THE PRIVATE LIFE OF CRIMINAL LAW

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Suk claims that criminal law's tentacles not only have reached out to regulate more *public* terrain, but they have also turned inward to regulate the *private* sphere as well. This move, Suk makes clear, is wholly at odds with an inherited legal narrative that depicts marriage, family, and the home as "private," and therefore insulated from criminal regulation.

Criminal law's regulation of private relationships is not a new development, however. Certainly, criminal law has resisted intervening in the home, as the history of domestic violence enforcement makes evident. However, despite this resistance, criminal law has long been an important force in defining and regulating the content of private life. Criminal law in fact works in tandem with family law to police the normative contours of marriage and intimate life.

Family law regulates the formation of families, in large part through the regulation of entry into and exit from marriage. Each jurisdiction sets forth a series of procedural and substantive requirements for entering into a valid union. Procedurally, lawful marriage requires compliance with the state's licensing apparatus, through which the couple confirms to each other, and the overseeing state, their consent to marriage.

Substantively, the state regulates who may and may not marry. Presently, all jurisdictions prohibit marriages between more than two people, between consanguineous relatives, and between parties where either of the participants is below the jurisdiction's age of consent. Historically, this litany of substantive restrictions was even more comprehensive. Until 1967, many Southern states prohibited interracial marriages; and until very recently, same-sex marriages were universally prohibited as well.

Together, these procedural requirements and substantive restrictions create a normative ideal of what marriage should be. Until the twentieth century, this normative ideal specified that marriage was an intraracial, monogamous, exogamous, and heterosexual union between consenting adults. Today, marriage may be interracial or (more limitedly) between persons of the same sex, but it is still understood to be an exogamous, monogamous enterprise between consenting adults. However, because family law regulates only entry to and exit from marriage, its opportunities to police this normative vision of intimate life are limited. In order to advance its normative project, family law, historically and presently, has relied on criminal law's assistance.

In most – if not all – jurisdictions, family law's substantive restrictions on marriage are reinforced by criminal bars on the same behavior. For example, not only was interracial marriage once prohibited as a civil matter, it also was subject to criminal penalties. Similarly, while marriage between consanguineous relatives is prohibited as a civil matter, sex (an essential incident of marriage) between such persons also is criminalized as incest. Through its substantive restrictions, family law says what

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marriage is and should be, and criminal law reinforces these norms by criminalizing behavior incompatible with the normative understanding of marriage.

Criminal law goes even further in defining the normative content of intimate life. While family law regulates entry into and exit from marriage, it does not regulate inside of intact marriages, and historically it did not regulate outside of marriage. Instead, criminal law – affirmatively and by omission – elaborates family law's normative vision of intimate life in critical ways. With respect to the regulation of sex outside of marriage, fornication laws and other morals legislation criminally prohibited out-of-wedlock sex, thereby underscoring marriage's position as the lawful site for sexual expression. Likewise, behavior deemed threatening to marriage and its procreative purpose also was criminalized through laws prohibiting prostitution, adultery, contraception, and sodomy.

With respect to intact marriages, criminal law has further entrenched family law's normative understanding of marriage as a private enterprise by *refusing* to intervene in the interior of marital life. Until very recently, marriage was a defense to criminal liability for rape – an omission that expressly served family law's interest in promoting and maintaining family privacy in the face of state intrusion. And as Suk notes, criminal law rarely intervened to police domestic violence, reflecting the understanding of the marital home as a quintessentially private space.

Suk rightly observes that criminal law's reluctance to intercede in the home has eroded as new approaches to domestic violence enforcement permit criminal law to renegotiate property rights and personal relationships. But attention to these developments should not obscure the fact that criminal law long has been a regulatory force in the legal construction of private life. Through its regulation of sexuality and its historic refusal to intervene inside the marital home, criminal law has played an important role in the regulation of marriage, family and sexuality. It has been family law's "muscle," reinforcing and refining intimate norms. In this way, criminal law *always* has been at home – or at least on the porch with shotgun in hand – policing and protecting the boundaries of private life.