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### Yes to Nondiscrimination, No to New Forms of Criminal Liability: A Reply to Professors Collins, Leib, and Markel

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**YES TO NONDISCRIMINATION, NO TO  
NEW FORMS OF CRIMINAL LIABILITY: A REPLY TO  
PROFESSORS COLLINS, LEIB, AND MARKEL**

**MICHAEL M. O'HEAR\***

INTRODUCTION

Bruce, Dick, and Alfred live together in a mansion that sits atop a certain well-known cave (not Mammoth). Dick's parents died in a circus accident some years ago. Bruce was appointed Dick's guardian, but no legal adoption occurred. Although he is Bruce's employee, Alfred enjoys an extremely close relationship with both Bruce and Dick, who have shared with him their most closely guarded personal secrets. The three have risked their lives for one another on many occasions. In short, they have a relationship of intimacy and mutual support that is far richer – and has proven far more durable – than that which is found in most families. Yet, if the three actually did form a traditional family unit – husband, wife, and biological child – then their relationship would be quite different in the eyes of the law. They would become subject to an elaborate new set of legal duties and prohibitions – many of them criminally enforceable – in their interactions with one another and with others in the world beyond Wayne Manor.

Why, ask Collins, Leib, and Markel, should this be so? The Bruce-Dick-Alfred relationship is functionally, if not formally, familial. It is a locus of child-rearing, intimacy, and caregiving. If we can imagine a sexual relationship between Bruce and Alfred, then it becomes even harder to draw functional distinctions between what happens in Wayne Manor and what happens in, say, the Cleaver household. Collins, Leib, and Markel invite us to question – and, as far as possible, eliminate – legal distinctions between relationships where functional distinctions do not exist.<sup>1</sup>

If we follow their lead and attempt to close the gap between the criminal liabilities faced by the members of formal families (the Cleaver household) and functional families (the Wayne household), we might head in either of two different directions. We could reduce the special criminal liabilities imposed by virtue of formal family status, or we could create new criminal liabilities based on the existence of relationships that are functionally familial. In

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<sup>1</sup> See generally Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327 (2008).

principle, the leveling impulse can be satisfied equally well by raising up disadvantaged groups as by knocking down the privileged.

In selecting which leveling strategy to employ, Collins, Leib, and Markel face a difficulty: their basic normative commitments seem to point in opposite directions. On the one hand, they embrace libertarian values of maximizing individual autonomy and minimizing the coercive power of the state.<sup>2</sup> This commitment supports paring back existing forms of criminal liability and rejecting new ones. On the other hand, they also embrace the promotion of voluntary caregiving relationships.<sup>3</sup> If certain forms of criminal liability are helping to advance voluntary caregiving within formal family relationships, then why not extend those liabilities to functional family relationships?

Grappling with these competing values, Collins, Leib, and Markel adopt a hybrid approach. Rather than uniformly eliminating or extending family based criminal liabilities, they offer an intricate analytical framework that promises to criminalize or decriminalize depending on a weighing of relevant values specific to each type of family burden. Of particular note is their proposal of a government-administered registry that would permit individuals to opt into a system of criminal liability for some forms of non-familial caregiving.<sup>4</sup> If Bruce, Dick, and Alfred choose to register, then the Wayne household can obtain the same criminal liability benefits the Cleavers enjoy. In other words – and this is the aspect of the article by Collins, Leib, and Markel on which I will particularly focus – they contemplate an expansion of the criminal law’s regulatory ambitions into a new set of private decisions traditionally regarded as matters of individual, not state, choice.<sup>5</sup>

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<sup>2</sup> *Id.* at 1332-33, 1366-69.

<sup>3</sup> *Id.* at 1363.

<sup>4</sup> *Id.* at 1365-66. As a model for their opt-in proposal, they cite David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, a Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348 (2001). Notably, however, the “designated friends” registry proposed by Chambers did not include a criminal liability component. *Id.* at 1348.

<sup>5</sup> The authors seem most supportive of expanded criminal liability when it comes to the duty to rescue. Collins, Leib & Markel, *supra* note 1, at 1374 (indicating their preference for a scheme automatically imposing a duty to rescue on all primary caregivers and allowing others to opt in). With respect to other family burdens (particularly vicarious liability, bigamy, adultery, child support, and parental support) their first-choice preference seems to be elimination of criminal liability, but they would seemingly tolerate, perhaps even affirmatively embrace, expansion to a broader range of voluntary caregivers as a second-best choice if criminal liability cannot be eliminated. *See id.* at 1390 (advocating for abolishing parental responsibility laws because they “fail to be fully justifiable,” or in the alternative expanding liability to all primary caregivers); *id.* at 1409 (promoting the decriminalization of bigamy but allowing couples to “contract around” the default rule if they desire monogamy); *id.* at 1413 (promoting the decriminalization of adultery but allowing couples regardless of marital status to “contract around” the default rule if they desire monogamy); *id.* at 1420 (suggesting that criminal sanctions in cases of nonpayment of child support only be placed on voluntary caregivers without regard to legal parental

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To be sure, there is much more going on in their pathbreaking article, which should be regarded as a major scholarly achievement even by those who disagree with some of their normative conclusions. They have fundamentally reimagined the domain where family law intersects with criminal law, moving us well beyond the intractable debates over law enforcement responses to domestic violence and identifying many promising new directions for research. Their work here is both innovative and meticulous, and other scholars will doubtlessly mine its insights for many years to come.

Despite my admiration for the article, I find myself unpersuaded by one of its central normative premises: that the criminal law has a useful and appropriate role to play in promoting voluntary caregiving relationships. My difficulties with this premise fall into two categories, which are explored separately below. In Part I, I argue that Collins, Leib, and Markel get it wrong when they make voluntariness the touchstone for criminal enforcement of caregiving responsibilities. The voluntary assumption of responsibilities later neglected has not generally been regarded as either necessary or sufficient as a basis for criminal liability, and the voluntariness upon which Collins, Leib, and Markel rely to overcome their libertarian leanings actually provides little support for the expansion of criminal liability that they endorse. In Part II, I argue that criminal law is generally a poor device for promoting changes in private behavior and raising the status of traditionally marginalized groups. Indeed, in light of the vast gap between the scope of the criminal law and the resources available to police and prosecutors, changes in formal law may prove counterproductive with respect to the normative ends that Collins, Leib, and Markel seek to achieve.

#### I. THE LIMITS OF VOLUNTARINESS

Collins, Leib, and Markel subscribe to what they call “liberal minimalism” in criminal law: in their view (as in mine), the coercive power of the criminal sanction should not be deployed without some compelling justification grounded in legitimate public purposes.<sup>6</sup> However, I part company with the authors to the extent they treat the voluntary assumption of a duty as a consideration that adds substantial support for the criminal enforcement of that duty. To be sure, voluntariness has a crucial normative role to play in criminal law: there can be no just criminal punishment unless the defendant has voluntarily chosen to do (or not do) something in violation of a criminally enforceable norm of conduct. But the criminal enforceability of a norm of conduct generally does not depend on whether it has been voluntarily agreed to. Voluntariness matters for the conduct, not the norm. This is generally true both as a matter of sufficiency (contracts are civilly, not criminally,

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status); *id.* at 1422 (expressing the view that all parental support laws should be abolished, or in the alternative expanded to include children from same-sex or polyamorous unions).

<sup>6</sup> *Id.* at 1332-33, 1366-69.

enforceable) and necessity (criminal liability does not even require knowledge of the violated norm, let alone agreement to it).

There are several good reasons why we might view an agreement to be bound by a norm as irrelevant to the norm's criminal enforceability, particularly when such an agreement is made within the context of a longstanding private relationship. To develop this point, it will be helpful for now to think of one adult agreeing to provide care to another; I will come back to minor children at the end of this Part.

#### A. *Adult-Adult Relationships*

Should Bruce and Alfred be permitted to opt into a regime of criminal liability for failing to satisfy heightened standards of care? One concern is the extent to which this co-opts public resources – criminal enforcement and the threat of criminal sanctions – to achieve private ends that could be equally well achieved through the use of private resources.<sup>7</sup> Parties who have the capacity and motivation to agree to criminal liability also presumably have the capacity and motivation to enter into other sorts of noncriminal bonding agreements. If Bruce wants to provide some guarantee of his commitment to support Alfred, he does not need a publicly administered criminal liability system to do so.<sup>8</sup>

Another concern goes to the actual voluntariness of the “voluntary” assumption of a criminally enforceable duty. Given how serious the risks are, I suspect that very few people would register purely as a matter of goodwill. Collins, Leib, and Markel seem to share this instinct, and suggest that registration will occur pursuant to quid pro quo exchanges; for example, “if you want me to move in with you, or buy that house with you, then you had

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<sup>7</sup> Collins, Leib, and Markel make a similar point in rejecting opt in criminal liability for adultery. *Id.* at 1414-15 (“[W]e recognized the unfairness of using public resources to investigate, prosecute, and punish conduct that amounted to a breach of private promises to each other.”). I suggest here that their argument has broader applicability.

<sup>8</sup> My use of Bruce as an example may seem rhetorically unfair; he is, after all, a millionaire. Collins, Leib, and Markel seem quite concerned about the prospect that caregiving registrants will be judgment-proof, and therefore immune to the incentives that might be created by civil (tort or contract) liability, thus justifying the use of criminal liability. *Id.* at 1375, 1381, 1387. But, really, we must anticipate strong class-based distinctions among those who will register. Marriage itself is in steep, long-term decline among underclass Americans. See Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567, 570-71 (2007) (stating that rich and poor Americans married at roughly the same rate fifty years ago, but the likelihood of marriage for poor people has since dropped to about half what it is for those with incomes at three or more times the poverty level). Not only are poor people less likely to have knowledge of the registration system and capacity to bear its transaction costs (even a single trip to a government office during regular business hours can be a significant burden for some), but they are also less likely to have confidence in the fairness of the criminal justice system and the long-term stability of relationships – forms of confidence that are probably necessary for registration to make sense to most individuals.

better register as a caregiver for me.”<sup>9</sup> But these sorts of exchanges can easily acquire a flavor of emotional blackmail or other (nonactionable) duress; imagine Alfred dropping a hint that he may expose Bruce’s secret identity if Bruce does not register. Voluntariness is a matter of degree, not a strict either-or proposition. To be sure, in contract law, we tend not to worry about varying degrees of voluntariness and set a low bar for how much is required.<sup>10</sup> But in criminal law the stakes are much higher. If we are looking to voluntariness as a basis for legitimizing criminal punishment, then we may appropriately question how voluntary is voluntary. Yet, doing so – parsing the subtle cues to determine whether the fine line between promise and threat has been crossed – will be especially difficult in the context of intimate long-term relationships, each of which will have its own unique and complicated dynamics.

Finally, there is the uncertainty over what precisely one is agreeing to do when one enters into the voluntary criminal liability regime for enhanced care. With liability potentially triggered by negligent or reckless omissions, it will not be clear to laypersons what exactly they must do in order to avoid liability. Those who do consult lawyers will be told there is a lot of gray area, which essentially leaves the scope of liability to opaque, ad hoc decisions made by police, prosecutors, judges, and jurors. Because of the vague and encompassing nature of the legal liabilities, registrants who end up as defendants are apt to find themselves criminally charged as a result of occurrences they never envisioned when they entered into the voluntary liability regime. Their inability to foresee the scope of their liability diminishes the moral significance of their opt-in decision. And the attenuated nature of the voluntariness makes it less compelling as a legitimating basis for punishment.<sup>11</sup>

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<sup>9</sup> Here, I paraphrase Collins, Leib & Markel, *supra* note 1, at 1376-77.

<sup>10</sup> See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1919-23 (1992) (discussing limitations in duress and unconscionability defenses in contract law).

<sup>11</sup> In the same vein, at the time of registration, laypeople are unlikely to have any clear sense of the ugly realities of criminal processes and punishment. Registrants will presumably expect reasonable and restrained treatment by the criminal justice system based on the facts of their case, their personal backgrounds, and the admirable voluntariness with which they assumed their caregiving responsibilities. Criminal justice cynics like me will, of course, view registration as too risky and steadfastly avoid it. Many registrants will no doubt be surprised by the tendency of the system to treat them, not as individual human beings, but as objects to be processed expeditiously or treated with studied harshness to “send a message.” Moreover, to the extent we are speaking in particular of registrants in same-sex relationships, there is a risk their treatment will be even harsher as a result of homophobia. Collins, Leib, and Markel appropriately emphasize the necessity of proportionality in punishment in the regime they propose, Collins, Leib & Markel, *supra* note 1, at 1368, but they seem a bit more sanguine than I am regarding the capacity of the system (from legislative enactment through arrest, charging, conviction, and punishment) to act in a reasonable and restrained fashion.

B. *Adult-Child Relationships*

I have observed that, in general, one person's commitment to provide care to another does not become criminally enforceable merely because that person voluntarily entered into a caregiving relationship. But Collins, Leib, and Markel would characterize parenthood as an important exception.<sup>12</sup> Indeed, in the legal liabilities of parents for the care of their children, they see a paradigmatic illustration of the "internal structure" of most family-burdening criminal laws: the voluntary choice to enter into the parent-child relationship justifies the imposition of legal liabilities to ensure the satisfaction of caregiving responsibilities.<sup>13</sup> Their premise that parenthood is voluntary then permits a reconciliation between their preference for individual autonomy and the use of criminal sanctions to enforce parental responsibilities.<sup>14</sup>

I am not so sure, though, that voluntariness really withstands scrutiny as a central part of the normative foundation for parental liabilities. For one thing, we do not have much more than the authors' word for it that "[m]ost parents want and choose to have children."<sup>15</sup> Accidental pregnancies are common, and the formal availability of abortion and adoption may not wholly transmute accidental pregnancy into voluntary parenthood. Fathers may be excluded from the choice, mothers may be pressured by fathers or others into keeping their children, abortion providers are not available in all communities, religious convictions may limit the range of choices, and so forth. Moreover, if our hope is to find a way to legitimize criminal punishments for parents, then we should also bear in mind the particular characteristics of the communities that bear a disproportionate share of law enforcement activity – communities in which teen pregnancy is common and in which poverty and racism constrict the options available to prospective parents. When the parent is a seventeen-year-old single mother from an impoverished neighborhood, I find the voluntariness of her choice to become a parent less than compelling as a basis for criminal punishment.<sup>16</sup>

And, even when the choice to become a parent is meaningfully voluntary, what exactly is being consented to? When I became a parent, no one told me anything about the legal duties I was thereby assuming, and I was as yet unacquainted with obscure doctrines like the parental duty to rescue. To be sure, we all recognize that "being a parent is a big responsibility" – a common

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<sup>12</sup> See *id.* at 1371 ("In the case of having children, it is fair to conclude in most circumstances that imposing obligations to rescue one's children . . . is consistent with voluntary caregiving . . .").

<sup>13</sup> See *id.* at 1371-72.

<sup>14</sup> *Id.* at 1360 (finding burdens based on voluntary relationships such as parenthood "more defensible").

<sup>15</sup> *Id.* at 1363.

<sup>16</sup> This is not to say that she should be shielded from liability for neglect, but that we need to look somewhere else besides the voluntariness of her assumption of parental duties as a normative basis for liability.

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phrase that seems to connote a moral obligation to meet a child's basic needs. But consent to this inchoate moral duty cannot automatically be equated with consent to the specific legal duties imposed on parents, or to the use of criminal processes and punishment to enforce those duties. Of course, one may take the position that an awareness that parents face some legal duties puts the burden on them to discover the precise content of those duties. But, when we rely on a sort of constructive consent to criminal liability – a model of consent that is least realistic as to the disadvantaged individuals who are most likely to find themselves enmeshed in the criminal justice system – then we are moving to a much less robust form of voluntariness, which is able to do less of the legitimizing work that Collins, Leib, and Markel want it to do.

If we are looking for a normative foundation for parental liabilities, I would suggest that simple pragmatic necessity is at least as important as voluntariness. Necessity derives from two common (albeit not universal) characteristics of the parent-child relationship: *vulnerability* of the child and *proximity* of the parent. Children, especially the youngest ones, have critical needs they cannot meet on their own, and their parents – as the people closest to them and most familiar with their needs, capabilities, personalities, and so forth – are sensibly the people conscripted by society to meet those needs in the most efficient manner.

Highlighting the vulnerability of the child underscores an important distinction between two sets of relationships that Collins, Leib, and Markel do not adequately distinguish: adult-adult relationships and adult-child relationships. And downplaying vulnerability in this context has consequences. Criminal liability for neglectful parents is a popular proposition.<sup>17</sup> If voluntariness is seen as the foundation of criminal liability for parents, then it is hard to resist the next step of extending criminal liability to other voluntary caregiving relationships, including adult-adult relationships. On the other hand, if the special vulnerability of young children is seen as a crucial feature of parental liability, then the case for extending a similar liability regime to adult-adult relationships may appear more tenuous. Indeed, as discussed above, the ability of adults to protect themselves through private agreements is an important reason why it seems generally inappropriate and unnecessary to bring criminal sanctions to bear in the adult-adult context. If we are to extend criminal liability into new territory, it is better to focus on the functionally *parental*, rather than the functionally *spousal*. But, for reasons discussed in the next Part, I am ultimately skeptical of any extension of criminal liability undertaken in the name of nondiscrimination or promotion of voluntary caregiving.

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<sup>17</sup> See generally Baruch Gitlin, Annotation, *Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children*, 118 A.L.R.5th 253 (2006) (discussing cases from thirty-six states involving allegations of parental neglect of their children's medical needs).



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## II. THE LIMITS OF SUBSTANTIVE CRIMINAL LAW REFORM

Where they seek to expand criminal liability, Collins, Leib, and Markel hope to accomplish two facially attractive ends: (1) expressive endorsement of the value of relationships that are functionally, but not formally, familial (an end that gathers much of its normative force from its promise to raise the status of same-sex couples, a group that has been traditionally and unfairly marginalized in our society); and (2) increased quantity and quality of care that private individuals give to one another. Criminal law, however, is a poor mechanism for achieving these attractive ends, and an expansion of criminal liability may even prove counterproductive. I outline my concerns regarding each end separately below.

### A. *Expressive Effects of Criminal Liability*

The notion of a new caregiving registry may initially call to mind the heart-warming images of couples flocking to the courthouse after the legalization of same-sex marriage in Massachusetts and California, finally receiving some official validation of their most intimate relationships. But the expressive value of a care registry must be far less than the value of marriage, given the uniquely rich cultural resonance of marriage in our society. In its symbolic weight, a care registry would be more akin to a civil union law – not unhelpful, but not especially inspiring either.

Would anyone actually register? A civil union at least delivers a clear set of useful legal rights.<sup>18</sup> A care registry produces more inchoate legal benefits and may be off-putting for its express linkage to criminal liabilities. An uncertain upside and a horrific downside do not seem a promising recipe for widespread registration.<sup>19</sup>

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<sup>18</sup> These might include, for instance, rights to hospital visitation, intestate succession, and health benefits. See Chambers, *supra* note 4, at 1350-51.

<sup>19</sup> Recognizing this problem, Collins, Leib, and Markel respond, in effect, “well, at least no one is worse off if only a few people actually register, and – who knows – maybe *someone* will be helped.” Collins, Leib & Markel, *supra* note 1, at 1383. But I am not so sure this is a do-no-harm proposal. In addition to the concerns I raise in the text later in this Part, I would note a few more here. First, even with few people registering, there are ever-present risks of wrongful convictions and excessive punishments. Second – and this may be just a species of wrongful conviction – I would also be concerned about the prospect of punishment being imposed on registrants who have forgotten or neglected to opt out after the nature of the underlying relationship has changed; in the aftermath of a messy break-up, for instance, we can surely understand if updating one’s status with an obscure care-registration program is not a next step that immediately comes to mind. Finally, in the spirit of sensitivity to the norms that law promotes, some of us may also have concerns about reinforcing beliefs that criminal law may be used to accomplish social engineering. See Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization (A Polemic and Manifesto for the Twenty-First Century)*, 74 SOC. RES. 307, 329 (2007) (arguing for an end to the use of criminal punishment to “engineer persons and social relations”).

We should also be concerned about actual enforcement practices. Changes in substantive criminal law may authorize, but cannot require, prosecution and punishment. Standing between offense and punishment are a series of mostly opaque and unreviewable discretionary decisions by police, prosecutors, judges, and jurors. Ultimately, the social meaning of a new criminal liability regime will be shaped by the way it is enforced. We might hope that a new, more facially neutral liability regime would help to move social norms in the direction of nondiscrimination against individuals in same-sex relationships, but such need not necessarily be the result. Indeed, if the point of legal reform is to change some background norm of discriminatory treatment, there is every reason to think that at least some of the discretionary decisions in the criminal justice system will be made in a discriminatory fashion; police, prosecutors, judges, and jurors have no special immunity from the social prejudices that surround them.

Discretionary decisions will be seen as validating or not validating the same-sex relationship, and – to make matters even more confusing – the same decision may be read quite differently by different people. Imagine the day a district attorney announces the first prosecution of a gay defendant in a registered caregiving relationship on a failure-to-rescue theory. What is the social meaning of this prosecution – what norms are reinforced? Is this an official validation of the caregiving value of same-sex relationships, or (in light of the seemingly general infrequency of failure-to-rescue prosecutions) a case of selective prosecution against a defendant with an unpopular lifestyle? Both accounts may be true, or at least have enough truth to them to be believed by many people. This illustrates, I think, the uncertain path down which we head when we attempt to change norms through new forms of criminal liability. Discretion plays such an important role in our system of criminal justice that we cannot have much confidence our good intentions at the lawmaking stage will be reliably expressed through the prosecution and punishment stages.<sup>20</sup>

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<sup>20</sup> In her empirical study of statutory rape prosecutions in California, Kay Levine provides a wonderful example of how the values expressed through a criminal law enforcement initiative can evolve as the initiative progresses from central authorities to ground-level legal actors. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 696 (2006). In the mid-1990s, Governor Pete Wilson launched a well-funded initiative against statutory rape, with the purpose of reducing teen pregnancy rates through deterrent threats. *Id.* at 709. Prosecutors, however, balked at the Governor's desire to obtain a year in jail as the sentence in all statutory rape cases, and worked with central authorities to develop a more discriminating approach; new guidelines then focused, not on teen pregnancy, but on sexual exploitation as the target of the statutory rape initiative. *Id.* at 710. The anti-exploitation goal was then operationalized by line prosecutors through a pattern of charging decisions that reserved lenience for defendants who were involved in long-term relationships with their victims. *Id.* at 694. Thus, what began as an effort to fight teen pregnancy ended up as an initiative that arguably "reinforce[d] . . . outmoded relationship norms by refusing to acknowledge the possibility of non-exploitative sex outside of commitment." *Id.* at 695.

Indeed, it is possible that a very different set of values will ultimately come across.<sup>21</sup>

B. *Caregiving Effects of Criminal Liability*

Collins, Leib, and Markel hope to change not only the way certain relationships are valued, but also the behavior of people in those relationships. In theory, the threat of criminal sanctions against registered caregivers should make them more likely to deliver care, but the actual effects are not likely to be impressive.

I have already suggested my doubts that many people will find it attractive to register, and those who do register are unlikely to modify their behavior much as a result. For one thing, scholars have increasingly come to recognize the weakness of criminal law's deterrent threats, for reasons that include the discretion and uncertainty surrounding criminal enforcement discussed above.<sup>22</sup> For another, by opting in, the registrants signal that they have a high level of commitment to their relationships and a high level of confidence that they will deliver care as needed in the future; by and large, these are people who are already doing the right thing and will continue to do so with or without the threat of criminal sanctions.<sup>23</sup>

Moreover, the threat of criminal sanctions may even prove counterproductive. As has been discovered in the domestic violence realm,

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<sup>21</sup> To illustrate the nature of the expressive values at stake, Collins, Leib, and Markel invite our consideration of a thought experiment: "[I]f omissions liability were distributed on the basis of race, such that whites had a duty to rescue their spouses, but blacks did not, it would clearly send a message devaluing the spouses of black people." Collins, Leib & Markel, *supra* note 1, at 1381. Clearly? I might interpret the hypothetical law as indicating that blacks are trusted to act responsibly within their marriages without the need of paternalistic state interference; in other words, that it is the *whites* who are symbolically disrespected by the law. Again, the social meaning of law and legal processes can prove rather mercurial.

<sup>22</sup> For a discussion of some of the major failings of deterrence theory, see Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 458-64 (1997) (arguing that a deterrence-based criminal justice system does not decrease crime because the threat of a prison sentence is "less potent" than generally believed).

<sup>23</sup> Nor need "doing the right thing" necessarily depend on the simple good-heartedness of the caregiver; people who are in long-term intimate relationships often develop effective sets of informal sanctions to ensure that commitments made to one another are satisfied. If Bruce does not live up to the commitment he has made to Alfred, he might face warm orange juice and cold coffee for breakfast, or, for more serious breaches, a threat of exposure of his secret identity. Indeed, the risk of promptly delivered informal sanctions is apt to be a more effective deterrent than the slower and more uncertain risks associated with criminal enforcement. *See id.* at 468-69. The authors note the potential redundancy of the criminal liability regime they propose, but suggest it nonetheless has value as a way to give "fair notice" of legal obligations. Collins, Leib & Markel, *supra* note 1, at 1375. Given the amorphous nature of the duty to rescue, though, it is not so clear to me that notice values are meaningfully served by their proposal.

ratcheting up criminal sanctions may depress reporting of the crime.<sup>24</sup> Similarly, the fear that a registered caregiver will face criminal prosecution may make it less likely that victims of inadequate care will seek official assistance to meet their needs. Registered caregivers, too, may be slow to seek necessary assistance where they fear official second-guessing of their performance.<sup>25</sup> In short, to whatever extent criminal liability does change behavior, it is hard to be confident that changes will be for the good.

#### CONCLUSION

Collins, Leib, and Markel are right when it comes to the basic impulse that propels their article: the criminal code should not treat the Wayne household any differently than the Cleaver household. But nondiscrimination should be pursued not by inserting the criminal law into the Wayne household, but by removing the criminal law from the Cleaver household. I would except, of course, general offenses such as assault and rape that are not dependent on the nature of the relationship between offender and victim. But as for adultery, bigamy, nonpayment of child support, and the like, these are matters for private agreements and/or civil and administrative enforcement, not criminal law. Relationships of intimacy, trust, and nurturance are indeed of the very highest value, but criminal law is far too crude an instrument to promote them effectively.

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<sup>24</sup> Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 756 (2004) (examining reasons why a battered spouse might be hesitant to report the batterer knowing he will automatically be arrested).

<sup>25</sup> Imagine that Bruce and Alfred are registered caregivers for Dick. Alfred, normally quite genial, becomes violently abusive to Dick from time to time after drinking. In order to protect Alfred from criminal sanctions, Dick may decline to seek medical attention for his injuries or otherwise report the abuse to others who may help prevent it in the future. For his part, if Bruce takes no action the first time he becomes aware of the abuse, he may decline to report any future abuse for fear of being punished for the first omission.