

# Legal Perspectives on Family Violence

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If privacy has any physical locale in modern society, it is in the home, properly renowned as a haven in the heartless world. If privacy has any social focus, it is in the family, a set of intimate relationships that can only flourish when sufficiently protected from public scrutiny. But privacy can metastasize into a Hobbesian arena where the strong prey on the weak and the weak on the weaker still. Life's greatest moments occur behind closed doors. So too do some of modern life's most outrageous exploitations.

A jurisprudence of family violence needs to confront the question of what aspects of private life are properly public. A coherent policy toward family violence depends on balancing the public value of privacy in family life against the social costs of exploitation and violence in unregulated family relations. In the political and social climate of the 1980's, this task is difficult and complicated.

Family violence is a chronic aspect of American life, but public concern about societal responses to this problem has been unprecedented and acute in the past decade. Violence between spouses and intimates existed before history was written, and little evidence suggests that the incidence or severity of intimate violence is more pronounced in the second half of the twentieth century than in earlier eras. Yet violence between intimates is a more salient public policy issue in the 1980's than ever before. There is a similar trend of increased social awareness about the related topics of child abuse and sexual exploitation of children. For example, although incest has a biblical pedigree, it has become the focus of public policy debate only recently. What is called "parental kidnapping" is behavior as old as family dissolution, yet an important legislative concern only in the 1970's and the 1980's.

The historical forces elevating public concern about family violence are beyond the scope of this Essay. The vindication of minority political and civil rights in the 1960's, increased intellectual and political concentration on questions of gender in the 1970's and 1980's, the current

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rethinking of role dependencies and their social implications, have all contributed to a political condition in which family exploitation issues are important and policy innovations quite frequent.

One consequence of this new salience is of central concern to this Essay. In an era when almost all aspects of legal policy toward family violence are being reevaluated, the basic legal conception of violent activities within the confines of family life—the jurisprudence of family violence—is particularly important.

This Essay attempts to lay a groundwork of basic classifications, to build toward a coherent legal perspective on family violence. Part I sets out the doctrine of family privacy and discusses its implications for legal intervention into situations of family violence. Part II presents a range of alternative government responses to family violence and the legal theories that they imply. Part III offers reflections on the role of the criminal sanction in response to family violence.

## I

### ON FAMILY PRIVACY

Formulating a family violence policy requires considering family privacy both as a set of legal principles and as a rationale that lies behind much current official behavior. The disputes that involve courts in discussions of family privacy often seem far removed from the control of interpersonal violence, but are relevant nonetheless. A leading case in family privacy doctrine, *McGuire v. McGuire*,<sup>1</sup> illustrates the seeming contradictions within the law that result when courts confront the family context, including family violence.

Mrs. McGuire, then sixty-six, sued her seventy-nine-year-old husband, to whom she had been married for thirty-three years, to enforce a marital duty to support her. She testified, according to the court: "For the past four years or more, the defendant had not given the plaintiff money to purchase furniture or other household necessities . . . the house is not equipped with a bathroom, bathing facilities, or inside toilet . . . . [The plaintiff] does not have a kitchen sink."<sup>2</sup>

Mr. McGuire's lapses in generosity were not occasioned by poverty; he was the 1950's equivalent of a 1980's millionaire, with substantial landholdings and cash. Nor was there any doubt that Nebraska law imposed on Mr. McGuire the duty to support his wife.

Yet the Nebraska court rejected Mrs. McGuire's pleas for indoor plumbing and a kitchen sink. The fatal flaw in her case was that the parties continued to live as husband and wife. And the reason this dis-

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1. 157 Neb. 226, 59 N.W.2d 336 (1953).

2. *Id.* at 228-29, 59 N.W.2d at 337.

qualified her claim for support was the doctrine of family privacy. The Nebraska court held: "The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said on his behalf."<sup>3</sup>

The court emphasized that if Mrs. McGuire were to leave the home, she would be entitled to support from her husband in a style corresponding to his financial means. While the parties were living together, however, the wife had either a right without a remedy or no right at all.

The justification for applying the family privacy doctrine in this fashion is the reluctance of government to intrude on the affairs of an ongoing family and to substitute regulatory edicts for family interaction, even if the power relationship within the family leads to regrettable outcomes. As in so many other situations involving the family privacy doctrine, the use of this principle to prevent relief in the *McGuire* case is contingent. If Mrs. McGuire dissolved the marital relationship, she could sue for support, and no legal concept of marital privacy would stand between her and a flush toilet or any other suitable comfort of life. But the ongoing family presents a higher value than state imposed concepts of financial equity in family relationships.

The *McGuire* case also illustrates one of the major difficulties with privacy doctrine as an explanation for judicial behavior. The posture of Nebraska is not strictly one of nonintervention. State law, after all, gave Mr. McGuire the power to manage his assets. And doctrines of nonintervention can serve merely as an additional reason to justify power relations that the advocate of privacy approves of in any event.

Does privacy doctrine extend to situations of violence within the family? The following article on parenthood training suggests an affirmative answer:

A mother and daughter enter a supermarket. An accident occurs when the daughter pulls the wrong orange from the pile and 37 oranges are given their freedom. The mother grabs the daughter, shakes her vigorously, and slaps her. What is your reaction? Do you ignore the incident? Do you consider it a family squabble and none of your business? Or do you go over and advise the mother not to hit her child? If the mother rejects your advice, do you physically restrain her? If she persists, do you call the police? Think about your answers for a moment.

Now let me change one detail. *The girl was not that mother's daughter.*<sup>4</sup>

Whatever the private citizen's view, as a legal matter it makes all the

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3. *Id.* at 238, 59 N.W.2d at 342.

4. McIntire, *Parenthood Training or Mandatory Birth Control: Take Your Choice*, PSYCHOLOGY TODAY, Oct. 1973, at 36 (emphasis in original).

difference in the world whether we classify this occurrence as a family matter. If the adult were a stranger, it would be considered assault and battery.

As with Mrs. McGuire's illusory right to indoor plumbing in an ongoing marriage, it is difficult to decide whether the parent-child relationship insulates a minor battery from legal scrutiny because the parent has a "right" to discipline her child (and the child therefore has no "right" to be secure against such discipline), or whether an existing right to be secure against physical batteries has been subordinated to the values of nonintrusion in the ongoing family. But considerations similar to the doctrine of family privacy in *McGuire* insulate family members from legal responsibility for many unconsented touchings by siblings, parents, and spouses.<sup>5</sup> And the spirit of the family privacy doctrine has led to traditional policies of nonintrusion by law enforcement personnel, juvenile and family courts, and other public agencies when confronting physical interactions within family settings that are far worse than "unconsented touchings."<sup>6</sup>

As with the McGuire situation, many who might advocate nonintervention for some kinds of family violence may support a privilege on separate substantive grounds. It is easier, after all, to find a privacy basis for not intervening in parental discipline of children when spanking is not considered a grave threat. For this reason, the law might be more apt to fail to intervene when parents slap children than when children slap parents. Yet strictly speaking, privacy is the real rationale when it supports nonintervention in both circumstances.

While notions of the husband's supremacy and of children as chattels are declining, family privacy plays a significant role in many modern reform efforts. The transition from matrimonial offenses as grounds for divorce to neutral standards such as incompatibility and finally to no-fault divorce was largely justified by the desire to avoid the extensive intrusion on privacy caused by airing a couple's dirty laundry in open court as the price of matrimonial dissolution. One target of this reform was the notorious "two slap" rule that required public testimony about low-level interspousal violence as the minimum condition for an Illinois divorce for many years.<sup>7</sup>

Family privacy has also been implicated by the movement towards abolition of interspousal tort immunity. This reform, however, is best

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5. See, e.g., W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 901-04 (spousal liability for torts), 904-07 (parental liability for torts) (5th ed. 1984).

6. See generally J. AREEN, CASES AND MATERIALS ON FAMILY LAW 1181-215 (2d ed. 1985).

7. See *Tuyls v. Tuyls*, 21 Ill. 2d 192, 171 N.E.2d 770 (1961); *Fritts v. Fritts*, 138 Ill. 436, 28 N.E. 1058 (1891).

viewed not as a rejection of family privacy doctrine but as a recognition that such immunity did not serve families well in an era of widespread third-party liability insurance. The decline of immunity makes resources from insurance companies available to families rather than encouraging conflict within family units.<sup>8</sup>

In the area of child protection policy, family privacy considerations are important in modern reform efforts, but the balance between privacy and public scrutiny varies with the context. The law of child neglect as it has evolved over the past two decades requires a high degree of justification before the state may intervene in the ongoing family.<sup>9</sup> When the focus shifts from child neglect to child abuse, however, the value accorded family privacy considerations seems to diminish.<sup>10</sup> Child abuse reporting laws, which require individuals to report possible physical mistreatment of minors to state authorities, are the most notable example of recent reforms that give little value to adult autonomy or family privacy. The inconsistent emphasis on values of family privacy as between child neglect and child abuse is one rather stunning illustration of the current confusion surrounding aims and means in child welfare legislation.

In other areas of family violence, most notably spousal violence and parental kidnapping, modern reform efforts subordinate family privacy considerations to the public interests in suppressing and responding to the target behavior.<sup>11</sup>

Considerations of family privacy always come into play when the law addresses the relations between members of an ongoing family. This is more than just a technical matter. The consequences of considering family privacy vary, but it is always considered. The legal responses that arise when different behaviors are balanced against privacy can be grouped under three categories: categorical exclusion from privacy doctrine protection, qualified coverage, and privilege.

Certain types of behavior are categorically excluded from the appli-

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8. See W. KEETON, *supra* note 5, at 902-03; H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 253 (1968).

9. See *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

10. See, e.g., *Roe v. Conn*, 417 F. Supp. at 779 (State may sever parent-child relationship only when child is subject to real physical or emotional harm and less drastic measures would be unavailing). See generally Areen, *supra* note 9, at 887-937.

11. See *Flood v. Braaton*, 727 F.2d 303 (3d Cir. 1984) (although Federal courts traditionally have avoided involvement in child custody disputes, they will intervene to force compliance of state courts with the Parental Kidnapping Prevention Act); Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3568; U.S. ATTORNEY GENERAL, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE (Final Report 1984).

cation of family privacy theory. The taking of life, incest, and the imminent threat to the life or health of a minor child all trigger the law's willingness to penetrate the privacy of family life because family privacy considerations are outweighed by other important public goals.<sup>12</sup> An issue in the current debate about spouse battering and about the proper threshold for intervention to halt child abuse concerns whether other behaviors should be added to the short list that has been a staple element of the jurisprudence of family privacy all along.

The second category, what I call the "qualified exclusion" to family privacy doctrine, is also a traditional legal approach to problems of family dysfunction. Just as Mrs. McGuire can sue for central heating and a kitchen sink only if she leaves the family home, there are a number of instances in which the law will not intervene if the family continues to function intact, but in which legal institutions will vindicate rights of a spouse or child once the victim and offender are no longer together. The "two slaps" required for an Illinois divorce on grounds of cruelty traditionally would not be the basis for either tort recovery or a successful battery prosecution if the parties continue living together.<sup>13</sup> A spouse's right to physical security is vindicated, however, by finding such an assault to be actionable cause for the dissolution of the marriage. Similarly, the physical discipline of children is typically insulated from legal review if it does not represent a gross threat to the child, but a court may consider such behavior in a custody contest at divorce, when determining the child's future placement.<sup>14</sup> Additionally, traditional law enforcement policy toward spousal abuse was to press formal charges only if there was a high likelihood that the complaining spouse would separate from the offender.<sup>15</sup> The right to be secure against physical force may exist in all cases, but the legal remedy is available only when the family dissolves.

Not all of the exclusions from normal legal treatment conferred by family status disappear when the family breaks up. For example, traditional exclusion of relations between spouses from the definition of rape is not contingent in the same sense as Mrs. McGuire's right to appropri-

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12. See *People v. Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (husband charged with robbery, kidnapping, and first-degree murder of wife); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984) (wife charged with reckless manslaughter of husband). See generally J. AREEN, *supra* note 6, at 1181-328; Areen, *supra* note 9, at 893; Wald, *supra* note 9, at 628-29.

13. See, e.g., *Kemski v. Kemski*, 33 Ill. App. 331, 77 N.E.2d 344 (1948).

14. See H. CLARK, *supra* note 8, § 17.4, at 584-91; Kay and Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 719 (1966). See generally J. AREEN, *supra* note 6, at 339-590.

15. See L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 41 (1981); Fields, *Wife Beating: Government Intervention Policies and Practices*, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 249-56 (U.S. Civil Rights Comm'n 1978) [hereinafter BATTERED WOMEN].

ate support.<sup>16</sup> If the parties were living as husband and wife when forcible sexual relations took place, a later separation or divorce will not retroactively reclassify the earlier event as rape. Similarly, if tort law immunizes parental spanking, the fact that the spanking parent ceases sometime thereafter to be the child's custodian will not alter the privilege that applied to the earlier behavior. In these fully privileged cases, the complaining family member has no legally enforceable right against the privileged behavior.

On occasion, the same behavior may be absolutely privileged for some legal purpose but only a qualifiedly privileged for others. The spanking parent may, for example, be immune from tort liability, yet the same physical discipline, if viewed by the court as inappropriate, may deprive him or her the custody of a child after divorce. This complexity necessitates review of the wide range of legal responses to family violence in modern American law.

## II

### VARIETIES OF LEGAL RESPONSE

An exhaustive list of possible legal responses to family violence would include almost all of the law's subtopics. My ambition here is more limited: to outline three basic strategies of legal control and to discuss some legal subsystems currently used in pursuit of each strategic purpose. The three basic strategies, *privatization*, *contingent intervention*, and *compulsory intervention*, parallel the applications of family privacy doctrine discussed in the previous section.<sup>17</sup>

Behavior within the family is privatized when the legal system refuses to attach consequences to the behavior only because of its family context. Not all behavior occurring in family settings that evokes no legal consequences should be considered privatized for family reasons. Verbal exchanges between family members may have no potential legal ramifications because of a societal judgment that such exchanges do not deserve legal consequences in almost all social settings. The mild insult or obscenity does not warrant a legal response because the speech itself is privileged, or because conduct falling below certain thresholds of harm is excluded by a *de minimis* principle. By contrast, the spanking of a child by a parent that would constitute a battery outside the family context but is immunized from legal system response because of the family relationship is an example of privatization. Privatization corresponds to the cat-

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16. See *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984) (noting that a general "marital exception" to rape and sodomy exists, but finding it unconstitutional); Schulman, *State-by-State Information on Marital Rape Exemption Laws*, in *RAPE IN MARRIAGE* 375-81 (D. Russell ed. 1982).

17. See *supra* notes 11-16 and accompanying text.

egories of behavior described as privileged in the previous discussion of family privacy doctrine.

Privatization policies span civil law, the administrative and equity jurisdictions of family law, and the criminal law. Examples include limitations of tort liability for battery and false imprisonment in the parent-child context,<sup>18</sup> the law's traditional refusal to enforce contracts made during ongoing marriages,<sup>19</sup> and family status exceptions in the criminal law of assault, battery, and commonly (in the spousal context) for rape.<sup>20</sup>

An alternative description of this process would be "diversion." Describing the pursuit of a privatization strategy as a diversion from the legal system provides an important insight into its modern rationale. An apologist for the privatization of the physical discipline of children need not support spanking any more than the Nebraska court considered Mr. McGuire a model of generosity. Legal solutions are unavailable for conflicts engendered by privileged family behavior because policymakers believe that conflict is better resolved either within the family itself or in alternative dispute-resolving structures rather than by legal institutions.<sup>21</sup>

Despite the increased political salience of family violence, privatization is still a basic and popular response to many problems of parent-child and spousal relationships. The movement to narrow criteria for finding child neglect, and the abolition of grounds for divorce, both discussed earlier, provide evidence of the continued popularity of privatization approaches.

Viewing the consequences of privatization as a process of diversion suggests another observation: Many who advocate legal privatization strategies may do so not because they regard family interaction as unimportant, the traditional rationale for de minimus nonintervention policies, but, on the contrary, because they regard such family interactions as very important indeed.

If privatization is the strategic equivalent of the unconditional privilege of family privacy, contingent intervention strategies are roughly parallel to the qualified privileges of family privacy discussed in the previous section. Here, legal responses are available only if action is taken—a complaint is made by the victim, charges are brought, suit is filed, or the victim leaves the household.

However, a contingent intervention strategy for family violence is not limited to circumstances in which qualified privileges of family privacy exist. It may be adopted because a qualified privilege exists, as

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18. See H. CLARK, *supra* note 8, § 9.2, at 256-57; W. KEETON, *supra* note 5, § 122, at 904-05.

19. See H. CLARK, *supra* note 8, § 7.2, at 226-28.

20. See Schulman, *supra* note 16, at 375-81.

21. See Laszlo & McKean, *Court Diversion: An Alternative for Spousal Abuse Cases*, in BATTERED WOMEN, *supra* note 15, at 327-57.



when we excuse Mr. McGuire from his obligation to pay for support unless Mrs. McGuire leaves the household. But contingent intervention programs also can be based on prudential considerations that may apply even when behavior within families is not privileged. Publicly supported aid to battered spouses may be restricted to those willing to leave the house or make complaints, not because passive spouses do not deserve help, but because it is believed that there is no effective way to help them if they remain at home.

Contingent intervention strategies are used in civil, administrative, and criminal law systems, but intervention is formally contingent only in civil law and voluntary aid programs: Tort and contract remedies only exist if they are pursued by private complainants. Shelters and legal aid programs are voluntary, and thus contingent, for spouses.<sup>22</sup> Traditionally, many forms of child neglect and abuse intervention have *in fact* relied on the initiative of an adult complainant to mobilize the system.<sup>23</sup> Similarly, the refusal of many public authorities to press formal charges in spousal violence episodes unless the abused spouse will separate is explicable as a contingent intervention policy based on prudential criteria.

Motives for exercising prudence in family violence intervention vary. One reason to limit public intervention in the child neglect sphere where the child and the target of enforcement will continue living together is to avoid exacerbating the child's situation. The continued proximity of victim and offender might make it impossible to prevent violence. If mobilizing the legal system increases the likelihood or severity of later violence, intervention might be made conditional on family separation to protect the child's best interest.

By contrast, support and intervention may be withheld in the absence of a complainant or even a separation simply to conserve scarce public resources. If interventions are less effective among battered spouses who remain at home, nonseparation might be one rational basis for withholding public funds to conserve program resources and maximize total social benefit. It is not, however, withheld on these grounds when the interests of the individual victim are considered paramount. When programs defend themselves in this manner, refusal of service is thus more problematic than when based on concern for the victims' safety and welfare.

Two tensions caused by contingent intervention strategies seem especially relevant to current debate. The first is the formal inconsistency between the criminal law in theory and contingent intervention as

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22. See generally BATTERED WOMEN, *supra* note 15.

23. See Wald, *supra* note 9, at 629.

a strategy. Without delving deeply into the "myth of full enforcement," there is basic conflict between defining behavior as criminal (therefore deserving suppression) and characterizing an optimal law enforcement strategy as conditional (pursuing suppression only under some circumstances).<sup>24</sup>

The second concerns whether policy should change from contingent intervention to compulsory intervention, and the relationship of that decision to the reasons that underlie contingent enforcement strategies. It may be useful to ask whether contingencies are defended merely to save money, or on the grounds of victim welfare. If scarce resources are the only reason for contingent rather than compulsory intervention, then the issue's increased public salience should favor compulsory intervention as a strategy. But if the protection of victims is also an important justification for the contingency of intervention, a heightened sense of priority of the problem has no obvious implications in the choice between contingent versus compulsory intervention.

Thus, if public money is the only factor in the choice between contingent and compulsory intervention in child abuse, increased regard for the security of children from physical attacks would encourage compulsory intervention. If compulsory intervention results in important child welfare costs, the association between the social importance of the goal and the appropriate strategy of legal response is anything but automatic.<sup>25</sup>

My third category, compulsory intervention, covers many of those behaviors within the family setting specifically excluded from family privilege doctrine. Here, the legal strategy is to pursue full enforcement to its practical limits. The principal tool of compulsory intervention in the United States is the criminal law, often supported with such civil law supplements as juvenile courts, equity courts, and some administrative agencies. But the fact that conduct is unprivileged because of its family status does not necessarily mean that the family context is unimportant in the definition of crime, in law enforcement strategy, or in the choice and level of criminal sanction.

Table 1 presents a visual summary of the relationship between cate-

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24. This inconsistency seems a particular irritant to the modern opponents of traditional law enforcement approaches to domestic violence. They have a strong point. But it is a somewhat broader point than current discussion recognizes, because it involves many behaviors outside the family context. See D. RUSSELL, *RAPE IN MARRIAGE* (1982); Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 59 CALIF. L. REV. 1657-733 (1981). For a discussion of discretionary justice, see K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

25. Child abuse in child care facilities provides a powerful illustration. The chilling effect of oversensitizing such facilities to the criminal law may have a significant child-welfare cost. When administrative directives on the order of "Please don't hug the children" go out to early childhood education teachers and custodial workers, child-welfare costs seem obvious.

gories of privacy doctrine coverage, discussed in Part I, and the enforcement strategies discussed in this Part.

**Table 1**

**Privacy Doctrine and Law Enforcement Response**

Doctrine of Privacy	Strategic Response by Legal System		
	Privatization	Contingent Intervention	Compulsory Intervention
Unconditional Privilege			
Qualified Privilege			
Categorical Exclusion			

The relationship between doctrinal categories and enforcement responses is neatly symmetrical, with one important exception. Even when the law categorically excludes behavior from any privilege, we may wish less-than-full enforcement of the law when victims of violence might be placed at greater risk by universal enforcement of the law.

There exist two fundamentally different methods of using the criminal law as an instrument to control family violence. On the one hand, standard prescriptions against crimes of violence can be extended to family violence behavior without major modifications in doctrine, enforcement strategy, or the nature and severity of sanctions. On the other hand, the family context of some violent behavior can provide the basis for a separate and specific sub-jurisprudence within the criminal law. The tension between these approaches surfaces in much current discussion.<sup>26</sup> It is revealed in the terminology used to refer to family offenses, in debates on enforcement strategy, and in the reaction of some observers to verdicts and punishments in particular family violence cases.

Some linguistic aspects of modern concern with family violence merit attention. The buzz words of the 1970's, phrases like "spousal rape" and "parental kidnapping," raise interesting issues. To what extent is the term "parental kidnapping" an oxymoron because what we think of as kidnapping cannot by definition be committed by parents, even if the parental behavior is properly regarded as a criminal offense?

26. See ATT'Y GEN. TASK FORCE ON FAMILY VIOLENCE 11-12 (Final Report 1984).

Putting aside the issue of whether the forcible imposition of sexual relations within marriage should be criminal, should the crime be considered a species of the genus rape, with the same enforcement policies and sanctions, the same degree of moral condemnation from the community? Indeed, is the same core moral wrong present in sexual predations within marriage that is in forcible rape by strangers?

Much, though not all, of the linguistic dissonance of family crime involves matters of public relations. "Parental kidnapping" and "parental abduction" are media phrases; they are the consciousness-raising tactics of those who wish to focus the public's attention on the seriousness of the harm inflicted by noncustodial parents. Most modern legislation defines the offense as the interference with custodial parent-child relationships, an appropriately specific isolation of the harm that fits my category of a separate family jurisprudence in criminal law.

The attempt to assimilate family violence into the existing general jurisprudence of violence is not always confined to public relations terminology. The movement to abolish the definitional exclusion of spousal behavior from forcible rape can leave spousal rape as a subcategory of rape offenses undifferentiated by punishment or defenses. This appears to be the intention of some of the movement's sponsors. Similarly, general doctrines dealing with duties, omissions, and negligence are often extended to parent-child interactions. For example, when children die, general doctrines regarding manslaughter liability are invoked. This may have troubling consequences.<sup>27</sup>

One cost of extending general doctrine to family violence is that the law formally governing family violence diverges from law enforcement policy as expressed through police and prosecutor discretion. The intentional nontreatment of severely handicapped newborns in hospitals may be murder in the statute books, but that law will rarely, if ever, be enforced. Thousands of children die accidentally each year because negligently supervised by parents, but only a trickle of cases are prosecuted in the United States. In almost all of those cases, criminal punishment seems inappropriate when intention to injure is absent. Spousal rape, even when criminal in theory, is rarely enforced. Whatever symbolic gains are associated with the extension and generalization of standard offenses of violence, the tactic generates a huge gap between doctrine and policy.

A preference for a specific family jurisprudence of violence is usually but not inevitably linked with a desire for less severe criminal sanctions and less rigorous law enforcement. Certainly the harsh sanctions associ-

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27. See, e.g., *State v. Williams*, 4 Wash. App. 908, 484 P.2d 1167 (1971) (parents convicted of manslaughter for failing to provide proper medical attention to seventeen-month-old son, who died of complications resulting from abscessed tooth).

ated with rape are one argument against generalization into the marital context, and the punishments available for manslaughter usually appear too severe for parental negligence.

However, a specific jurisprudence of family violence is not necessarily lenient. Extreme and repetitive child abuse may call for more severe sanctions than assault by strangers. Certainly the "family context," which is the defining aspect of parental incest, justifies more serious sanctions for the same reasons that embezzlement can be a more severely punished property crime: the penal wrong is exacerbated by abuse of trust.

At the enforcement level, the tendency of family violence to represent a continuing threat to the victim's safety may justify both more vigorous enforcement efforts and somewhat more serious sanctions than assaults between strangers that are unlikely to constitute a recurrent threat to an individual victim.<sup>28</sup> In this sense, an emphasis on specificity in the jurisprudence of family violence can be considered a neutral principle, not inherently associated with special leniency.

The arguments for assimilation of standard crimes into the family violence context seem a mixture of practical momentum and the desire for moral education. Assimilation is a relatively easy legislative remedy: the general offenses of violence already exist. The abolition of special privileges, such as spousal rape, automatically include the marital offense in the general category.

But more than this momentum supports general extension. Many of those who wish the criminal law extended to forcible sexual relations within marriage also desire that the offense be called rape and be treated as if it were equally culpable as traditional notions of the crime. Widespread social feeling that the offense is not as culpable in marriage is seen by these advocates as the very reason equal treatment under the general rape rubric is necessary.<sup>29</sup> The puzzles, manifest and latent consequences, and costs of this approach are issues to which I shall return presently.

### III

#### FAMILY VIOLENCE AND THE CRIMINAL LAW

Parts I and II have touched on the variety of legal contexts involved in the regulation of family violence, viewing the criminal law as one system among many available to respond to and suppress violence among intimates. In this Part, the focus shifts from examining the effect of the criminal law and other legal regimes on family violence to looking at

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28. See Marcus, *supra* note 24, at 1670.

29. See generally D. RUSSELL, *supra* note 24.

matters from the opposite perspective, discussing the impact of family violence problems on the substantive criminal law.

Although this topic richly deserves a separate treatment, exigencies of time and space necessitate only sketchy presentation of five themes contributing toward understanding the impact of family violence on substantive criminal law. My short list of impressions gleaned from the family violence literature includes: (1) criminalization as fashion; (2) the preferred position of the criminal sanction; (3) the appeal of assimilation; (4) the tension between retribution as a limit and moral education as a goal; and (5) the continuing challenge of determining the penal significance of relationship in the definition and grading of criminal harms.

### A. *Criminalization as Fashion*

The movement to expand the reach of the criminal law over family violence is somewhat at odds with efforts to cut back on the application of penal law in other spheres. Over the broad sweep of decades, just when society began to recognize the limits of the criminal sanction in areas such as narcotics, gambling, and prostitution, there was a growing emphasis on using criminal law for the regulation of family violence.<sup>30</sup> More striking, while the increased salience of family violence has led some observers to seek alternatives to criminal law sanctions, it has simultaneously led others to press for increased reliance on criminal sanctions.<sup>31</sup>

This is not the place to belabor the litany of impediments that limit the effectiveness of the criminal law in regulating human behavior, or the special problems associated with low-visibility behaviors that frequently lack complaining parties to mobilize enforcement personnel. Further, the enthusiasm for criminal sanctions against family violence is not necessarily inconsistent with curtailing criminal enforcement in other areas. Problems associated with deterrence and incapacitation for victimless crimes or predatory crimes among strangers do not necessarily argue against criminalization of some types of family violence.

Unlike so-called victimless crimes, a potential complainant exists in

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30. Compare N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970) (arguing that extension of criminal law into areas of private morality and social welfare exceeded proper limits and bred inefficiency) with ATT'Y GEN. TASK FORCE ON FAMILY VIOLENCE 10 (Final Report 1984) ("Family violence should be recognized and responded to as a criminal activity.") and Marcus, *supra* note 24, at 1657 (nonenforcement of assault laws against domestic offenders violates equal protection clause of the 14th amendment).

31. Compare essays collected in *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* 363-480 (H. Davidson, L. Ray & R. Horowitz eds. 1982) and *MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES: AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION CENTER* (1980) (discussing domestic violence mediation) with ATT'Y GEN. TASK FORCE ON FAMILY VIOLENCE 22-23 (Final Report 1984) (recommending that arrest be established as the preferred law enforcement response to family violence.)

almost all instances of spousal abuse and in most child abuse cases involving children of school age and older. And the victims of family violence, unlike those of many other violent offenses, know their predators all too well. The potential for high levels of detection, and thus for enhanced deterrence and incapacitation, may distinguish family violence from other crimes and justify more optimism about punitive approaches in family violence prevention.

Yet some of the enthusiastic support for a penal response to family violence is based not on utilitarian calculations about chances of apprehension, but on the moral force of criminal law classification. Moreover, the limits of the criminal law, widely recognized in other contexts, frequently are overlooked by proponents of criminal law solutions to family violence.<sup>32</sup>

One irony in the area of child abuse is that the behavior is most visible when it is least dangerous and most dangerous when it is least visible. In the school years, when almost every child participates in a public world that makes his or her bruises and dysfunctions visible, the threat to life from parental abuse is relatively low. During infancy and the early preschool years, when child abuse is less visible, physical abuse is much more likely to be life threatening. A substantial majority of all known child abuse fatalities occur before age five, and the rate per thousand children of such fatalities is far higher in the early years.<sup>33</sup> Thus, the criminal law may be able to respond to all but the most dangerous forms of child abuse.

Perhaps proper understanding of the limits of criminal law system requires a period of reliance on criminal sanctions. If so, the contrast between social confidence in criminal law solutions for the family violence area and that for other areas of traditional criminal law enforcement may be a matter of a time lag. However, I question the confident assertion that the discouraging record of criminal law enforcement in areas such as spousal abuse is only a result of low law enforcement priorities or insufficient use of sanctions in earlier times. The Minneapolis Domestic Violence Experiment demonstrated that the use of arrest and custody led to a decrease in further abuse. Some see this as strong evidence that jailing is an effective remedy for spouse beating.<sup>34</sup> But many

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32. The Attorney General's Task Force on Family Violence concluded:

Because family violence is the only crime in which the victim knows the identity of the offender, the deterrent effects of legal sanctions against the offender are potentially greater than for any other crime. If family violence were always reported and if the legal system always acted on the basis of its knowledge, the deterrent effects of swift and certain legal penalties would be great.

ATT'Y GEN. TASK FORCE ON FAMILY VIOLENCE 4-5 (Final Report 1984).

33. See J. AREEN, *supra* note 6, at 1207-08; McCoid, *The Battered Child and Other Assaults Upon the Family* (pt. 1), 50 MINN. L. REV. 1, 15 (1965).

34. ATT'Y GEN. TASK FORCE ON FAMILY VIOLENCE (Final Report 1984).

observers, including this one, have their doubts about whether the criminal law, by itself, can ever be an effective instrument of family safety.

### *B. The Preferred Position of Criminal Law*

Part of the renewed emphasis on criminal law approaches to family violence simply reflects a greater awareness of spousal and child violence as social problems. This awareness would explain the heightened emphasis on criminal law solutions to family violence problems just as it should explain increases in fiscal aid programs, domestic violence shelters, administrative child neglect and abuse programs, and domestic violence programs as part of the civil law of family life. However, there seems to be an ever-increasing trend to favor criminal law approaches over their civil law or regulatory alternatives.

An instructive example of the emphasis and preferred position of the criminal law in family violence is the recent report of the U.S. Attorney General's Task Force on Family Violence. In its report, this body mentions favorably the involvement of the criminal law, the police, and institutions of criminal justice in family violence no fewer than fifty-eight times. The institutions of civil justice, including juvenile and family courts, play a much smaller role in the task force agenda, with a total of four references scattered throughout the document.<sup>35</sup> This pattern of emphasis is not confined to the Task Force; rather, it seems a prominent part of the landscape of current debate.

The extent of this "preferred position," its origins, and its effects are difficult to document. Part of the climate in which decisions have been made in the late 1970's and early 1980's has been the perception that anything other than criminalization demeans the seriousness of the offenses and the dignity of the victim-interests at stake in family violence. If this perception is widespread, it may bias the selection of strategies toward criminal justice and away from alternative solutions. The feeling that any public regulation other than the criminal law confers second class citizenship on victims may also hinder the identification of promising and creative solutions outside the criminal justice system. The language of blame and the machinery of criminal justice are necessary components of a societal response to serious family violence. Law enforcement institutions, notably the police, are historically the only twenty-four-hour community presence available to respond to family violence. But in this field, as with many others, the search for promising

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35. Mara Grossman, Boalt Hall 1987, coded the references in this report. Her complete count, in the order of frequency:

Criminal Law, Criminal Law Enforcement 58

Other Governmental Responses (excluding Criminal Law, Courts, Family Courts) 34

Communal Institutions 29

Civil Law (including Juvenile and Family Courts) 4.



partial solutions can benefit from a deliberate spirit of eclecticism. Peripheral vision is one of the great tools of public policy analysis.

### C. *The Momentum Toward Assimilation*

Parental beating of children is not just another form of aggravated assault, nor is parental "kidnapping" a subset of child abduction. The transporting of a child across state lines by his or her noncustodial parent in the wake of a divorce may be both harmful and evil, but considering this behavior and abduction for ransom as two kinds of kidnapping is like observing that small families and atomic explosions are both nuclear. Yet the momentum toward extending general crime rubrics is considerable.

Parental kidnapping is a metaphor, but the metaphoric definition of substantive crimes can have unintended consequences. So-called "statutory rape" is one example. When we consider sex achieved by force and sexual relations with a consenting minor to be two forms of rape, does that mean that the same kinds of mistakes and the same threshold for excusable error should apply?<sup>36</sup> Would it not be an amazing coincidence if the proper substantive definition, punishment, and enforcement strategies for parental abduction and kidnap for ransom were parallel?

Specificity in defining and grading criminal offenses is always a virtue. In an era of declining confidence in sentencing discretion, narrowing sentencing ranges associated with specific crimes, and renewed emphasis on retributive equity, specificity is an ever more necessary virtue.<sup>37</sup> For similar reasons, the shift from total reactivity to management and planning rationality in law enforcement argues for separate harms being defined, punished, and targeted for enforcement resources under separate rubrics. From this perspective, if there were ever a time for marital rape to be blended seamlessly into a larger category including predatory stranger rape, that time is not the present.

### D. *Retribution Versus Moral Education*

More than novelty made the Rideout trial in Oregon, the first full-blown courtroom trial of marital rape, one of the premier media events of its time. Public reaction was heightened by the prospect of forcible sex in marriage being treated as forcible rape because the majority of the population does not accept the moral equivalence of the two behaviors. The

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36. Compare *People v. Mayberry*, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975) (forcible rape) with *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (statutory rape).

37. See Zimring, *Sentencing Reform in the States*, in REFORM AND PUNISHMENT 101, 116 (M. Tonry & F. Zimring eds. 1983) (broadly defined offenses are incompatible with determinant sentencing scheme).

human interest of the trial was the dissonance between the public perception of the behavior and public notions of the seriousness of rape.

This dissonance was not lost on those who welcomed the trial and hoped the conviction would be accompanied by serious and therefore unpopular punishment. Rape classification was desired by some not in spite of a tolerant public attitude that would view the punishment for the behavior as extreme but because of that tolerant public attitude. Toleration of forcible sex within marriage is evidence of the need for public education. Creating a penal law equivalence between stranger rape and forcible marital sex was for many a deliberate strategy in pursuing moral education by overshooting the retributive ceiling then existing in the public mind for the marital offense. Almost all thoughtful observers would agree that there was no public consensus on the moral equivalence between the raping stranger and the raping husband. But the trial and the punishment were viewed by some as the mechanism to create that equivalence.

Was this a gamble worth taking? The strategic issue, whether the spousal and stranger sexual exploitation should be viewed as equivalent, is beyond the scope of these remarks. The tactical question, whether stretching retributive limits will underscore the seriousness of spousal exploitation rather than produce disrespect and rejection of the legal result, is important in its own right. Whenever the criminal law is used as an instrument of moral education, the legal result must lead rather than follow public perceptions of the seriousness of offenses. But lead by how much? The conventional wisdom is that the criminal law may lead public opinion in exceptional and deserving cases, but that ground must be chosen carefully. The crusade against drunk driving seems one modern success in this pursuit.<sup>38</sup> Heavy penalties for possession and use of marijuana seem one conspicuous modern failure.<sup>39</sup> By my assessment, the Rideout trial overreached the criminal law's capacity for moral leadership, even if one judges the behavior within marriage and amongst strangers to be equivalent. The drama associated with the criminal prosecution of absconding noncustodial parents is a closer question.

We are on notice that this competition between retributive ceilings and efforts to use severe sanctions as instruments of moral education will be a recurrent element in the new jurisprudence of family violence.

### *E. The Penal Significance of Relationship*

The reexamination of the criminal law of family violence has stimu-

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38. See generally Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595 (1985).

39. See J. KAPLAN, MARIJUANA—THE NEW PROHIBITION 47 (1972) ("Despite the criminalization of marijuana, its use is widespread.").

lated, much to our benefit, renewed interest in the significance of the relationship between victim and offender in judging the moral culpability of a variety of offenses. Are sexually predatory husbands like raping strangers, or is there something in the nature of the relationship that affects our judgment of the harm done or of the offender's culpability and future dangerousness? If husbands are different than strangers, what about those located at midpoints in the continuum between nonrelationship and intimacy? What about date rape?<sup>40</sup>

One of the major contributions of the renewed interest in the jurisprudence of family violence is that it raises the broader question of the appropriate significance of prior relationship in gauging the seriousness of assaults, sexual impositions, child abuse, and misfeasance in the supervision of the young. The significance of relationship in the definition and grading of offenses of violence has long been neglected. The new emphasis on family violence makes these issues a compulsory part of an agenda for criminal law reform.

### CONCLUSION

Advanced societies take family violence seriously. Thus, the increased attention devoted to intrafamilial violence in the United States is evidence of societal maturity.

Yet the pervasiveness of intimate violence in Western culture suggests there is a parochial limit to current discussion of the control of such violence in the United States. Child abuse and violence between sexual intimates are recurrent behaviors throughout the Western world. Historical and comparative studies of social control in this area would thus appear to be of substantial potential value.

What are the practices in those democracies in Europe and Scandinavia with which we usually compare ourselves? Which of the policy options raised in current discussions have been tried elsewhere and with what results? Are there approaches being used by our Western neighbors that we have not yet considered?

Family violence, like the poor, may be always with us, but in different proportions and with different outcomes. Thus, the comparative study of this chronic problem seems particularly important to a balanced agenda of policy research.

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40. There have been several recent articles on date rape in popular publications. See, e.g., Kay, *Was I Raped?*, GLAMOUR, Aug. 1985, at 258; Sweet, *Date Rape: The Story of an Epidemic and Those Who Deny It*, MS., Oct. 1985, at 56.

