

Franklin E. Zimring

Toward a Jurisprudence of Family Violence

ABSTRACT

Modern law reform developments have focused increased attention on the jurisprudence of family violence. State intervention in ongoing family relations has been generally constrained by concern for family privacy except when the taking of life, parental incest, or the imminent threat to life or health of a minor child was involved. There are three basic enforcement strategies for dealing with family violence—privatization, contingent intervention, and compulsory intervention—and they represent a continuum of responses to suppress violence among intimates. Privatization is essentially a separation from the formal legal system, contingent intervention makes legal responses available only after the victim has taken action, and compulsory intervention involves full enforcement of the criminal law. Participants in the social and political movement calling for criminalization of family violence would use criminal law powers to regulate family violence by preferring criminal law over other alternatives to deal with family violence, using general crime categories to punish violence within the family as severely as the same acts outside of families, using severe sanctions as instruments of moral education, and reviving interest in the significance of relationships between victim and offender in defining and grading violent offenses.

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, within a set of intimate relationships that can flourish only when sufficiently protected from public scrutiny.

Franklin E. Zimring is professor of law and director of the Earl Warren Legal Institute, University of California at Berkeley.

© 1989 by The University of Chicago. All rights reserved.
0-226-80806-8/89/0011-0002\$01.00

But privacy can metastasize into a Hobbesian arena where the strong prey on the weak, and the weak prey on those who are 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 the proper public aspects of private life. 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 1980s, 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 it was in earlier eras (Zimring, Mukherjee, and Van Winkle 1983). Yet violence between intimates is a more salient public policy issue in the 1980s than ever before. There is a similar trend toward increased social awareness in regard to 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 it has become an important legislative concern only in the 1970s and 1980s.

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 1960s, increased intellectual and political concentration on questions of gender in the 1970s and 1980s, and the current 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 are quite frequent.

One consequence of increased public concern is legal change. No short list can give credit to the manifold legal changes relating to family violence. Among the more important changes of the last fifteen years are the rapid development of child abuse reporting laws in the states, the creation of shelters for battered spouses, the abrogation of marital status as a defense to forcible rape charges, legal recognition of the battered child syndrome, and debates about expansion of the law of justification in self-defense to include the "battered spouse syndrome."

I do not attempt to catalog in these pages the specific changes in the

law of family violence over the past fifteen years. Instead, I focus on one consequence of this new salience: 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, if you will—is particularly important.

This essay attempts to lay a groundwork of basic classifications in order to build toward a coherent legal perspective on family violence as a set of legal problems. Section I sets out what I call the doctrine of family privacy with respect to legal interventions concerning violent acts. Section II presents a range of alternative government responses to family violence and the legal theories that these responses imply. Section III offers reflections on the role of the criminal sanction in response to family violence. Conclusions are offered in Section IV.

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. *McGuire v. McGuire*, 157 Neb. 226, 59 N.W. 2d 336 (1953), a leading case of family privacy doctrine, 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 in Nebraska to enforce a marital duty to support her that had existed for more than thirty years of their marriage. Her complaint alleged: “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” (pp. 228–29).

Mr. McGuire’s lapses in generosity were not occasioned by poverty; he was the 1950s equivalent of a 1980s 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. The reason this

disqualified her claim for support was the doctrine of family privacy: "The living standards of the family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward the wife, according to his wealth and circumstances, leaves little to be said on his behalf" (p. 238). 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 the circumstances and condition" of his financial means. However, while the parties were living together, 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 in 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 marriage 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.

Does this doctrine extend to situations of violence within the family? The following excerpt from a 1973 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 thirty-seven 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.* [McIntire 1973, pp. 34-36]

Whatever the private citizen's view, as a legal matter it makes all the 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 her ongoing marriage, it is difficult to decide whether the parent-child relationship insulates an otherwise 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 battery has merely 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 roughings by siblings, parents, and spouses,¹ ranging from physical discipline to minor fights to forcible restraint. Further, 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" (Clark 1968, p. 257; Areen 1985, pp. 1181-1215).

While notions of husband supremacy and the view 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 extensive intrusion on family privacy caused by airing a couple's dirty laundry in open court as the price of matrimonial dissolution (Areen 1985, pp. 267-81). One target of this reform was the notorious "two slap" rule that required public testimony that one spouse had hit the other twice; this was the minimum condition for an Illinois divorce for many years.² The movement toward abolition of interspousal tort immunity is best viewed not as a rejection of the 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 does not encourage conflict within family units but instead often makes resources from insurance companies available to families; if one spouse is held liable, homeowners' or car insurance pays for the other spouse's injuries (Clark 1968, p. 253; Prosser 1971, § 122, p. 868; McKinney's

¹ See *Thompson v. Thompson*, 218 U.S. 611, 618 (1910); *Bruno v. Codd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); Clark (1968, pp. 252-153 [spouses]), 256-25 [parents]; Prosser (1971).

² *Fritts v. Fritts*, 138 Ill. 436, 28 N.E. 1058, 14 L.R.A. 685 (1891); *Tuyls v. Tuyls*, 21 Ill. 2d 192, 171 N.E. 779 (1961).

Domestic Relations Law [New York], 57; McKinney's Insurance Law [New York], 167[3]).

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 has evolved over the past two decades, requiring greater justification to support state intervention in the ongoing family (Areen 1975; Wald 1976). When the focus shifts from child neglect to child abuse, however, the value accorded family privacy seems to diminish. 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, if child neglect is compared to child abuse, is one rather stunning illustration of the current confusion surrounding the aims of and means in child welfare legislation.³

In other family violence areas, most notably spousal violence and parental kidnapping, modern reform efforts that increase law enforcement and court presence subordinate family privacy considerations to the public interest in suppressing and responding to the target behavior.⁴

It is important to note, not just as a technical matter, that doctrines of family privacy always apply when the law addresses the relations among members of an ongoing family. The consequences of family privacy doctrine vary, but not its application. Across the range of behaviors to be balanced against privacy, the legal responses that arise when different behaviors are balanced against privacy can be grouped under three headings: categorical exclusion from protection under the privacy doctrine, qualified exclusion, and privilege.

Certain types of behavior are categorically excluded from the application of family privacy theory. The taking of life, parental incest, and the imminent threat to the life or health of a minor child all trigger the

³ *Roe v. Conn*, 417 F. Supp 769 (M.D. Ala. [1976]); Areen (1975). The family privacy doctrine has taken on constitutional significance but usually in the context of family members versus state regulation. See *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); but see *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

⁴ Parental Kidnapping Prevention Act of 1980. Pub. L. No. 96-611, § 7, 94 Stat. 3568; Areen (1985), pp. 573-75; *Flood v. Braaton*, 727 F.2d 303 (3d Cir., 1984) (and in Areen [1985], p. 575); U.S. Attorney General's Task Force on Family Violence (1984); Clark (1968), p. 325.

law's willingness to penetrate the privacy of family life because family privacy considerations are outweighed by other important public goals.⁵ An issue in the current debate about spouse battering and the proper threshold for the consideration of 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.

What I call "qualified exclusion" from the 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, so 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 would not be the basis for either tort recovery or (by law enforcement tradition) a successful battery prosecution if the parties continue living together.⁶ A spouse's right to physical security will be vindicated, however, by finding such an assault to be actionable cause for the dissolution of the marriage. 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 can consider such behavior in a custody contest at divorce when determining the child's future placement (Kay and Philips 1966; Clark 1968, pp. 584–91; Areen 1985, pp. 339–589). Traditionally, 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.⁷ In such cases, the right to be secure against physical force may exist in all cases, but the legal remedy has often been available only when the family dissolves.

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

⁵ Areen (1975); Wald (1976); *People v. Green*, 27 Cal. 3d 1, 164 Cal. Rptr. 1, 609 P.2d 468 (1980) (husband charged with robbery, kidnapping, and first-degree murder of wife); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); Areen (1985), pp. 1181–1328.

⁶ Compare *Kemski v. Kemski*, 33 Ill. App. 331 (abstract), 77 N.E.2d 344 (1948); to *Prosser* (1971), § 122, p. 868.

⁷ *Bruno v. Codd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979); Marcus (1981), pp. 1657–1733; U.S. Commission on Civil Rights (1982), see esp. pp. 23–34; Lerman (1981).

appropriate support.⁸ 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. 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 the subject of an absolute privilege for some legal purpose but only a qualified privilege for others. The spanking parent may, for example, be immune from tort liability, yet the same inappropriate physical discipline may deprive him or her the custody of a child after divorce. This complexity necessitates review of the wide range of different legal approaches that are alternative 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 ambitions here are more limited: I outline three basic strategies of legal control and discuss some legal subsystems currently used in pursuit of each strategic purpose. The three basic strategies I mention, *privatization*, *contingent intervention*, and *compulsory intervention*, parallel the levels of family privacy doctrine discussed in the previous section.

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 minimus* principle. By contrast, the spanking of a child by a parent would constitute battery outside the family context, but it is immunized from legal system response because of the family relationship; this is an example of privatization. Privatization corre-

⁸ Russell (1982); Schulman (1982), pp. 375-81; *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567 (1984).

sponds to the categories 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 criminal law. Many examples could be cited. The law has traditionally immunized parents from liability for most batteries involving the physical discipline of children. Detentions that would otherwise constitute false imprisonment are not so considered between parent and child. Contracts between married parties are usually not enforceable by courts during marriage. The law traditionally would not treat forced sex during marriage as rape (Clark 1968; Prosser 1971), and it is notoriously difficult to get police and court agencies, when exercising law enforcement discretion, to view most spousal assaults as other than a private matter.

An alternative description of this process might 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 (U.S. Commission on Civil Rights 1978, pp. 62-66; Lazlo and McKeen 1978, pp. 327-57).

Despite the increased political salience of family violence, privatization is still a basic and popular response to many problems of parent-child relationships as well as relationships between spouses. 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 one form of diversion program 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 minimis* nonintervention policies, but, on the contrary, because they regard such family interactions as very important indeed. If important values are disserved by formal processes, values such as the safety of victims, the result may be advocacy of nonintervention.

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 (Kohlberg 1982; Fagan et al. 1984).

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 when we excuse Mr. McGuire from an enforceable 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 (U.S. Commission on Civil Rights 1978; Jorgensen 1982; Fagan et al. 1984). Traditionally, many forms of child neglect and abuse intervention have in fact relied on the initiative of an adult complainant to mobilize the system (Areen 1975; Wald 1976; U.S. Attorney General's Task Force on Family Violence 1984). 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 that is based on prudential criteria.

The motives for prudence in family violence intervention vary. One important contrast is between the reluctance to aggravate the situation and the desire to conserve scarce public resources. One reason to limit public intervention in the child-neglect sphere when 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 ab-

sence of a complainant, or even a separation, simply to conserve resources (Davis 1969; Fagan et al. 1984). 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 program administrators defend the program's failure to assist victims in order to conserve funds, refusal of service is much more controversial than when the refusal is based on concern for the victim's 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 as a theory and contingent intervention as a strategy. Without delving deeply into the "myth of full enforcement" (the theory that every violation of the criminal law should be discovered by the police and prosecuted in the courts), 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).⁹

The second important aspect of this classification scheme concerns the conditions under which policy should change from contingent intervention to compulsory intervention and the relation of that decision to the reasons that underlie contingent enforcement strategies. It may be useful to ask whether contingent approaches 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, the increased public salience of an issue 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 resulted in im-

⁹ 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, involving many behaviors outside the family context, than current discussion recognizes (see Marcus 1981; Russell 1982).

portant child welfare costs, such as excessive removal of children from potentially sustaining family settings, the association between the social importance of the goal and the appropriate strategy of legal response is anything but automatic.¹⁰ When continuity of care is important, the removal of a child will produce suffering even though the child's continued placement risks physical harm. This is a risk that some judges would run for the child's own welfare.

My category of compulsory intervention covers many of those behaviors within the family setting specifically excluded from family privilege doctrine, behaviors such as homicide, grievous assault, and incest. 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 categories of privacy doctrine coverage, discussed in Section I, and the enforcement strategies discussed in this section. The relation 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,

¹⁰ One powerful illustration of the point concerns child abuse not only in the family context but also in child-care facilities. The chilling effect of oversensitizing such facilities to the criminal law may also have a significant child-welfare cost. When administrative directives go out to early childhood education teachers and custodial workers on the order of, "Please don't hug the children," child-welfare costs seem obvious. This is one widely reported impact of recent child sexual abuse prosecution. But also see U.S. Attorney General's Task Force on Family Violence (1984). "Contrary to common perception, persons who sexually abuse children tend to be persons of respectable appearance and behavior who are known and trusted by the victim. These abusers tend to use nonviolent techniques, seducing the child through attention, affection, and gifts. One of the common strategies of pedophiles and child molesters is to try to gain employment with organizations whose work involves the care, treatment, transportation, supervision or entertainment of children" (p. 106). The task force urges all states to use fingerprinting and other criminal data-base techniques in screening job applicants for such occupations.

TABLE 1
Privacy Doctrine and Law Enforcement Response

Doctrine of Privacy	Strategic Response by Legal System		
	Privatization	Contingent Intervention	Compulsory Intervention
Unconditional privilege	X		
Qualified privilege		X	
Categorical exemption		X	X

standard proscriptions 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 behaviors can provide the basis for a separate and specific subjurisprudence within the criminal law. The tension between these approaches surfaces in much current discussion (cf. Morris and Hawkins [1970] with Marcus [1981] and U.S. Attorney General's Task Force on Family Violence [1984]). It is revealed in the terminology used to refer to family offenses, in debates on enforcement strategy, and in reaction to verdicts and punishments in particular family violence cases.

Some of the linguistic aspects of modern concern with family violence merit attention. The buzzwords of the 1970s, phrases like "spousal rape" and "parental kidnapping," raise interesting issues. To what extent does the term "parental kidnapping" represent a situation where the adjective defeats the noun, in the sense that what we generally think of as kidnapping cannot by definition be committed by parents, even if the parental behavior is properly regarded as a criminal offense?

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 and the same degree of moral condemnation from the community? Indeed, is the same core moral wrong present in sexual predations within marriage as 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 tactic 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 include behavior between spouses in the category of forcible rape makes spousal rape an undifferentiated part of the general group of rape offenses, with its punishment or defenses correspondingly undifferentiated. This appears to be the intention of some of its sponsors. Similarly, general doctrines dealing with duties, omissions, and negligence are often extended to parent-child interactions. When children die, general doctrines regarding manslaughter liability are invoked, with troubling consequences. Parents who never meant harm are convicted of crimes when children die as the result of innocent ignorance (*State v. Williams*, 4 Wash. App. 908, 484 P2d 1167 [1971]).

One price of extending general doctrine to family violence is a divergence between the formal law that governs family violence and law enforcement policy expressed through police and prosecutor discretion. The intentional nontreatment of severely handicapped newborns in hospitals technically may be murder in the statute books, but that law will rarely, if ever, be enforced. The accidental death of children negligently supervised by parents occurs thousands of times each year, with only a trickle of prosecutions in the United States. Almost all of those cases seem problematic for criminal punishment when intention to injure is absent. Spousal rape, even when criminal in theory, has never been strictly 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 associated with rape are one argument against generalization into the marital context, and the punishments available for manslaughter usually appear too severe for parental negligence.

But a specific jurisprudence of family violence is not necessarily

lenient. Extreme and repetitive child abuse may call for more severe, as well as less 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 (Clark 1968, § 2.8; Comment 1979).

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 (Marcus 1981). 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 of the requirements of 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 includes 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 treated as if it were as 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 reason why equal treatment under the general rape rubric is necessary (Russell 1982). 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

Sections I and II have examined a variety of legal contexts that are involved in the regulation of family violence, viewing the criminal law as one alternative system among many available to respond to and to suppress violence among intimates. In this section, the focus shifts from examining the effect of the criminal law and other legal regimes on family violence to looking at matters from the opposite perspective, discussing the impact of family violence problems on the substantive criminal law.

That topic richly deserves a separate treatment, but I shall use ex-

igencies of time and space to defend my sketchy presentation of five themes as a contribution toward understanding the impact of family violence on substantive criminal law. My short list of impressions gleaned from the family violence literature includes (a) criminalization as fashion, (b) the preferred position of the criminal sanction, (c) the appeal of assimilation, (d) the tension between retribution as a limit and moral education as a goal, and (e) the continuing challenge of determining the penal significance of relationship in the definition and grading of 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. In the broad sweep of decades, just when society has begun to recognize the limits of the criminal sanction in areas such as narcotics, gambling, and prostitution, there is a growing emphasis on using criminal law for the regulation of family violence (cf. Vera Institute of Justice [1980] with U.S. Attorney General's Task Force on Family Violence [1984, pp. 22–23]). More striking, the increased salience of family violence has simultaneously led to the quest for alternatives to criminal law sanctions, such as mediation of low-level interspousal violence by some observers, while others press for increased reliance on criminal justice institutions for the same behavior (Goldstein 1960; Morris and Hawkins 1970).

This is not the place to belabor the litany of impediments that limit the effectiveness of the criminal law in regulating human behavior or to attack 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 enforcement in other areas.¹¹ Many of the problems associated with deterrence and incapac-

¹¹ The legal response to family violence must be guided primarily by the nature of the abusive act, not by the relationship between the victim and the abuser. The task force recommends that the legal system treat assaults within the family as seriously as it would treat the same assault if it occurred between strangers. "When an officer enters a home and finds a mother or child who is the victim of an assault, the officer is dealing with a crime—a crime with its own distinctive characteristics, but first and foremost a crime. . . . 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" (U.S. Attorney General's Task Force on Family Violence 1984, pp. 4–5).

tation for victimless crimes or predatory crimes among strangers are not necessary handicaps for some types of family violence.

Unlike so-called victimless crimes, a potential complainant exists in almost all instances of spousal abuse and 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, with 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 penal approaches to family violence is not based on utilitarian calculations about chances of apprehension but on the moral force of criminal law classification. Moreover, many limits of the criminal law that are widely recognized in other contexts—problems of resources, arbitrary enforcement, and limited citizen support—frequently are overlooked by proponents of criminal law solutions in the family.¹²

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 of lesser visibility, the life-threatening quality of physical abuse is much greater. A substantial majority of all known child abuse fatalities occur before the age of five, and the rate of such fatalities per thousand children is far higher in the early years.¹³ The criminal law may be able to respond to all but the most dangerous forms of child abuse.

Maybe the only way we learn of the limits of the criminal law in an area such as family violence is to depend on it for awhile. If so, the contrast between social confidence in criminal law solutions for the family violence area and social confidence in those solutions for other areas of traditional criminal law enforcement may be a matter of a time lag. However, one wonders about the confident assertion that the discouraging record of criminal law enforcement in areas such as spousal abuse is only a matter of low law enforcement priorities or insufficient

¹² McCoid (1965), p. 15; *State v. Tanner*, 675 P.2d 539 (S.Ct. Utah, 1983); Areen (1985, pp. 1207–8).

¹³ U.S. Attorney General's Task Force on Family Violence (1984).

use of sanctions in earlier times. The almost euphoric embrace of the apparent policy implications of the Minneapolis spouse abuse experiment, where the use of arrest and custody led to an apparent decrease in further abuse, may stand the test of time and experience (see Elliott, in this volume). But many observers, including me, 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 would explain the heightened emphasis placed on criminal law approaches by family violence programs, 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 U.S. Attorney General's Task Force on Family Violence, mentioned above. In its report (1984), this body gave no fewer than fifty-eight instances of favorable mention to the involvement of the criminal law, the police, and institutions of criminal justice. 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.¹⁴ This pattern of emphasis is not confined to the task force; rather, it seems to be a prominent part of the current debate.

The extent of this "preferred position" emphasis, its origins, and its effects are difficult to document. Part of the climate in which decisions have been made in the late 1970s and early 1980s 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 as opposed to alternative solutions.

¹⁴ U.S. Attorney General's Task Force on Family Violence (1984). Mara Grossman, Boalt Hall, University of California, Berkeley, 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).

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 in many others, the search for promising 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. The transporting of a child across state lines by his or her noncustodial parent in the wake of a divorce is 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?¹⁵ 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 the defining and grading of criminal offenses is always a virtue. In an era of declining confidence in sentencing discretion, narrowing of sentencing ranges associated with specific crimes, and renewed emphasis on retributive equity, specificity is an ever more necessary virtue (Tonry and Zimring 1983). 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

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

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 sustained courtroom trial of marital rape, into one of the premier media events of its time. The public reaction was heightened by the prospect of forcible sex in marriage being treated as forcible rape because the majority of the population did not accept the moral equivalence of the two behaviors. The human interest of the trial was the dissonance between the public perception of the behavior and public notions of the seriousness of rape (Russell 1982).

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 (Russell 1982). Toleration of forcible sex within marriage, the argument goes, is seen as evidence of the need for public education. Creating a moral 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 spousal and stranger sexual exploitation should be viewed as equivalent, is beyond the scope of these remarks. The tactical question, whether stretching punishment to and beyond the public perception of what is deserved will underscore the seriousness of spousal exploitation or will 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 do this, in exceptional and deserving cases, but that that ground must be chosen carefully. The crusade against drunk driving seems one modern success in this pursuit. Heavy penalties for possession and use of mari-

juana seems one conspicuous modern failure (Kaplan 1970; Jacobs and Strossen 1985). By my assessment, the Rideout trial overreached the criminal law's capacity for moral leadership, even if one judges the behavior within marriage and among 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 Relationships

The reexamination of the criminal law of family violence has stimulated, much to our benefit, renewed interest in the significance of a relationship between victim and offender in judging the moral culpability of a variety of offenses. Are sexually exploitative 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 from strangers, what about those located at midpoints in the continuum between nonrelationship and intimacy? What about date rape (see Kaye 1985; Sweet 1985)?

One of the major contributions made by the renewed interest in the jurisprudence of family violence is its raising of a broader question: 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.

IV. 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 that 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? How many 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.

REFERENCES

- Areen, Judith. 1975. "Intervention between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases." *Georgetown Law Journal* 63:887-937.
- . 1985. *Cases and Materials on Family Law*, 2d ed. Mineola, N.Y.: Foundation Press.
- Clark, Homer H., Jr. 1968. *Law of Domestic Relations*. St. Paul, Minn.: West.
- Comment. 1979. "Incest and the Legal System." *U.C. Davis Law Review* 12:673.
- Davis, Kenneth Culp. 1969. *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press.
- Elliott, Delbert. In this volume. "Criminal Justice Procedures in Family Violence Crimes."
- Fagan, Jeffrey, Elizabeth Friedman, and Sandra Wexler, with Virginia Leurs. 1984. *The LEAA Family Violence Program: Final Evaluation Report*. Vol. 1, *Analytic Findings*. San Francisco: URSA Institute.
- Goldstein, Joseph. 1960. "Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice." *Yale Law Journal* 69:543-94.
- Jacobs, James B., and Nadine Strossen. 1985. "Mass Investigations without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks." *U.C. Davis Law Review* 18:595-680.
- Jorgensen, Carol. 1982. "The Role of Shelter Staff in Mediation." In *Alternative Means of Family Disputes Resolution*, edited by H. Davidson, L. Ray, and R. Horowitz. Washington, D.C.: American Bar Association.
- Kaplan, John. 1970. *Marijuana, the New Prohibition*. New York: World Publishing Co.
- Kay, Herma Hill, and Irving Philips. 1966. "Poverty and the Law of Child Custody." *California Law Review* 54:717.
- Kaye, E. 1985. "Was I Raped?" *Glamour* 83:258-59.

- Kohlberg, Amy. 1982. "Social and Legal Policy Implications of Domestic Violence." In *Alternative Means of Family Disputes Resolution*, edited by H. Davidson, L. Ray, and R. Horowitz. Washington, D.C.: American Bar Association.
- Lazlo, Anna T., and Thomas McKeen. 1978. "Court Diversion: An Alternative for Spousal Abuse Cases." In *Battered Women: Issues of Public Policy*, edited by U.S. Commission on Civil Rights. Washington, D.C.: Commission on Civil Rights.
- Lerman, Lisa G. 1981. *Prosecution of Spousal Abuse: Innovations in Criminal Justice Response*. Washington, D.C.: Center for Women's Policy Studies.
- McCoid, Allen H. 1965. "The Battered Child and Other Assaults upon the Family: Part One." *Minnesota Law Review* 50:1-58.
- McIntire, Roger W. 1973. "Parenthood Training or Mandatory Birth Control: Take Your Choice." *Psychology Today* 7(5):34-36.
- Marcus, Maria L. 1981. "Conjugal Violence: The Law of Force and the Force of Law." *California Law Review* 69:1657-1733.
- Morris, Norval, and Gordon Hawkins. 1970. *The Honest Politician's Guide to Crime Control*. Chicago: University of Chicago Press.
- Prosser, William L. 1971. *Handbook of the Law of Torts*, 4th ed. St. Paul, Minn.: West.
- Russell, Diana E., ed. 1982. *Rape in Marriage*. New York: Macmillan.
- Schulman, Joanne. 1982. "State-by-State Information on Marital Rape Exemption Laws." In *Rape in Marriage*, edited by Diana E. H. Russell. New York: Macmillan.
- Sweet, E. 1985. "Date Rape: The Story of an Epidemic and Those Who Deny It." *Ms.* 14:56-59.
- Tonry, Michael, and Franklin E. Zimring, eds. 1983. *Reform and Punishment: Essays on Criminal Sentencing*. Studies in Crime and Justice. Chicago: University of Chicago Press.
- U.S. Attorney General's Task Force on Family Violence. 1984. *Final Report*. Washington, D.C.: U.S. Attorney General.
- U.S. Commission on Civil Rights, eds. 1978. *Battered Women: Issues of Public Policy*. Washington, D.C.: U.S. Government Printing Office.
- Vera Institute of Justice. 1980. *Mediation and Arbitration as Alternatives to Prosecution in Felony Arrest Cases: An Evaluation of the Brooklyn Dispute Resolution Center*. New York: Vera Institute of Justice.
- Wald, Michael S. 1976. "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." *Stanford Law Review* 28:625-706.
- Zimring, Franklin, Satyanshu K. Mukherjee, and Barrick Van Winkle. 1983. "Intimate Violence: A Study of Intersexual Homicide in Chicago." *University of Chicago Law Review* 50:910-30.

