Family Courts as Criminal Courts: A Story of Origins

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Elizabeth Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws,* __ **U. Chi. L. Rev.** __ (forthcoming 2019), available at SSRN.

The question of the relationship between criminal law and family law has been amply explored in recent years, the seemingly neat separation between the fields coming under repeated challenge.[1] Scholars have tackled the question from a variety of different perspectives: showing us how criminal law can function *as* family law for a specific section of the population, obliterating in the process basic family law assumptions about privacy and autonomy;[2] or demonstrating the ways in which family law and criminal law have always operated in *tandem* to enforce specific sexual mores or ideals of intimacy.[3] In Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws, Elisabeth Katz contributes to this body of scholarship in a way that has the potential to unmoor contemporary assumptions about the civil nature of family court jurisdiction.

In this carefully researched and thoughtfully written piece of legal history, Katz concentrates on the history of family courts and their jurisdiction especially in the first half of the twentieth century. Adding a plethora of original sources to the historical literature on domestic relations courts,[4] Katz highlights aspects of this history that had perhaps gone underappreciated inside family law.[5] At their inception, some of the most influential domestic relations courts in the country focused heavily on the criminal prosecution of nonsupport cases and no one at the turn of the twentieth century would have thought of domestic relations courts as anything other than a branch of the criminal courts. More importantly, Katz argues that criminal jurisdiction over non-support cases continued to be at the core of family courts' expansive jurisdiction, even as states strategically recharacterized the nature of these courts as civil in order to give judges more flexibility without the necessity of criminal law protections.

Katz tells this story in three steps. The first step is the gradual criminalization of family non-support in the late nineteenth century. States adopted criminal penalties for family non-support, usually at the misdemeanor level, at the behest of overburdened charities using a discourse of paternal moral failures reminiscent of the "deadbeat dads" of more recent welfare reforms. Some criminalized non-support as a felony, but in most states misdemeanor non-support was judged sufficient to qualify for extradition, a tool thought of as necessary in an era of increasingly mobile family deserters.

The second step was the creation of specialized domestic relations courts and the "symbiotic growth of family courts and probation."[6] Domestic relations courts lightened the burden of already clogged criminal dockets and made speedier the enforcement of non-support laws through the heavy use of the probation departments or the government prosecutor. Despite resistance to the creation of family courts from various stakeholders, including the judges who thought that whoever presided over such hearings would "have to be descended straight from the angels",[7] the trend was largely successful, with specialized divisions spreading throughout the country. Probation, an institution considered today a hallmark of criminal procedure, was considered to be at the center of family court jurisdiction. Divorce, today's staple of family court jurisdiction, did not become part of the family court's jurisdiction until the second half of the twentieth century. In other words, some elements of modern family law and modern criminal law were delivered as conjoined twins, inextricably linked.

The third and final step in her account describes a historical process whose endpoint, the transformation of domestic relations courts into courts of civil jurisdiction, is so foundational to modern understandings of family law that the Supreme Court took it pretty much at face value in 2011's *Turner v. Rogers*.[8] In this part of the article, Katz focuses on the nationally influential New York Family Court Act of 1933 that wrestled domestic relations and juvenile delinquency cases away from the lower criminal court system and created a standalone court, whose powers, however, continued to heavily rely on the criminal law system. Notably, incarceration for contempt, at stake in *Turner*, remained a tool regularly used by the judges, in terms identical to the straightforward punitive jail term for nonsupport.

While many elements of this story have been amply told by historians before, Katz's article brings to the foreground several that can potentially shift contemporary understandings of family law jurisdiction as a civil, certainly in the child support enforcement aspects. To begin with, Katz argues that the shift of family courts from criminal to civil jurisdiction that began happening around the ninety thirties was not only partial; it was intentionally so. In other words, reformers desired to retain the most effective pieces of criminal jurisdiction, including incarceration and probation, without the delays and procedural safeguards of the criminal law machinery. The civil approach, which still allowed incarceration for non-support and incorporated the threat of extradition, proved to be highly effective in inducing compliance with support orders. Presaging *Turner*, several courts that dealt with constitutional challenges to the domestic courts' jurisdiction relied on the "civil" tag to justify withholding procedural protections such as the right to a jury trial.As Katz highlights, this meant that "defendants faced state personnel and powers typical of the criminal context, but without criminal procedure protections."[9]

As Katz points out, this history also complicates the field's persistent notions of privacy as a foundational, operative concept in family law that only later gets challenged through the operation of domestic violence enforcement and women's constitutional equality rights. Katz highlights instead that at the very creation of domestic relations courts, the state employed a vast bureaucracy charged with close supervision and surveillance of families. In addition, and by contrast to Jacobus tenBroek's classic account of a dual family law,[10] one for the well-off and one for the poor, Katz suggests that family law at its inception in the twentieth century was intensely public and interventionist "at a range of income levels."[11] This last claim could probably benefit from more extensive documentation, since Katz recognizes that the vast majority of child-support debtors came from the recent immigrant populations, such as the Jews and the Irish in New York, or from the African-American community in the south.

The final part of the article directly engages with the implications of this history for *Turner*, highlighting the circularity entailed in relying on the label "civil" for determining the outcome of a case which essentially asked the court to decide whether the label "civil" should be taken at face value. Given the prior court history emphasized by Katz, the Supreme Court's formalist reliance on the label becomes even more problematic. As an alternative, Katz suggests that a graduated approach might be more appropriate with constitutional protections against state action triggered when: 1) incarceration is threatened; 2) the state's involvement goes beyond the interest in ensuring the fair administration of justice; and 3) government employees other than the judges control various stages of the proceedings. As is often the case with new proposed doctrinal solutions to doctrinal problems, Katz's suggestion raises perhaps an equal number of questions as the ones she resolves. What does "beyond the interest in the fair administration of justice" mean exactly? Does requirement number one combined with requirement number three mean that many of the typical scenarios of welfare state intervention, including threatened removal of children for abuse or neglect, will now trigger constitutional law protections? More broadly, why try to solve what seems to be essentially a legal policy question by re-establishing a doctrinal test that at some level is bound to reproduce a formalist distinction between the civil and the criminal?

Overall, Katz has contributed a piece of legal history that is important and compelling. As I sat in the

Family Court division of the DC Superior Court with my students recently, and watched a steady stream of poor, pro se, minority litigants attempt to convince the judge that they deserved custody in a legal language most clearly did not understand, I thought that the story of family courts as poor people's courts has many more episodes that need telling.[12] Katz's article certainly complicated the historical picture in a way that is interesting and bound to provoke more discussion within the field.

1. See, e.g., Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 **Iowa L. Rev.** 1253 (2009); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 **J. Gender Race & Just.** 617 (2012); Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 **Const. Comment.** 281 (2017); Jeanie Suk, *Criminal Law Comes Home*, 116 **Yale L.J.** 2 (2006); Andrea L. Dennis, *Criminal Law as Family Law*, 33 **Ga. St. U.L. Rev.** 285 (2016).
2. See, e.g., Suk, *supra* note 1; Dennis, *supra* note 1.
3. *See*, *e.g.*, Murray, *supra* note 1.
4. *See*, *e.g.*, Anna R. Igra, **Wives Without Husbands: Marriage, Desertion, &Amp; Welfare In New York, 1900-1935** (2007); Michael Willrich, **City Of Courts: Socializing Justice In Progressive Era Chicago** (2003); Amy J. Cohen, *The Family, the Market, and ADR*, 2011 **J. Disp. Resol.** 91, 100-103 (2011).
5. With exceptions as Katz notes. *See*, *e.g.*, Amy J. Cohen, *supra* note 4; Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 **Yale J.L. & Human.** 190 (2011).
6. P. 22.
7. *Want Special Court for Domestic Woes*, N.Y. TIMES, Jan. 29, 1909, at 4. Cited in Katz, P. 29.
8. 564 U.S. 431 (2011). In *Turner*, the U.S. Supreme Court held a state must provide safeguards to reduce the risk of erroneous deprivation of liberty in civil contempt cases, such as child support cases. The Court's decision, however, stopped short of requiring states to provide counsel to indigent defendants in civil contempt child support cases.
9. P. 43.
10. Jacobus tenBroek*, California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I*, 16 **Stan. L. Rev.** 257 (1964).
11. P. 8.
12. Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, **Geo. J. On Povert L. & Pol'y** 473, 478-79, 488-94 (2015).

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