

BOOK REVIEW

THE ROLE OF THE FAMILY IN CRIMINAL LAW

PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE
OF FAMILY TIES. DAN MARKEL, JENNIFER M. COLLINS &
ETHAN J. LEIB. OXFORD UNIVERSITY PRESS, 2009.

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INTRODUCTION

The authors of *Privilege or Punish (PoP)* pose two questions, one descriptive and the other morally evaluative. “First, how *does* the criminal justice system in this country approach the issue of family status? Second, how *should* family status be recognized, if at all, in a criminal justice system situated within a liberal democracy committed to egalitarian principles of nondiscrimination?”¹

PoP divides the realm of “family status” into the “benefits” and “burdens” of “family ties.”² The former include evidentiary privileges and domestic violence statutes, and some concessions predicated upon family status in pretrial release, sentencing, and prison administration. The latter are entirely substantive crimes. These “burdens” include sexual acts long understood to be subversive of the family (bigamy, incest, and adultery), and familial duties unrelated to sexual morality, such as supporting indigent parents and dependent children.³ Another “burden” is the legal obligation to rescue family members from danger.⁴

The descriptive side of *PoP* is not quantitative. The authors expressly decline one pertinent data collection project: meas-

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1. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES*, at xiii (2009) (emphasis added).

2. *Id.*

3. *Id.* at xviii.

4. *Id.*

uring the “indirect” cultural and economic effects upon families of criminal justice practices that do not explicitly depend upon family status, such as sentences of extended incarceration.⁵ They consider instead what they term “distinctively purposeful practices,”⁶ “explicit legislative or judicial choices,” and “laws expressly drawn to privilege or disadvantage persons based on family status alone.”⁷

The authors purport to focus upon “facial benefits and burdens,”⁸ yet they do not attempt to measure these elements. They do not investigate, for example, how many prosecutions there are annually for adultery. They do not measure the practical effects of “explicit” family benefits like the marital evidentiary privilege.⁹ But the value of *PoP* does not ultimately depend upon the criteria of success appropriate to social science.

Nor does *PoP* rise or fall as conventional legal analysis. Its subject matter is a handful of family-sensitive statutes. The authors’ selection is unexceptional. There is no significant case-crunching in the book and almost no legal history.

The authors describe their work as “synthetic.”¹⁰ They see it as an effort to construct an analytical “framework” for critical evaluation, so that “policymakers” might better reflect upon their choices, which “have been insufficiently analyzed in a synthetic manner by academics before this project.”¹¹ *PoP* is relentlessly philosophical. It is mainly a work of moral philosophical evaluation, a sustained normative critique of “family ties” in criminal justice.

PoP’s moral evaluations are bold. The authors judge that all the “family ties benefits” they examine should be modified or abolished. Some “can remain viable in a liberal criminal justice system so long as these benefits are extended more broadly on the basis of relationships of caregiving, rather than arbitrary familial status.”¹² On the “burdens” side, the authors would decriminalize the sex crimes (though they remain “divided” on

5. *Id.* at xiv.

6. *Id.*

7. *Id.* at xv.

8. *Id.*

9. *Id.* at xv–xvi.

10. *Id.* at xv.

11. *Id.*

12. *Id.* at 150.

certain “sub-issues” involving incest).¹³ They oppose most of the other family ties burdens they examine.¹⁴ They also oppose the family itself, because it is “gendered, and otherwise unjustifiable.”¹⁵ The family is, morally speaking, very bad news.

PoP's success plainly depends, then, upon the soundness of the normative criteria that undergird its sharp judgments. Much of this Review accordingly focuses upon their normative apparatus. I argue that this apparatus is, for the most part, question-begging, vague, or simply mistaken.

But here is an important caveat: identifying the authors' normative criteria is both easy and hard. It is easy insofar as the authors' expressions of moral evaluative terms are frequent and easily located on the page. The authors could scarcely be more explicit, for example, about the “four normative cost[s]” of family ties benefits in the criminal justice system.¹⁶ But identifying the authors' normative criteria is hard insofar as what the authors mean by many of these expressions is elusive, vague, and seemingly clichéd. Harder still is figuring out the relationship among the authors' ensemble of interdependent and mutually supporting moral norms.

The problem is apparent from the quotations in the first paragraph of this Review. The authors ask: “[H]ow should family status be recognized, if at all, in a *criminal justice* system situated within a *liberal democracy* committed to *egalitarian principles of nondiscrimination*?”¹⁷ The added emphasis here indicates several conceptually dense threads of moral justification tethered together. In the one sentence we have: first, the moral norms endemic to the criminal justice system itself; second, the moral norms associated with a certain political form (“democracy”), overlaid with those involved with a particular political morality (“liberal[ism]”); and third, additional free-standing norms of justice, namely, equality and nondiscrimination. The authors rely very heavily, too, upon another free-standing moral norm, one not plainly visible in the quoted sentence, namely, “autonomous” individual choice of affectionate relations.

13. *Id.*

14. *Id.*

15. *Id.* at 25.

16. *Id.*; see *infra* Parts III & V.

17. MARKEL ET AL., *supra* note 1, at xiii (emphasis added).

The opening parts of this Review make the most coherent sense possible of the authors' complex normative system. I have sorted out the norms and evaluated them independently. I have also tried to explain how and where the authors' various fusions of norms work and where they do not.

Part I disposes of two rhetorical strategies in *PoP* that can be isolated from the authors' wider justificatory framework. These strategies are meant to bear the burden of argument. But neither is an argument. The first is the authors' repeated attempts to buttress their moral critique of the family by appeal to the readers' biases, not to their critical judgment. The second is the authors' futile attempt to occupy the commanding heights of moral "neutral[ity]." ¹⁸

Part II affirms the authors' view that liberty and equality are the moral pillars of the criminal justice system. The authors mistakenly conclude, however, that these foundations support a presumption against family predicates in that system. Their mistake is to overstate the role of coherence in reasoning about legal practices. This Part also argues, dialectically, that granting the authors' presumption against family "status" would undermine countless other (that is, non-familial) criminal justice "status" predicates that no one seriously questions.

Part III is the first installment of my critique of the authors' package of four "normative" criteria. These criteria include two "costs" specific to criminal justice. These costs are, first, whether family ties "undermine the pursuit of accuracy in the effective prosecution of the guilty and the exoneration of the innocent (thus, possibly leading to unwarranted harshness or leniency in the administration of justice)," and second, whether family ties "tend to incentivize more crime and more *successful* crime."¹⁹ No one disputes the legitimacy of the latter of these criteria, which does not pull justificatory weight in *PoP* anyway. It is a redundant makeweight. The former is two-sided: "accurate" conviction of the guilty and "accurate" exoneration of the innocent. But this axiom about "accurate" convictions is seriously mistaken. It ignores the complex relationship between the moral norm of just deserts and the overall common

18. *See id.* at xvii.

19. *Id.* at 25.

good of political society, a relationship at the heart of any sound understanding of criminal justice.

Part IV takes my investigation deeper into the authors' evaluative matrix. Here I try to describe and evaluate the distinctive contribution of political theory to the authors' overall argument—basically what they seek to accomplish by their frequent adjectival use of “liberal” (as in “liberal democracy” and a “liberal state”).²⁰ My judgment is that these “liberal” usages are unsuccessful. They are vague, redundant, question-begging, or mistaken. This part also suggests that the authors assign greater moral value to individual “autonomous” choice in the family context than their evidence and arguments warrant.

Part V is the second installment of my “package” critique. The remaining two “normative costs” are exogenous to criminal justice and support the authors' rejection of the family on broad—that is, not specific to criminal justice—moral grounds. The argument is that, first, family status has “historically facilitate[d] gender hierarchy” and, second, that family status “disrupt[s] our egalitarian political commitments to treat similarly situated persons with equal concern and discriminate[s] against those without families recognized by the state.”²¹ The family is, according to *PoP*, inegalitarian, sexist, and insufficiently inclusive of other personal ties that the authors consider to be “family.” The authors do not so much establish as assume the validity of these norms. They are apparently ignorant of the radical mutuality and equality upon which the family is, in truth, founded, and they do not take full account of how their radical interjection of strong autonomy values into family life would affect personal well being and, even, autonomy. Finally, Part VI sketches how we could better analyze family status in the criminal justice system.

I. THE INADEQUACIES OF RHETORIC

In *PoP* the authors seek rhetorical advantages without argument in two different ways. One is their appeal to the readers' biases, rather than to their reason, for affirmation of important claims. The authors assert that family ties benefits and burdens

20. See, e.g., *id.* at xiii, 94.

21. *Id.* at 25.

are suspect because the “traditional state-sanctioned” family is oppressive.²² These scare-quote locutions not only distance the authors from the highlighted entity (indicating that it is *someone else’s* idea of the family, not *theirs*), but also indicate that the prevailing “family” owes its place to power (“state-sanctioned”), history (“traditional”), or the fact of being favored (“recognized”), rather than to reason.

The authors sometimes make their misguided appeals even more explicit. They attribute support for contrary positions to emotion (“distaste,” “the ‘disgust factor’”)²³ or to religion (which they clearly presume to be a non-cognitive phenomenon). The authors say that the criminal justice system “should treat citizens’ interests with equal concern, without fear or favor based on morally *arbitrary* characteristics like family status.”²⁴ In other words, the “traditional” family is not defensible in the light of critical reflection. The authors propose to “reorient[] the criminal law of family ties burdens around a conception of voluntarily assumed obligations of caregiving,”²⁵ a “conception” that would avoid a “reflexive resort to familial status alone.”²⁶ But the authors do not explain why such “resort” is thoughtless and “reflexive.”

Second, a recurring criticism in *PoP* of the status quo is that “the state necessarily is making express normative judgments regarding who counts as family and who does not.”²⁷ The authors’ corrective is to “redesign[] all family ties intersections with the criminal justice system in family-neutral terms.”²⁸ Again, present practices “enmesh[] the state in an expressly normative dispute over who counts as family and who does not,”²⁹ a matter that, they say, is “highly contested.”³⁰ The authors are determined “to refrain from defining the family in the criminal justice system because the criminal law should generally be drafted in terms that are neutral to the status of a family

22. See, e.g., *id.* at 44, 117.

23. *Id.* at 120, 126.

24. *Id.* at 29 (emphasis added).

25. *Id.* at xx.

26. *Id.* at xix.

27. *Id.* at 21.

28. *Id.* at 36.

29. *Id.* at 84.

30. *Id.* at 150.

member.”³¹ They would not “align the criminal justice system with any particularly partisan conception of what the family is and who belongs to it.”³²

But the position that the state should remain “neutral” about what counts as a family is a normative claim. It is not itself “neutral.” Between the position that the state ought to define the family according to (let us say simply) the perceived moral truth about the family, and the position that the state ought to define the family in (again, simply) a more functional way,³³ no moral neutrality is possible. Each proposed position is a normative proposal. The choice between them is inevitably a choice between competing moral options.

There is no nonmoral metric of choice between the authors’ proposal to make choice and voluntarily assumed commitments the core of the family,³⁴ and the position that a biological matrix establishes important connections among persons in a “family.” Saying that the state ought not to define the family in any way that causes “controversy,” or that seems to some people to be “partisan,” is itself a “controversial” and “partisan” point of view.

The authors’ proposals in *PoP* are serious and their arguments deserve sober consideration. But merely styling one’s own choices as “neutral” is not an argument. It is not even an available option.³⁵

II. LIBERTY AND EQUALITY DO NOT REQUIRE IGNORING FAMILY STATUS

PoP often describes its normative foundations modestly, expressly limiting them to the moral implications and entailments of the criminal law and its just administration. They dis-

31. *Id.* at 157 n.19.

32. *Id.* at xx.

33. The authors would substitute caregiving “function” for “status.” *Id.* at 36.

34. The authors aim to supplant traditional, state-sanctioned family status with a “conception of voluntarily assumed obligations of caregiving.” *Id.* at xx.

35. In one apparent concession to their opponents’ rationality, the authors say that those favoring incest laws “may be sincerely motivated by religious views or other comprehensive moral views.” *Id.* at 212 n.78. But rather than deal critically with these viewpoints, the authors declare them illegitimate: “[I]n a liberal society sensitive to the rights of minorities” these views “are not necessarily views that a liberal criminal justice system must abide by.” *Id.*

claim, for example, any “endorse[ment]” of incest: “[R]ather, we simply think the state should not be using the *criminal* law to tread upon the intimate associational rights of mature individuals.”³⁶ The authors say that “prosecution is ordinarily unnecessary to prevent [incestuous] conduct,” which “social stigma” will deter.³⁷ They do not suggest that this noncriminal moral disapproval is unjust. Again, “[i]t is one thing for the law to recognize how citizens organize themselves into close circles of affection; but it is another for the criminal law to take a stance on how citizens ought to organize themselves.”³⁸ The authors say that their “focus” is “on whether currently criminal conduct should be decriminalized or reformed,” and they “restrict [their] discussion to that subject.”³⁹

What are the moral bases within criminal justice for these judgments? The authors say that “the principle of equality should be a lodestar guiding our collective actions in the criminal justice system.”⁴⁰ As discussed above, the authors also emphasize the central place of “voluntarism,” “consent,” “choice,” and “autonomy”—collectively, what one might call “liberty”—in that system.

So far so good: Liberty and equality are indeed the moral axes upon which the criminal law and its just administration spin. A just criminal law system presupposes individual liberty. The essential condition of liability for any crime is that the accused could have done otherwise. Moreover, no one is liable for the criminal acts of others, save where one has freely chosen to align oneself with the other’s criminal undertaking. Crimes are all about an individual’s free choices.

Further, for a criminal law to be just, it must apply equally to all similarly situated persons. Consider that the *dramatis personae* of criminal statutes are mainly generic people with unidentified characteristics: “whoever,” “a person,” and “another person.” These anonymous individuals are equal in life and in death. “Murder,” for example, occurs whenever one “person” intentionally causes the death of “another person.” Neither proper names nor social attachments have anything to do with it.

36. *Id.* at 121 (emphasis in original).

37. *Id.*

38. *Id.* at xiii.

39. *Id.* at 212 n.78.

40. *Id.* at 31.

Thus, the criminal law is famously concerned with acts freely chosen, and not with one's character, personality, condition, or habits. No one may be criminally punished for being a bad boy all these years, for possessing mischievous character traits, or for holding unpopular opinions. Even in prosecutions for freely chosen criminal acts, evidence of character is strictly circumscribed, lest the trial become a referendum on the defendant's reputation or on the conduct of his life to date.⁴¹

The basic moral justification for punishing criminals depends upon these two leading values. The harm common to every criminal act, over and above that visited upon any particular victim, is the undue advantage that the criminal obtains compared to all others in the community. The criminal unfairly usurps a liberty that he denies himself by his observance of the legally specified pattern of restraint. The criminal introduces, in other words, an unjustified inequality into the social order. Criminal prosecutions are begun in the "people's" name, not in the name of individual victims, precisely because of the social quality of the harm done by a crime.⁴²

Depriving the criminal of an undeserved liberty is also the aim of punishment. Because the ill-gotten gain is the wrongful exercise of freedom of choice and action—an unjust willfulness, really—punishment properly consists of some unwelcome deprivation, some imposition upon the criminal's will. The moral aim of punishment is to undo the criminal's bold and unjust self-assertion, which is the criminal's "debt to society." Proportionate punishment restores the *ex ante* condition of equal liberty among society's members. The authors even acknowledge this moral justification of punishment when they say that "if a criminal derogates from the democratically derived codes of proper conduct, he indicates a superiority that claims he is not bound by the rules that bind others."⁴³

But the moral norms of equality and free choice that undergird the criminal justice system do not somehow establish a moral presumption against family ties benefits and burdens within the system, as the authors seem to think. The authors go wrong with the presupposition that systemic principles shape

41. See FED. R. EVID. 404(b).

42. For a fuller account of these claims, see Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19 (2003).

43. MARKEL ET AL., *supra* note 1, at 30.

every act within the system. This presupposition is a mistake. To say that *A* and *B* are the principles of a system is not to say or imply that they are the *exclusive* sources of justification or explanation within that system. It is not to say or imply that they must explain all of the concepts and definitions at work within the system.

One might accurately observe that religion, like the family, is rarely a legitimate criterion of treatment in the criminal justice system. One could also suppose that making what one believes about God a predicate for good or ill offends liberty and equality. Nonetheless, Muslim prisoners should be accorded special diets, permitted to congregate as a group for required prayer, and excused from court on Friday—all demands that other believers do not make and that unbelievers have no standing to make. Making unreasonable noise near a house of worship may be a crime, as selling liquor or drugs in the vicinity of a church may be. Negligent supervision of clergy could be a special crime. And, of course, there is the priest-penitent privilege. These practices could all be described as unusual and, perhaps, anomalous. But they should not for that reason be presumed unjust.

The authors may nonetheless seem to be on sound footing in arguing that one's fate in the criminal justice system should not depend upon familial status. After all, criminal law is concerned with an individual's freely chosen acts and not with anyone's character or condition. One might then ask: Do not these commitments lead straightaway to the conclusion that "status" predicates should be jettisoned from our system of criminal justice?

The answer is yes and no, because the term "status" is multivocal. Yes, it would be unjust, for example, to make being poor a crime. Yes, it would be unjust to establish, say, the crime of assault with a deadly weapon, but then to exempt retirees and veterans from its scope. But no, it would not be unjust to define crimes according to "status" in the sense of recognizing the requirements of certain socially important roles.

Many crimes pertain exclusively to such relationships or positions. Among these specialized roles are those of bookkeeper, gun dealer, shop owner, union official, congressman, and lobbyist. It is true (as the authors might reply) that no one is born or forced into any one of these roles. People can and do choose to become a pilot, accountant, or schoolteacher. So the authors might

say that people should be bound, at least in the eyes of the criminal law, only by the rules of those roles that they freely choose.

But the robustness of any such consent is often questionable, and even illusory. Roles and their accompanying forms of criminal liability are presented on an “as is,” “take-it-or-leave-it” basis. No one may choose to be a lawyer who has not satisfied all the entry requirements (for example, obtaining a J.D. degree, passing the bar exam, and receiving certification from a state character committee). No lawyer enjoys the option of practicing according to a personal view of professional ethics, save where those views coincide with the established local rules of professional responsibility. Besides, no one can predict upon becoming a lawyer in 2010 what the professional rules will be in 2040. It is a pretty hollow “choice” that one may have at that later point between either abandoning one’s livelihood or “consenting” to the latest regime of professional criminal liability. Indeed, considering all the regulatory crimes at a given moment, and that any adult not-to-the-manor-born has to earn a living somehow, some role-based criminal liability may be inescapable.

Even those out of work may find role-based liability inescapable. Students, air travelers, and money-borrowers all have to put up with onerous regulations backed by criminal sanctions. Other roles are forced upon us, as anyone who has been subpoenaed or who has net income will readily attest. Witnesses, jurors, and taxpayers are typically conscripted against their wishes; in some democracies (Israel is one), young men and women are still conscripted into the military. No one is free to ignore these summonses to serve the common welfare.

Public authority sometimes deems a particular role-relationship incompatible with sexual intimacy. Examples include relations between teachers and students (including adult students), lawyers and clients, doctors and patients, and even employees of the same government office. To some extent, these prohibitions owe to concerns about the genuineness of any putative consent to sex. But they also owe to the judgment that these are valuable relationships that would be undermined, in various ways, by even truly consensual sexual relations.

In more general terms, one could say that liberty and equality constitute the system’s normative infrastructure, the moral preconditions of criminal liability, and the moral justifying aim of punishment. But the superstructure built up around them,

which they animate—the substantive criminal law—comes mainly from elsewhere. Criminal law emerges, most basically, out of a reflection upon the myriad truths that form the foundation of the common good of political society. Contrary to the authors' claims, the axiomatic position of liberty and equality in criminal law does not tend to show that "crimes against the family" is an oxymoron.

III. REDUCED "ACCURACY" IS A TOLERABLE COST

Among the "normative costs" of family ties in the criminal system, the authors count "undermin[ing] the pursuit of accuracy in the effective prosecution of the guilty and the exoneration of the innocent."⁴⁴ They contend that "[i]f innocent people mistakenly sit in prison (or guilty people escape prosecution altogether) as a result of these benefits, then our commitment to the accurate distribution of justice is undermined at an intolerable cost."⁴⁵ They even go so far as to say that "prosecuting the guilty fairly and protecting the innocent from crime and prosecution" are the "primary criminal justice values."⁴⁶ A "cost" of recognizing family benefits is thus that they "tend to incentivize more crime and more *successful* crime."⁴⁷ The authors have in mind the family exception to the crime of harboring a fugitive and spousal testimonial immunity.

Yet this "cost" is a redundant makeweight. It is anyone's guess how much crime these "incentives" create, as the authors provide no data. The true extent is certainly limited to one side of the "distributive of justice," for these impediments enable the occasional criminal to evade capture and exclude some probative testimony, much as the warrant requirement and any evidentiary exclusionary rule do. So the cost is only that some guilty people may go free. None of the family ties benefits to which the authors apply these norms create any risk of false conviction. The innocent are not put at peril. Only the guilty are affected insofar as some of them may get away with crimes.

Let us now look more closely at this normative "cost." The authors' commitment to moral symmetry between convicting

44. *Id.* at 25.

45. *Id.* at 28.

46. *Id.* at 151.

47. *Id.* at 25.

the guilty and exonerating the innocent is unusual. The commonplace statement of moral priorities in our society has long been “better that a hundred guilty persons go free than that one innocent suffer.”⁴⁸ Perhaps a hundred is hyperbole; Blackstone put the number at ten.⁴⁹ No matter. Both numbers express an important truth: A just society stops at almost nothing to avoid convicting the innocent. But just societies—including ours—limit the “accurate” and “effective” prosecution of the guilty according to a host of competing moral and practical considerations. It is a grave injustice to punish an innocent person. But it is not a grave injustice to forego the investigation, arrest, prosecution, or conviction of someone—or even of many people—clearly guilty of a crime. Any family ties benefit that creates a risk of convicting an innocent person is wrong. Period. But not all benefits (or burdens) that increase unpunished criminal behavior are wrong.

Why? What supports this widespread belief that moral asymmetry in the “distribution of justice” is morally justified? The answer lies in the complex relationship between the principle of just deserts and the larger common good of political society. All societies have limited pools of common resources, and the common good places great demands upon them. Criminal justice is only one such demand. In any given set of social circumstances, the demands of public health, common defense, public education, and many others may be more pressing than the marginal needs for criminal law enforcement. Hard choices must be made, all having more or less predictable negative side-effects. Reduced “accuracy” in convicting the guilty is one. It is often a tolerable cost.

Many discrete aspects of the common good justify sacrificing convictions. Diplomacy (not equality or choice) explains diplomatic immunity from prosecution; national security explains non-prosecution of some terrorists; privacy explains the limits upon evidence gathering that hinder “accurate” prosecution; scarce resources explain the practical immunity of some trivial offenses from prosecution; family welfare explains the spousal testimonial privilege. The list goes on.

48. This maxim is attributed to Benjamin Franklin. See Alexander Volokh, *Guilty Men*, 146 U. PA. L. REV. 173, 181 (1997). The Supreme Court used related formulations as early as 1895. *Coffin v. United States*, 156 U.S. 432, 455–56 (1895).

49. See Volokh, *supra* note 48, at 174.

The authors might reply that unanswered wrongdoing threatens the fundamental equality of all persons in society.⁵⁰ But this is not true. The principle of moral desert establishes a presumption that punishing any guilty person is not unjust.⁵¹ But the common good of political society—which includes but goes beyond justice, and which goes far beyond just deserts—is often better served by pursuing other objectives, even if doing so leads to fewer convictions. Even when society does not punish a criminal, however, crime victims usually retain their civil remedies; that aspect of their “equality” is preserved.⁵² Because the common good requires that we tolerate some criminal behavior, the victim *qua* plaintiff in any foregone criminal action—one of the “People” or a citizen of the “Commonwealth”—receives treatment no different from that other members of society would receive were they in the same situation.

Finally, *PoP* emphasizes the distinctively “liberal” character of our criminal justice system and of criminal justice in a “liberal” state. But there is nothing distinctively “liberal” about the system so far described. The foundational moral principles of liberty and equality are no less conservative than they are liberal. Saint Thomas Aquinas clearly articulated the retributive justification for punishment⁵³ to which the authors point. Was Aquinas a “liberal” or a “conservative”? Are there contrasting “liberal” and “conservative” views about whether being a slob should be made a crime? Or on whether having an income above \$100,000 annually should be a defense against murder charges? One has serious doubts.

The leading indicators today of “conservative” criminal justice opinions are probably preferences for long prison sentences and for aggressive police investigative techniques (searches, seizures, and confessions less encumbered by rules in favor of privacy). But the authors of *PoP* do not engage these issues. It therefore seems that this adjectival move either is misplaced, or

50. See MARKEL ET AL., *supra* note 1, at 28–29.

51. The presumption can be rebutted. Occasionally it is unjust to seek the conviction of a person who is provably guilty of a crime. The taxonomy of such occasions and their justification are beyond the scope of this Review.

52. But this is not always so. One exception is when a civil plaintiff is denied the effective relief to which he is legally entitled by the need to preserve “state secrets,” even if they constitute relevant, and perhaps dispositive, evidence in a civil suit.

53. See JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 210–11 (1998).

simply shifts the justificatory burden to some wider doctrine of “liberalism.” It is to that displacement that I now turn.

IV. POP’S “LIBERALISM” IS NOT MORALLY NEUTRAL

The authors support their normative judgments by reference to a wider “liberal” body of thought: “[W]e think a liberal state may not use its criminal law to reinforce a very particular version . . . of the family.”⁵⁴ The authors say that they rely upon “the institutional design of criminal justice practices in a liberal state.”⁵⁵ Such burdens “run afoul of principles that should constrain the use of the criminal justice system in a liberal democracy.”⁵⁶

The authors make special use of the link between liberalism and a strong moral valuation of autonomous individual choice. They espouse a “liberal minimalist approach” to criminal justice, a framework by which any “family relationship that is an element of criminal liability must be one that is the product of freely chosen behavior.”⁵⁷ “Family status” causes substantial problems for the “liberal state” because it “can burden relationships that persons have had no autonomy in creating or rejecting” and because it “risks infringing upon citizens’ liberty.”⁵⁸

I offer five criticisms of the authors’ liberal usage of “liberal,” the last of them particular to the autonomy link. First, these adjectival arguments are dense with morally-freighted terms. The combination of such terms in close proximity calls for subtle explanation. The authors do not provide it. The reader is left guessing about the distinctive contribution of “liberal” in any particular sentence.

Second, the authors use “liberal” to burnish their dependence upon one of contemporary liberalism’s characteristic arguments, that the state must be “neutral” on controversial moral questions concerning the good life. But such “neutrality” remains an illusion,⁵⁹ even when borrowed from a larger philosophical framework.

54. MARKEL ET AL., *supra* note 1, at 94.

55. *Id.* at 89.

56. *Id.* at xviii.

57. *Id.* at 95–96.

58. *Id.* at xviii.

59. See *supra* text accompanying notes 27–35.

Third, the authors' position is implausible and counterintuitive. "Liberal[ism]," "democracy," and "egalitarianism" are all good things in their proper frames of reference. But those frames are limited. Institutions critical to our society do not conform to these norms of internal order. Neither the military nor the modern business corporation can be readily described as "liberal" or "democratic" or, even, "egalitarian." Neither can most churches. The contemporary university is "liberal" and possibly "egalitarian," but it is hardly "democratic." No one seriously proposes that, in our "liberal democratic state," the military, the corporation, and the university must, as a matter of justice, be rendered invisible to the criminal law, or somehow reconstituted by state power to mimic the state's "liberal," "democratic," and "egalitarian" ordering principles. There is no obvious reason why the family is a more deserving candidate for such a disappearing act, or makeover, than any of these other important institutions.

Fourth, the authors have adopted a contestable, partisan conception of liberalism without acknowledging their choice. Much less do they defend or justify their preference. Contemporary liberal thought is a house divided when it comes to questions about the family and the state's responsibilities.⁶⁰

The division runs along two analytical axes, with largely overlapping sorting effects. The first axis is the division between perfectionist and anti-perfectionist liberals. John Rawls is the leading anti-perfectionist liberal of the last generation. Rawls and those who follow his lead (including, at times, *PoP's* authors) maintain that the state is obliged in justice to remain scrupulously neutral on controversial questions concerning the morally good life.⁶¹ "Perfectionist" liberals, on the other hand, do not affirm any strong doctrine about the state's duty to refrain from acting on the perceived moral truth about the good. The leading "perfectionist" liberal is the legal-moral philosopher Joseph Raz.⁶² Raz affirms, for example, the state's authority to protect traditional marriage if it represents the moral truth about marriage.⁶³

60. See PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* 173-74 (1999).

61. See John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36, 37 (1993).

62. Raz's leading work in this area is JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

63. *Id.* at 162.

The second axis divides what might be called “progressive” liberals from more “conservative” liberals.⁶⁴ The subject matter of this disagreement is not so much political *morality* (as it is between Rawls and Raz), but rather political theory, or even political science. “Progressive” liberals characteristically consider the central political moral value to be a radical personal autonomy. One prominent expression of this viewpoint is the so-called “Mystery Passage” from *Planned Parenthood of Southeastern Pennsylvania v. Casey*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”⁶⁵

The more “conservative” liberals hold that a liberal society requires the people’s possession of certain moral virtues. Chief among these virtues are a deep sense of personal moral responsibility, a strong ethic of self-restraint, and an abiding devotion to the well-being of others. “Conservative” liberals recognize further that these virtues are threatened when government acts in such a way as to undermine the civil institutions—family, church, and school—that inculcate virtue. They recognize that one way that government threatens these nonpolitical “little platoons” is by imposing a progressive vision upon them. One of the state’s most important functions is to protect and promote the nonpolitical institutions—the family perhaps above all others—that can and usually do directly inculcate the necessary virtues.

My fifth criticism is specific to the authors’ “progressive” liberalism. They locate their endorsement of the caregiving function within a broader endorsement of a distinct moral value that they call variously “voluntariness,” “autonomy,” and “choice.” They assert that the criminal sanction is only appropriate if “individuals have roughly consented to these extra obligations by their antecedent conduct to join or start particular relationships.”⁶⁶ “It follows, we believe, that if voluntariness matters, then a family ties burden should not be placed on someone who

64. I am grateful to Peter Berkowitz for suggesting this way of mapping contemporary liberalism.

65. 505 U.S. 833, 851 (1992). For a critical discussion of the Mystery Passage, see Gerard V. Bradley, *Three Liberal—but Mistaken—Arguments for Same-Sex Marriage*, 50 S. TEX. L. REV. 45, 69–75 (2008).

66. MARKEL ET AL., *supra* note 1, at 61.

has had a familial status *imposed* upon him.”⁶⁷ As a result, “[t]o our mind, the family relationship that is an element of criminal liability must be one that is the product of freely chosen behavior.”⁶⁸ This need for free choice purportedly compels the conclusion that “we think a liberal state should . . . give people some autonomy about entering relationships before using the relationship status as an element of a crime.”⁶⁹

To some extent, the authors in these (and other similar) statements reiterate the same status anxiety that I criticized in Part II as destructive of role-based liabilities that no one seriously questions. Additionally, the authors fail to address the paradoxical effects of trying to expand individual choice by legally unpacking the “traditional” family. They do not consider that, insofar as their proposed legal changes will change cultural practices, it will soon become the case that persons who wish freely to *choose* traditional marriage and family may be denied that choice. Individuals can only choose from among the marriage and family options offered in their society. Practically no one in America today can realistically “choose” between polygamy and monogamy, largely because of our culture and law’s exclusive commitment to the latter. As Raz has argued, “[m]onogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public’s attitude and through its formal institutions.”⁷⁰ Professor Robert George explains why:

[M]arriage is the type of good that can be participated in, or fully participated in, only by people who properly understand it and choose it with a proper understanding in mind; yet people’s ability properly to understand it, and thus to choose it, depends upon [legal] institutions and cultural understandings that transcend individual choice.⁷¹

Moreover, *PoP* considers only one major set of the effects from just one side: the perspective of the one who chooses to abandon a committed relationship. The relevant considera-

67. *Id.* at 87.

68. *Id.* at 96.

69. *Id.* at 89.

70. RAZ, *supra* note 62, at 162.

71. ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 88 (2001).

tions, however, are bilateral and multilateral relations (consider the case of a father and husband who walks out to begin a new romance). For every person who exercises his freedom to choose, there may be several others who have been deprived of the relationship of his choice. Even assuming that individual autonomy is the sole relevant value, a full accounting of the authors' proposals' net effects across the population must still be done if that relevant valuation is to be adequately defended. The authors attempt no such accounting.

V. A MORAL JUSTIFICATION FOR RECOGNITION
OF THE FAMILY

The authors of *PoP* do not shy from moral evaluation. The book is awash in normative criteria and in decisive judgments based upon them. *PoP* is also all about the family. It is therefore curious that *PoP* contains no philosophy of the "traditional" family, not even as a suitable target for its critical exercises. *PoP* lacks an account of the family's moral constitution and its moral value. This vacuum is consistent with the authors' evident belief that the family is rooted in bias, all the way down.

The authors *say* a great deal, of course, about the family. They say that the family is "heterosexist," which refers to the fact that same sex couples are in most places unable to legally marry.⁷² The authors complain that the family evinces "repronormativity," meaning that the prevailing legal understanding of the family is still linked to having and raising children.⁷³ The authors say that persons in same-sex or polyamorous unions might feel "marginalized" by the state's restriction of marriage to opposite sex couples.⁷⁴ The authors disapprove of all these realities. They also say that the family is "gendered" and "discriminatory."⁷⁵ All in all, the authors judge the family to be morally wrong.

These judgments express a limited set of criticisms. But they converge upon the argument that the traditional family is suf-

72. See MARKEL ET AL., *supra* note 1, at 48.

73. *Id.* at 84.

74. See *id.* at 21. Feelings of "marginalization" are not necessarily bad if we believe that those who experience them can and will respond to such feelings by adopting more desirable behavior. A full discussion of whether that general principle applies to these particular issues is beyond the scope of this Review.

75. *Id.* at 84.

fused with an indelible inequality. This defect forms the core of the authors' other two "normative costs," those concerned with gender hierarchy and discrimination.⁷⁶ To be sure, the authors also maintain that the prevailing notion of "family" is underinclusive; households that the authors believe *should* be counted as families—same-sex and polyamorous households—are not.⁷⁷ But the validity of this criticism depends in turn upon the truth of an underlying account of what the family represents. And so these two remaining "normative costs" collapse into one weight-bearing assertion: the "traditional" family itself is "heterosexist" and otherwise infected with inequality. Now, the authors recognize that *only* these two "normative costs" pertain to the "burdens" and "benefits" of family status.⁷⁸ The other two costs, "inaccurate" convictions and "incentivizing" crimes, have no bearing upon whether making adultery a crime is morally justifiable or other "burdens" questions. *PoP* thus has a lot riding on its broad moral rejection of the family.

Make no mistake about it: These non-neutral moral criteria for judging the family swing free of any specific argument about the moral foundations of criminal justice. And if the authors are right that the "traditional" family is a structure of oppression, then their analysis of family ties burdens in criminal justice succeeds for that reason *alone*. One does not need a theory of criminal justice to conclude that the state has no business criminalizing certain acts as assaults upon the "family," where they are, in moral truth, assaults only upon an unjust social practice calling itself the "family."⁷⁹

76. *Id.* at 25. "[F]amily ties or status historically facilitate gender hierarchy[,] disrupt our egalitarian political commitments to treat similarly situated persons with equal concern[,] and discriminate against those without families recognized by the state."

77. *See id.* at 21.

78. *See id.* at 82.

79. The authors have previously contended that all consensual sexual activity should be decriminalized: "[W]e think that in situations where genuine and mature consent between the parties is possible, and where negative externalities can be eliminated, the criminal law should prescind from application." Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1391 (2008). Thus they argue against criminalizing incest and adultery. But their consent-drive analysis does not make sense of our criminal law about sex. The claim is also question-begging: Its validity depends at least partly upon the truth about the family; if the family is oppressive, then forbidding mutually agreeable sex to *protect* the family is perverse for that reason. But what if the sexually chaste family is a great social and personal good?

The moral truth about the family has long supplied an essential, though not sufficient, condition for legal protection of the family. The law has long made the family morally normative for sexual activity to protect and preserve the valuable relationships that constitute the family. Incest is forbidden to protect the sibling relationship from ruin by sexual attraction and activity. Adultery is forbidden to preserve the fidelity which defines spousal love.⁸⁰ Fornication has also historically been forbidden as a crime against marriage, on the grounds that marriage is morally normative for both sex and having children.⁸¹

The relevant moral truth about the family includes a radical equality and mutuality at the heart of family relationships. These relationships have an unbreakable foundation in the way children come to be within marriage. When the spouses' marital acts bear the fruit of children, the children are perceptively called (in law) "issue of the marriage." Children embody in a unique way their parents' union; just as the married couple is often described as two in one flesh, so too their child is the two of them in one flesh. The child *is* their union, extended into time and space, and thus into human history and the whole human community.

Because all of the married couple's children come to be in and through the same act—separated only by time—each child is equally and wholly the image of his parents' unique union. The siblings' family identity is just that: a matter of *identity*. All the children are, one compared to the others, equally and wholly the offspring of the same parents; mother and father are equally and wholly parents of each child, in whom they see so many unique, yet related and, in a sense, similar expressions of their own union.

The lifelong and unbreakable chords of fealty and relatedness that family members possess, one for the others, and that even distance and alienation never quite erase, depend upon

80. The authors identify this position and describe it as an *ex ante* "prism" through which one could see criminal law burdens as protecting and benefiting the "family as a social institution." To this they contrast an *ex post* "defendant-centered perspective," one that they link intimately to consent. See MARKEL ET AL., *supra* note 1, at 75–79. The defendant-centered perspective emerges—unfortunately, in my view—as the dominant feature of their analysis.

81. I develop this line of thought more fully in Gerard Bradley, *What's in a Name? A Philosophical Critique of 'Civil Unions' Predicated Upon a Sexual Relationship*, 91 *MONIST* 606, 612–20 (2008).

the parents' unique procreative union. No other "family" form can replace it.⁸² The radical equality and mutuality suffusing the family are not mysterious or dreamily metaphysical concepts. They are qualities no more subtle or beyond the state's concern than is the correct judgment that the factor of equality of marital friendship lies at, or very near, the heart of the state's legitimate judgment that polygamy is not supportable.

The metaphysical and philosophical structure of the family supports a moral corrective for the cultural and legal distortions of the family that are all too familiar to students of history and current events: subordination of wives to husbands, parents' treatment of children as extensions of their own plans and desires, and children's indifference to their parents who vouchsafed them life and whose marriage the children embody.

This sublime and powerful equality at the family's root makes doubtful the authors' "inegalitarian" charges. The practice of family life in a given society may still be unjustly discriminatory, as it so often has been with regard to wives and mothers. Nonetheless, recovering the truth about the family is a much surer first step towards genuine reform. Erasing the family from the law or reducing it to a web of chosen contingent commitments, which is practically the same thing, is not a surer way to reform the family along more egalitarian lines. The authors' medicine is too strong. They would burn down the house to roast the pig.

VI. WHAT ROLE SHOULD THE FAMILY PLAY IN THE CRIMINAL LAW?

It is scarcely the province of civil law to superintend family life. The law must tolerate a great deal of miserable behavior by family members towards each other. But the family's basic structure and the sexual morality that flows from it—and that in turn protects it—should always be respected by the civil law.

82. Stressing (as I do in the text) the procreative understanding of marriage naturally leads to objections centered around the fact—and it is indeed the fact—that infertile opposite-sex couples are free to marry according to our law, even where such couples *know* that they are infertile. For a response to this objection see Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 303–13 (1995).

Protection of the family may, but need not necessarily, extend to the criminal law.⁸³ The argument for criminalizing bigamy, adultery, and incest is strong. Each is *malum in se*. Each is almost universally regarded as immoral and deserving of social reprobation. Each act attacks a defining feature of family life; in other words, each seriously subverts a socially important set of relationships.

At least as to bigamy and incest, the occurrence rate is so low that prosecuting all those who are provably guilty would not overly burden the criminal justice system. And juries are unlikely to acquit bigamists and those who practice incest. The incidence of adultery is considerably higher than that for bigamy or incest, however, and so potentially arbitrary selective enforcement of criminal laws against it is a genuine threat. Jurors may also be unwilling to convict adulterers because, unlike the situation with bigamy and incest, many will have been tempted to commit adultery and may think: "There but for the grace of God go I." They may also believe that many marriages can survive an adulterous affair. They will then see that putting the philandering party in jail eliminates that chance, to the detriment of children and, perhaps, the faithful spouse.

On the other hand, adultery stands today in some danger of losing its social stigma. Defining it as criminal may stop its slide toward respectability. It is thus a critical question whether our society can preserve adultery's status as objectively immoral and socially harmful—a necessity, in my view—without making it a crime.

More generally, criminal laws against incest, adultery, and bigamy occupy one polar region of "family ties" predicates. Here, the family (or a particular family relationship) is the terminal point of the law's solicitude. The family is not transparent or a proxy for some ulterior or accompanying value, policy goal, or relational quality. The family is the end of the line.

At the other pole are cases of pure proxy or perfect transparency. Here, the lawmaker pursues a non-familial good, a benefit marked or symbolized but not constituted by the family. The population of this polar region is both large and small. It is

83. I leave aside domestic violence and the extravagant neglect of parental duties to take care of children; these acts should remain the crimes that they presently are. The relevant questions have to do with their effective enforcement and appropriate punishment.

large insofar as the law commonly treats “family” as an indicator of other facts, such as relations of dependency, friendship, or support, or of common ethnic and racial identity. The population is small because the law usually proceeds directly to the targeted fact, and explicitly treats the family as one member of the designated class, or as a species within the valued genre. The census counts “households” and tax law cares about “dependents” because family relations are included in, but not exhaustive of, these categories.

Most explicit references to “family ties” reside somewhere between the poles. These references are ambiguous because they often contain both a descriptive and a normative component. They often signal didactically that the family as such is good, and prosaically that the “family” stands in close proximity to some other purpose. One law may both promote the family as morally normative and accomplish some non-familial business by using the “family” moniker. Of course, the descriptive component may be more or less accurate, because the correlation between the marker and the desired goal may be more or less tight.

What can we say of a general evaluative nature about these in-between cases? I do not think any general presumption of injustice (such as the authors’) is warranted. One could better imagine two lines of analysis intersecting at right angles, one expressing the clarity and appropriateness of the lawmaker’s didactic intent, and the other tracing the fit between the family marker and a targeted trait or goal. As that correlation becomes tighter and the didactic intent of the law more prominent—imagine now one quadrant—the overall justness of the law approaches a zenith.

And so on around the four corners. As the fit loosens, and especially as normative moral values recede from the lawmaker’s mind, the family tie is morally suspect, and probably should be abandoned. At least, non-familial applicants ought to be freely permitted to make a case for the subject legal benefit. The relevant public authority may then argue that the possibility of abuse or opportunism (or both), in addition to the transaction costs of deciding all the non-familial applications, justifies limiting the benefit to family members.

The authors of *PoP* cleave to a more categorical and dogmatic approach to family ties. They conclude “that the family exemption” to criminal harboring is misguided, and that it should “be soundly rejected by state legislatures,” partly because it is unjust

to “close friends who provide assistance.”⁸⁴ But this argument insists gratuitously that family relations are, or should be viewed by the law as, examples of “friendship” and not as *sui generis*.

A more nuanced analysis would go as follows. The family exemption for harboring a fugitive probably includes some normative ingredient; to some extent, the lawmaker is making a teaching point about the special nature of family ties. The exemption is also partly an application of excuse principles. The lawmaker might think it is just too much to ask a mother, for example, to choose between escaping her own liability for a crime and caring for her escaped son, who may be seeking no more than a meal or a bed or even a brief reunion with her. The exemption may also reflect difficulties of proof: The line between “harboring a fugitive” and innocently caring for one’s own may be hard to draw (much as it could be for a homeless shelter or a church soup kitchen for an undocumented migrant). Or, the exemption may reflect the lawmaker’s recognition that juries will not convict mothers for feeding and housing their fugitive sons.

The lawmaker could also believe that, lest there be a complete defeat of law enforcement efforts to apprehend fugitives or limit assistance to criminals after the fact, or both, only a small number of exemptions—if any—may be made. It is then a choice from among these options: Exempt mothers and fathers only, exempt the whole immediate family, or exempt no one. Extending the exemption to all “close friends”—which the authors suggest justice requires—is not a viable option. Society’s likely choice may be made clear by applying the Golden Rule: Would “close friends” allow that mothers and fathers should get the exemption, as opposed to exempting no one at all? My guess is that they would say yes.

CONCLUSION

The authors of *PoP* say that “the criminal justice system, with a few exceptions, is not generally an appropriate place to foster a particular vision of family life.”⁸⁵ “Having a family . . . is typically morally unrelated to the offender’s claim of superiority repre-

84. MARKEL ET AL., *supra* note 1, at 43.

85. *Id.* at 149.

sented by the crime.”⁸⁶ Just so, family ties, benefits and burdens should indeed be few in the criminal justice system, because the family is indeed “typically” beside the point—but not always.

The authors also assert that “the family can sustain itself without special immunity from the criminal justice system.”⁸⁷ “[A]t least right now,” they state, it is “doubtful that the family needs systematic support through the use of criminal justice benefits in order to enable and ensure its flourishing.”⁸⁸ The authors may be right. They offer no data to support their claim. But nothing about the possibility that the family might get by with nonsystematic support or ordinary immunity from the criminal justice system tends to prove that we should either render the family altogether invisible, or define it differently when it comes to the criminal law, as they argue unsuccessfully in *PoP*.

86. *Id.* at 30.

87. *Id.* at 38.

88. *Id.* at 58.