuperscript{510} Teegardin, supra note 506; Welch, supra note 506.
\item \textsuperscript{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.
\item \textsuperscript{512} Bearden v. Georgia, 461 U.S. 660, 661 (1983).
\item \textsuperscript{513} HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 68 (2014).
\end{itemize}
relatives—and coerced them into raising money to pay what the probationer owes. 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.

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. 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. 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.

5. Family Stability: Revocation and Incarceration

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

514. Id. at 51–52.
515. Id.
516. See Scott-Hayward, supra note 1, at 448–49.
520. E.g., O.C.G.A. § 19-9-3(b).
521. 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. When such a request is made, the court may issue a warrant allowing for the immediate, unannounced arrest of the individual. 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.

The threat of incarceration looms over the family and the supervisee, causing stress. The supervisee has to continually be mindful to avoid possible violations of supervision conditions. Family members may worry that they have revealed information to an agent, leading to a violation. Everyone is concerned that a violation will result in incarceration and the supervisee’s immediate removal from the family. 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. Another family member might be forced to step into the absent parent’s shoes.

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. Children worry about the prospect of the arrest of a parent or family member, and their wellbeing is

525. Id.
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.
533. See GOFFMAN, supra note 3, at 31.
negatively affected by the observation of arrest. 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. 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. Some children suffer attachment difficulties, developmental regression, traumatic stress, and rejection of limits on behavior. These children are more often expelled or suspended from school and more likely to enter the juvenile justice system. The state may take into custody a child whose parent is incarcerated. Children who enter the foster care system suffer harms. They are more likely to have severe educational deficiencies, show significant behavioral problems during and after placement, and internalize problems at higher levels.


537. Denise Johnston, Children of Incarcerated Parents 68, tbl5.6 (Katherine Gabel & Denise Johnston eds., 1995).


539. Id. at 18.


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.\(^{551}\)


\(^{544}\) Mullins & Toner, supra note 22, at 7.


\(^{546}\) 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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{564} In light of what is learned about the supervisee’s family, caseworkers predict whether a relationship will undermine success.\textsuperscript{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.\textsuperscript{566}

Finally, beyond information sharing, the Family Approach expects that families and other social networks will be involved in monitoring and enforcement.\textsuperscript{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.\textsuperscript{568} Though observing that some families may not want to share information with officers out of concern for the ultimate use of the information,\textsuperscript{569} the approach endorses caseworkers looking to family members to report possible or actual violations to supervision officers.\textsuperscript{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.\textsuperscript{571} Further, they are cautioned to avoid

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\textsuperscript{562} Id. at 45. \\
\textsuperscript{563} Id. at 29. \\
\textsuperscript{564} MULLINS & TONER, supra note 22, at 17–18, 35–36. \\
\textsuperscript{565} Id. at 29–30. \\
\textsuperscript{566} Id. at 17–18, 35. \\
\textsuperscript{567} Id. at 38. \\
\textsuperscript{568} Id. \\
\textsuperscript{569} Id. at 39. \\
\textsuperscript{570} MULLINS & TONER, supra note 22, at 39. \\
\textsuperscript{571} Id.
\end{flushleft}
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.
officers traditionally came from social work backgrounds. 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. In contrast to prosecutors, judges viewed officers as objective government agents whose aim was to assist defendants.

Beginning in the 1980s, a shift occurred. 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. Officers focused on the offense not the offender, strict adherence to the law, control and surveillance.

Many explanations can be offered for the shift. 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. Based on risk assessments, courts only placed on probation individuals who were deemed amenable to community supervision and close-contact rehabilitation programs. Over time, courts ordered probation for individuals with lengthier and more serious criminal histories, as well as significant substance abuse histories. These individuals were at greater risk of unsuccesfully completing probation. As a consequence, probation authorities may have shifted to a law enforcement model for personal and public safety reasons.

578. Ahlin, supra note 462, at 33 (describing the history of probation and probation officers).
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. In the late 1970s, researchers claimed corrections programs were not working. The social services approach to probation was a predictable casualty of these research findings.

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

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. Over time, more agents studied criminal justice, or previously worked as corrections or law enforcement agents.

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. Probation officers were categorized as law enforcement officers charged with investigating, arresting, and detaining convicted individuals. They were granted authority to carry firearms, authorized to make arrests, and trained in law enforcement tactics.

A final explanation may be the “get tough on crime” era which shifted sentencing regimes from individualized, discretionary, indeterminate, rehabilitative sentences to mandatory, determinate,
custodial sentences, particularly evidenced by the adoption of sentencing guidelines. Under the guidelines, the facts underlying the offense and a defendant’s criminal history were dispositive as to the sentence the court must impose. Judges were not to consider individual offender characteristics or the causes of criminal offending. Consequently, probation officers did not conduct extensive background investigations for the court. Relatedly, probation officers were no longer devoted to helping offenders; rather, they were focused on application of the guidelines and advising the court.

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

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,

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. 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. 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

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612. See supra Part I.
613. Id.
the regulation of families, especially Black families. 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. 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. Millions of individuals—a large portion of them Black—are on supervision, and millions more family members—including children—are substantially impacted by supervision.

615. See supra Part II.A and Part II.F.
616. See supra Part II.
617. Supra Part III.A.1.
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.