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## The New Family Freedom

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# THE NEW FAMILY FREEDOM

EMILY J. STOLZENBERG

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# THE NEW FAMILY FREEDOM

EMILY J. STOLZENBERG\*

**Abstract:** In family law, “autonomy” has traditionally meant freedom from state interference in one’s intimate life. This Article describes an emergent, libertarian vision of autonomy as property rights that also demands freedom from other family members. This conception, “choice about obligations,” holds redistribution of resources between intimates to be illegitimate unless the richer party “chose” to take on financial obligations *ex ante* by ceremonially marrying or formally contracting. But as more people conduct their intimate lives outside these legal institutions, choice about obligations increasingly collides with another, more fundamental, family law principle: the imperative to “privatize dependency,” i.e., to redistribute resources between family members in lieu of publicly supporting those who cannot support themselves. This conflict is insoluble on its own terms and creates persistent doctrinal problems in the modern law of family obligations. Parentage law, cohabitant property-division claims, and alimony each present the clash between a richer party’s interest in avoiding “unchosen” family obligations and the state’s interest in avoiding responsibility for citizens’ material needs. Against the backdrop of scant collective support, the law denies the importance of freedom to privatize dependency in parent-child relationships and vindicates “choice” in adult relationships by requiring adults to self-support, all the while insisting that intimates “assumed the risk” of obligation or economic loss. Thus, despite attempts to dispel it through doctrinal workarounds, legal fictions, or willful ignorance, the tension remains. The incompatibility between choice about obligations and privatizing dependency also reveals a deep normative tension in the law, for both principles originate in the current neoliberal moment. Neoliberal commitments shape modern family law, but prove both incoherent and deficient as a framework for intimate relationships. As currently struc-

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tured, family law fails to recognize and further the vital role that families play in meeting their members' deepest human needs. To better conceptualize the rights and responsibilities attending intimacy, modern family law should rethink its approaches to both autonomy and dependency.

## INTRODUCTION

Recent Supreme Court pronouncements suggest that family relationships help individuals to achieve freedom. *Obergefell v. Hodges* recognized the right of same-sex couples to marry in part because "choices concerning . . . family relationships" "define personal identity and beliefs."<sup>1</sup> Calling such "intimate choices" "central to" and "inherent in the concept of individual autonomy," the opinion forged a tight positive link between family relationships and freedom.<sup>2</sup>

But the link need not be positive. Against *Obergefell*, modern family law increasingly understands autonomy also to require freedom *from* other family members. This "new family freedom" rejects as illegitimate any attempt to redistribute resources between intimates unless the richer party "chose" to take on family obligations *ex ante* by ceremonially marrying or formally contracting. But as more people conduct their intimate lives outside legal institutions,<sup>3</sup> this libertarian vision collides with another, more fundamental, family law principle: the imperative to "privatize dependency," i.e., to redistribute resources between intimates in lieu of the state providing resources to meet dependents' needs.<sup>4</sup> The new family freedom and privatized dependency both pervade modern family law, and yet, as the following cases illustrate, they are often mutually exclusive:

- A sixteen-year-old babysitter seduces her twelve-year-old charge. Although she is adjudicated a juvenile offender for her conduct, the court nonetheless orders the boy to financially support the resulting child.<sup>5</sup>
- A couple cohabits for fifteen years, holding themselves out as married and raising three children. The woman devotes herself to parenting and

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<sup>1</sup> 135 S. Ct. 2584, 2597, 2599 (2015).

<sup>2</sup> *Id.* at 2597, 2599; *see also id.* at 2599 (referring to an "abiding connection between marriage and liberty").

<sup>3</sup> Over 18 million Americans currently live in unmarried cohabitant households. Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1016 (2018). *See generally* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (discussing how family law regulates nonmarital families).

<sup>4</sup> Although I follow other scholars' lead in using the term "privatizing dependency," *see infra* notes 29, 63–72 and accompanying text, "private responsibility for dependency" is perhaps a more accurate description of the phenomenon.

<sup>5</sup> *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1274, 1279 (Kan. 1993).

supporting the man's education and professional career. Because the couple never formally married, however, the court rejects her claim for an equal share of the property accumulated during the relationship.<sup>6</sup>

- A permanently brain-damaged wife seeks continuing spousal support after a 70-month marriage. Although the husband is able to pay, the court terminates support after fifty-eight months, reasoning that his obligation ends "at [that] point in time."<sup>7</sup>

Each of these cases presents an irreconcilable conflict between the new family freedom and privatizing dependency. In the first case, excusing the boy from support liability would harm the innocent child, who bears no responsibility for the means of her conception.<sup>8</sup> In the second case, the woman assisted the man in acquiring assets and sacrificed significant opportunities in reliance on the relationship, yet the court's decision leaves her with nothing.<sup>9</sup> In the third case, the ex-wife is left to subsist on meager disability benefits insufficient to ameliorate her poverty.<sup>10</sup> In each case, the law must choose between competing commitments, one of which must give way to the other.

This Article argues that the clash between the new family freedom and privatizing dependency creates persistent doctrinal and normative problems in the modern law of family obligations—the financial duties that attach to intimate relationships.<sup>11</sup> I describe the conflicting principles and situate them in the current neoliberal moment,<sup>12</sup> before showing how their intersection creates chronic confusion in the laws of parentage, cohabitant obligations, and alimony.<sup>13</sup> I argue that the principles' core incompatibility reveals fundamental flaws in modern family law's normative paradigms.<sup>14</sup> I suggest some doctrinal reforms within the present system, but conclude that neoliberal commitments are a poor fit for family life and that we should restructure family law around alternative approaches to autonomy and dependency.<sup>15</sup>

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<sup>6</sup> *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1205, 1211 (Ill. 1979); see also *Blumenthal v. Brewer*, 69 N.E.3d 834, 860 (Ill. 2016) (holding that *Hewitt* remains good law).

<sup>7</sup> *In re Marriage of Wilson*, 247 Cal. Rptr. 522, 523–24 (Ct. App. 1988).

<sup>8</sup> See *Hermesmann*, 847 P.2d at 1279.

<sup>9</sup> See *Hewitt*, 394 N.E.2d at 1205, 1211.

<sup>10</sup> See *Wilson*, 247 Cal. Rptr. at 527; Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 36, 37 n.73 (2014).

<sup>11</sup> See Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 320 (defining "the law of family obligations" as comprising "child support, property distribution, and alimony").

<sup>12</sup> See *infra* notes 36–124 and accompanying text (Part I).

<sup>13</sup> See *infra* notes 125–310 and accompanying text (Part II).

<sup>14</sup> See *infra* notes 313–346 and accompanying text (Part III.A).

<sup>15</sup> See *infra* notes 347–382 and accompanying text (Part III.B and Conclusion).

This Article makes several contributions. First, I identify and describe a vision of autonomy as property rights that has emerged since the early 1970s and explain how this conception—which I call “choice about obligations,” “choice logic,” or simply “choice”—undermines the law of family obligations.<sup>16</sup> Whereas constitutional descriptions of autonomy contemplate the freedom to pursue chosen family relationships without state censure or with state recognition,<sup>17</sup> choice logic defines autonomy also to include the freedom to avoid “unchosen” family obligations. But defining autonomy in this libertarian way undercuts the private support imperative, which attaches financial obligations to family relationships to avoid demands on the public fisc.<sup>18</sup> Scholars have described how family law advances the state’s increasingly pervasive and invasive efforts to privatize dependency,<sup>19</sup> but they have yet to realize how the new family freedom complicates and delegitimizes that goal.

The tension between choice about obligations and privatizing dependency comes to a head in precisely those doctrinal areas whose proper regulation has been the subject of long-standing, yet unresolved, scholarly debate: the laws of parentage for purposes of child support, cohabitant property division claims, and alimony.<sup>20</sup> Men seeking to avoid paternal obligations ask why women may avoid maternal obligations through abortion or adoption, whereas the public policy of “personal responsibility” denies them any such choice.<sup>21</sup> In determining what cohabitants who neither ceremonially married nor formally contracted owe one other, the law must inevitably weigh the richer party’s interest in controlling (what he views as) his prop-

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<sup>16</sup> See *infra* notes 36–77 and accompanying text (Part I.A).

<sup>17</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>18</sup> See, e.g., Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866 (2014).

<sup>19</sup> See, e.g., MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 67–117 (2017); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 228 (2004); Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL’Y REV. 3, 4 (2010); Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 97 (2015) [hereinafter Appleton, *Between the Binaries*]; Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 YALE J.L. & FEMINISM 1, 28 n.185 (2016) [hereinafter Appleton, *Forgotten Family Law*]; Melissa Murray, *Family Law’s Doctrines*, 163 U. PA. L. REV. 1985, 1990, 2015–17 (2015); Rosenbury, *supra* note 18, at 1866–67; Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409–12 (2009).

<sup>20</sup> Cf. Baker, *supra* note 11, at 320 (defining “family obligations” as “child support, property distribution, and alimony”). I examine property distribution between cohabitants instead of spouses because marital property obligations are arguably justified by consent to be married. See *infra* note 120 and accompanying text.

<sup>21</sup> See *infra* notes 128–197 and accompanying text (Part II.A).

erty against assigning resources to the poorer party.<sup>22</sup> And permanent alimony pits an obligor's property rights in his post-divorce income stream—a proposition ratified by no-fault divorce—against providing for a recipient's ongoing financial need.<sup>23</sup> In each of these doctrinal areas, the law cannot both privatize dependency and vindicate choice about obligations; instead, it must prioritize one of the competing values.

Against the backdrop of our society's refusal collectively to support family life, family law persists in privatizing dependency. It does so explicitly in the law of parentage, which concerns children developmentally incapable of meeting their own needs, and implicitly in the laws of cohabitant obligations and alimony, by deeming all adults capable of self-support. But harmonizing the new family freedom with this institutional settlement requires fictionalizing choice.<sup>24</sup> Although family law insists that adult intimates "assumed the risk" of obligation or economic loss by reading consent to legal consequences from causally attenuated conduct, this rhetoric denies the importance of adult freedom in parent-child relationships and ignores dependency and interdependency in adult intimate relationships. Thus, despite attempts to reconcile autonomy with family obligations through doctrinal workarounds, legal fictions, or willful ignorance, the tension between principles remains.

This Article's second contribution is to reveal a fundamental incoherence within modern family law's theoretical foundation. Far from discrete phenomena, the new family freedom and the private support imperative share roots in the current neoliberal moment. Although some scholars contend that the term is "too vague or polemical for responsible use," neoliberalism is a useful shorthand for an interrelated set of political, economic, and social policies and their justificatory apparatus.<sup>25</sup> Since the 1970s, "a loose

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<sup>22</sup> See *infra* notes 198–273 and accompanying text (Part II.B). Because choice about obligations functions from the title holder's perspective, I use the term "redistribution" to describe the law's assignment of entitlements between family members. Under different theories of ownership and obligation, however, these distributions of entitlement would not necessarily qualify as "redistributive."

<sup>23</sup> See *infra* notes 274–307 and accompanying text (Part II.C). Because most alimony obligors are men and most recipients are women, I use the corresponding gendered pronoun for clarity's sake.

<sup>24</sup> Cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing the principle of "institutional settlement" as "the judgment that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed").

<sup>25</sup> COOPER, *supra* note 19, at 18–19 (using "neoliberalism" to "refer . . . to the American schools of new economic liberalism . . . defined by the social and economic upheavals of the 1960s and 70s" which "helped redefine the intellectual and popular consensus on state deficit spending, the role of the central bank, inflation, taxation, consumer protection laws, tuition fees,

constellation of thinkers, politicians, and activists” has worked “with remarkable success to dismantle the American welfare state, to provide more control over labor for multinational corporations and more freedom for finance capital, [and] to facilitate a transfer of wealth . . . to a small upper class.”<sup>26</sup> In support of these projects, proponents have “reviv[ed] . . . the doctrines of classical economic liberalism . . . in politics, ideas, and law,” articulating “an overlapping set of arguments and premises” that “tend[] to support market imperatives and unequal economic power.”<sup>27</sup> Thus neoliberalism describes both a policy agenda and a “political rationality,” “a mode of governance encompassing but not limited to the state . . . that produces subjects, forms of citizenship and behavior, and a new organization of the social.”<sup>28</sup>

Scholars have located modern family law’s approach to privatizing dependency in neoliberalism,<sup>29</sup> but they have yet to recognize how a particular neoliberal idea of *autonomy* also shapes family law doctrine. For in using choice-based arguments to resist assignment of resources to poorer family members, richer parties rely upon neoliberal premises, in particular that freedom consists in strong property entitlements and that property transfers are illegitimate absent title holders’ consent.<sup>30</sup> The “assumption of risk” logic that modern family law deploys in attempting to reconcile choice with privatized dependency also reflects the neoliberal insistence that “rationally calculating individual[s] bear[] full responsibility for the consequences of [their] action[s] no matter how severe the constraints on this action.”<sup>31</sup> The clashing principles thus reveal a profound paradox of neoliberalism: It demands macro-level structures that preclude its micro-level application in the family sphere. The neoliberal state depends, for its continued existence, upon constraining family members’ ability to “choose” their own obligations.<sup>32</sup> Far from a coherent normative theory, neoliberalism proves to be a

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and welfare”); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 2 & n.3 (2014) (describing criticisms of term).

<sup>26</sup> Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 *WM. & MARY BILL RTS. J.* 1539, 1555 (2006).

<sup>27</sup> Grewal & Purdy, *supra* note 25, at 1–2.

<sup>28</sup> WENDY BROWN, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 37, 37 (2005).

<sup>29</sup> See, e.g., Appleton, *Forgotten Family Law*, *supra* note 19, at 27–28, 41; Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 *VA. L. REV.* 79, 84, 87 (2016); Rosenbury, *supra* note 18, at 1869–70.

<sup>30</sup> See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 7 (2005); Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269, 299 (1986).

<sup>31</sup> BROWN, *supra* note 28, at 42.

<sup>32</sup> Cf. Nancy Fraser, *Contradictions of Capital and Care*, 100 *NEW LEFT REV.* 99, 99 (2016) (“No society that systematically undermines social reproduction can endure for long.”).



contingent historical phenomenon, an ideology that entrenches certain economic, political, and social power structures.<sup>33</sup> This insight denaturalizes neoliberalism as a framework for organizing collective life, rendering its normative primacy in family law ripe for challenge.

Although neoliberal approaches to autonomy and dependency are a poor fit for family life, they shape modern family law. I therefore propose some incremental reforms to the law of family obligations, taking both choice logic and the current approach to dependency as fixed.<sup>34</sup> In the law of parentage, I suggest eliminating or reducing paternal child-support liability in the case of less-than-voluntary sexual conduct and rescinding policies that interfere with fathers' ability to provide economic and emotional support. In the law of cohabitants, I propose tailoring different levels of obligations to different kinds of cohabitant relationships. And in the context of alimony, I propose redistributing resources between former spouses through unequal division of marital property, rather than post-divorce transfer payments. These proposals' limitations prove the need for broader reform. For resolving family law's underlying problems will require a concomitant transformation of our entire collective life—a project that calls for the attention and efforts of many.

This Article's final contribution is to highlight what a choice-based conception of freedom forecloses: consideration of alternative ways to understand autonomy within the family. Because family relationships ideally help individuals to meet some of their deepest human needs, family members are not—and cannot and should not be—fully independent of one another. A satisfactory conception of family autonomy must therefore account for the dependency and interdependency that attend intimacy. But choice logic, with its insistence on *ex ante* consent to obligation, rejects the moral fact that even intimacy unsanctioned by legal formality can belong within the sphere of family justice. Defining family freedom in terms of individual property rights precludes the law from embracing richer conceptions of autonomy that understand one's commitments, especially to intimates, as consistent with and even necessary to freedom.<sup>35</sup> With the limits of choice logic exposed, we can begin to consider how family relationships might support, rather than impede, their members' pursuit of important life projects.

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<sup>33</sup> See, e.g., Harris, *supra* note 26, at 1556; Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 784 & n.2 (2003); cf. 1 KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* 79–86 (C.J. Arthur ed., 1970) (1845).

<sup>34</sup> See *infra* notes 347–372 and accompanying text (Part III.B).

<sup>35</sup> See *infra* notes 378–382 and accompanying text.

This Article proceeds as follows. Part I describes how the family's responsibility for dependency shapes current family law doctrine and traces the ascendance of choice logic in modern family law. I situate both principles within the current neoliberal moment and explain how they set the stage for doctrinal conflict. Part II analyzes how the laws of parentage, cohabitant obligations, and alimony inevitably require states and scholars to choose between principles, to either respect a view of autonomy requiring the richer party's ex ante consent to family obligations or ensure that an economically vulnerable party's needs are met. Part III exposes neoliberalism's structural incoherence and normative unattractiveness as a framework for family life. I propose some interim reforms, but conclude that appropriately conceptualizing the rights and responsibilities attending intimacy requires rethinking family law's approaches to both autonomy and dependency.

### I. MODERN FAMILY VALUES

The importance of autonomy and the family's role in privatizing dependency are both central premises of modern family law. On the surface, these phenomena appear to be distinct and even opposed: Scholars generally applaud legal developments that further intimate self-determination, while criticizing the state's refusal meaningfully to support the caregiving upon which society depends. But as this Part shows, both the private support imperative and an ascendant libertarian view of family autonomy originate in the current neoliberal moment. Although constitutional respect for autonomy protects many interests, including the freedom to pursue chosen family relationships, autonomy increasingly grounds claims that individuals should also be free to choose their family *obligations*—and by extension, to avoid family obligations that they did not “choose” ex ante. This conception of autonomy as financial freedom from other family members, which began to emerge in the early 1970s, reflects deeply ingrained neoliberal convictions, namely that property cannot be legitimately transferred absent its owner's consent. This new vision of family freedom conflicts with the thoroughgoing way in which modern family law privatizes dependency, which in turn can only be understood against the backdrop of our current minimalist state. Family regulation based on marital status and formal contracting succeeds in balancing privatizing dependency with choice about obligations, but as ever more individuals conduct their intimate lives outside these traditional legal institutions, the two principles increasingly clash within the law of family obligations.

### A. Dependency and the Minimalist State

Every society faces what we could call the “dependency problem.”<sup>36</sup> To ensure its self-perpetuation, a society requires the continued vitality of its members. But adults do not spring into being fully formed. Instead, they are born as vulnerable children who depend on others for the physical resources, care, and guidance they need to develop the capacity for social membership.<sup>37</sup> And because raising children is such intensive work, caregivers must in turn depend on others to meet their own needs. Martha Fineman has described these respective phenomena as “inevitable” and “derivative dependency.”<sup>38</sup>

A society’s options for addressing dependency lie on a spectrum between two poles: ensuring collectively that the needs of those who cannot care for themselves are met, or assigning the responsibility to private parties or institutions.<sup>39</sup> As scholars have recognized, the United States generally opts for the latter course by “privatizing dependency” within the family, primarily through the vehicle of family law.<sup>40</sup> This policy choice requires American families to bear most of the costs of social reproduction, or “the biological reproduction of the next generation along with the subsistence, socialization, education, and caregiving of existing generations.”<sup>41</sup> As a result, families are expected to “shoulder their own financial weight,” despite the fact that “society depends upon families to engage in social reproduction and has a stake in families successfully doing so.”<sup>42</sup>

Although families have long been responsible for dependency, the law has defined and enforced their precise duties differently over time. At common law, for instance, the law of coverture and the doctrine of necessities

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<sup>36</sup> See generally FINEMAN, *supra* note 19.

<sup>37</sup> See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 45–51 (2010).

<sup>38</sup> FINEMAN, *supra* note 19, at 34–37.

<sup>39</sup> See, e.g., LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 21 (2006) (“A just society must ensure that its members are able to meet their basic needs for nurture, care, food, shelter, and other material goods.”).

<sup>40</sup> See, e.g., FINEMAN, *supra* note 19, at 33; MCCLAIN, *supra* note 39, at 5 (arguing that in the U.S., “there is insufficient recognition of a public responsibility to support families’ efforts”); Dinner, *supra* note 29, at 84 (“[T]he United States tilts strongly in the direction of private responsibility for social reproduction . . .”); Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 215–16 (2017) (arguing that the U.S. “stands alone in the degree of its failure” to recognize that “the distribution of conditions necessary for sound families is a basic responsibility of government”).

<sup>41</sup> Dinner, *supra* note 29, at 84.

<sup>42</sup> Eichner, *supra* note 40, at 214; MCCLAIN, *supra* note 39, at 5.

required a husband to support his wife and children.<sup>43</sup> This obligation went hand-in-hand with male familial and political prerogative, for it was “[a] man’s . . . taking . . . responsibility for dependent wife and children [that] qualified him to be a participating member of a state.”<sup>44</sup> In the late nineteenth century, married women’s property acts and earnings statutes relaxed the rules of coverture by permitting wives to hold property in their own names, to contract, and to claim rights in their own labor. These enactments preserved, however, the common-law expectation that married women would render household services in exchange for their husbands’ support.<sup>45</sup> Tort and criminal law similarly underscored the continuing importance of the family’s role in private provision: Breach-of-promise-to-marry suits permitted women to recover the “loss of the pecuniary and social advantages which the promised marriage offered,” while men charged with the crime of seduction could avoid prison by marrying and providing for their victims.<sup>46</sup> Each form of legal liability understood marriage as the institution through which dependency needs were to be satisfied.<sup>47</sup>

Legal developments beginning in the 1960s formally abolished the last vestiges of coverture while retaining the family’s historical support function in a transmuted form.<sup>48</sup> The no-fault divorce revolution of the 1970s and

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<sup>43</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*430, \*434–35 (1765) (describing a husband’s duty “to provide his wife with necessities” and characterizing parents’ duty to support their children as “a principle of natural law”); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 146 (Charles M. Barnes ed., 13th ed. 1884); *see also* Earle v. Earle, 43 N.W. 118, 119 (Neb. 1889) (“It is a well-established rule of law that it is the duty of the husband to provide his family with support and means of living . . . and for this purpose the wife has generally the right to use his credit for the purchase of necessaries.”).

<sup>44</sup> NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 7 (2000); *cf.* Rosenbury, *supra* note 18, at 1866 (“[S]tates originally recognized marriage and the parent-child relationship as a means to encourage men to assume responsibility for women’s and children’s dependencies.”).

<sup>45</sup> *See* Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1409–12 (1983); Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–83 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2141 (1994).

<sup>46</sup> *Stanard v. Bolin*, 565 P.2d 94, 96 (Wash. 1977); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 32 (2012).

<sup>47</sup> The government continues to view marriage as a solution to poverty. *See, e.g.*, Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1650 (2005) (describing marriage-promotion policies of the Personal Responsibility and Work Opportunity Reconciliation Act (“PWORA”) of 1996).

<sup>48</sup> *See* Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (describing the “preservation through transformation” of “status regime[s]”); *cf.* Rosenbury, *supra* note 18, at 1866 (stating that “even as our understandings of

1980s made private family law sex-neutral, a shift that confirmed fathers' post-divorce custodial rights and child support obligations but limited women's access to spousal support.<sup>49</sup> The Supreme Court's illegitimacy decisions of the 1970s, accompanied by the 1973 Uniform Parentage Act, extended a parent's duty of support to non-marital as well as marital children.<sup>50</sup> At the same time, welfare reforms from the 1970s through the 1990s restricted the availability of government aid for family life, enacting private provision norms into federal and state law in order to retrench the administrative state.<sup>51</sup> In all of these ways, modern family law embodies the principle that the state bears little responsibility for the costs of social reproduction.

The United States' current extreme approach to the dependency problem is rooted in modern neoliberalism.<sup>52</sup> Unlike the classical liberalism on which it draws, neoliberal "political rationality" seeks to organize collective life by "extending . . . market values to all institutions and social action."<sup>53</sup> Neoliberalism "advocates the institution building, policies, and discourse development appropriate to" this "normative . . . claim about the pervasiveness of economic rationality,"<sup>54</sup> "call[ing] for the abandonment of public space and public institutions and their replacement with market-produced private space and institutions."<sup>55</sup> Under neoliberalism, the state's purpose shrinks from "furthering a broader range of public goods" to "creat[ing] and

family roles and composition have changed, legal recognition of family status remains rooted in the privatization of dependency").

<sup>49</sup> Dinner, *supra* note 29, at 83–84. See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (arguing that pursuit of formal equality negatively affects women and children).

<sup>50</sup> See Trimble v. Gordon, 430 U.S. 762, 776 (1977); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172–76 (1972); Levy v. Louisiana, 391 U.S. 68, 72 (1968); UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973).

<sup>51</sup> See *infra* notes 135–140, 176–179 and accompanying text; see also Baker, *supra* note 11, at 329 (stating that the federal government required states to adopt child support guidelines in order to "secur[e] more private funds for low-income children so that those children would be less of a financial burden on the government"); Onwuachi-Willig, *supra* note 47, at 1677 ("The thrust of PRWORA and related state legislation is to alleviate governmental responsibility where it can be privatized through the family.").

<sup>52</sup> See *supra* notes 25–33 and accompanying text.

<sup>53</sup> BROWN, *supra* note 28, at 40 (emphasis omitted); *id.* at 42 (noting that "classical liberalism articulated a distinction . . . among the criteria for individual moral, associational, and economic actions"); see also HARVEY, *supra* note 30, at 3 (describing neoliberalism's assertion "that the social good" is to be achieved "by maximizing the reach and frequency of market transactions, and . . . bring[ing] all human action into the domain of the market"); cf. Harris, *supra* note 26, at 1557 ("The neoliberal project is not only a political and economic project, but also a cultural one.").

<sup>54</sup> BROWN, *supra* note 28, at 40.

<sup>55</sup> Harris, *supra* note 26, at 1558.

preserv[ing]” the “structures and functions required to secure private property rights and to guarantee . . . the proper functioning of markets.”<sup>56</sup> Because neoliberalism espouses a “narrow[ed] vision of the role of government,”<sup>57</sup> it is sometimes said to advocate a “minimal” state.<sup>58</sup> But because “the opposition between ‘market’ and ‘state’ . . . is nonsensical” and “the neoliberal position” is better understood as “a call for a particular kind of state,”<sup>59</sup> I prefer and will use the term “minimalist.”

Neoliberalism also makes demands upon individuals, “construct[ing]” them “as entrepreneurial actors in every sphere of life.”<sup>60</sup> “[C]itizen-subject[s] of a neoliberal order” are “rational, calculating creatures whose moral autonomy is measured by their capacity for ‘self-care’—the ability to provide for their own needs and service their own ambitions.”<sup>61</sup> Neoliberalism defines the “good citizen . . . as the enterprising, self-regulating subject who manages his or her own risk,” without imposing costs on the collective.<sup>62</sup>

Scholars have begun to analyze how neoliberalism shapes family law. Anne Alstott argues that modern family law reflects the commitment to “three core” neoliberal tenets: “negative liberty, laissez-faire market distributions and the minimal state.”<sup>63</sup> Because constitutional law protects individuals from state interference in their family lives but refuses to redistribute resources to alleviate harsh market outcomes, state-level family law can do no more than divide a family’s resources between its members; dependency needs must be met through private resources, or not at all.<sup>64</sup> “The entrenched neoliberalism of family law” thus “blocks sustained considera-

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<sup>56</sup> HARVEY, *supra* note 30, at 2; Eichner, *supra* note 40, at 218; *see also* BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 10 (2007) (“Governments are no longer responsible for ensuring even the most basic economic well-being of their citizens. Individuals must assume that responsibility and ensure their individual self-reliance through the market.”); Harris, *supra* note 26, at 1558 (“Neoliberal policies devolve issues formerly considered collective, such as the management of economic risk, from government to individual families.”).

<sup>57</sup> Eichner, *supra* note 40, at 218.

<sup>58</sup> *Cf.* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26–28 (1974) (describing a theory of the “minimal . . . and ultraminimal state”) (emphasis omitted).

<sup>59</sup> Grewal & Purdy, *supra* note 25, at 8.

<sup>60</sup> BROWN, *supra* note 28, at 42.

<sup>61</sup> *Id.*

<sup>62</sup> COSSMAN, *supra* note 56, at 15.

<sup>63</sup> Alstott, *supra* note 10, at 25.

<sup>64</sup> *Id.* at 25–26; *see also id.* at 32 (“The state’s implicit role is to facilitate market transactions by protecting property rights. Beyond that, the state need not take any particular actions to promote family life, protect children, or mitigate the poverty, distress, and isolation produced by free markets.”).

tion” of ways to “promote a family life open to all,” including by collectively supplying “the resources that make family life possible.”<sup>65</sup>

Others join Alstott in describing the modern approach to privatizing dependency as “neoliberal” and criticizing the limits it imposes on family law. Laura Rosenbury argues that “the underlying rationale for legal recognition of family in the neoliberal state” is “encouraging the private support of dependency,” and that pursuing this goal precludes the state from adequately recognizing other values, including “pluralism,” “dignity,” and “equality,” which also “help . . . families flourish.”<sup>66</sup> Deborah Dinner describes late-twentieth century developments in divorce and welfare law as entrenching the neoliberal requirement to privatize support and thereby “reinforc[ing] gender and class inequalities.”<sup>67</sup> Susan Appleton describes how “a neoliberal gloss” transformed *Eisenstadt v. Baird*’s potentially radical promise of privacy into the modern “principle of ‘privatization’ of dependency” and “‘personal responsibility,’” again with gender- and class-based consequences.<sup>68</sup> Angela Harris similarly observes that neoliberalism’s naturalization of “economic relations” “conceal[s] subordination and naturalize[s] inequality,”<sup>69</sup> while Angela Onwuachi-Willig exposes how “attempts to make all people into self-sufficient citizens” cast “families that do not fit the traditional white family model as deviant” and preserves “the hierarchical race-based organization of American society.”<sup>70</sup> And Maxine Eichner argues that the neoliberal state’s failure to “protect[] families from market forces” undermines family life for market winners and losers alike.<sup>71</sup> These scholars condemn the way in which modern family law instrumentalizes the family and its resulting blindness to other roles that families could, and should, play in promoting their members’ well-being.<sup>72</sup>

Scholars have also recognized that the law’s focus on privatizing dependency undermines autonomy. Susan Appleton notes that “family law[] embrace[s] . . . contradictory objectives,” with “the protection of autonomy, liberty, and personal choice, on one hand, and the ongoing regulation of

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<sup>65</sup> *Id.* at 25–26.

<sup>66</sup> Rosenbury, *supra* note 18, at 1869–70.

<sup>67</sup> Dinner, *supra* note 29, at 83; *see also id.* at 84.

<sup>68</sup> Appleton, *Forgotten Family Law*, *supra* note 19, at 27–28, 41 (discussing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

<sup>69</sup> Harris, *supra* note 26, at 1543, 1564.

<sup>70</sup> Onwuachi-Willig, *supra* note 47, at 1694.

<sup>71</sup> Maxine Eichner, *The Family, in Context*, 128 HARV. L. REV. 1980, 2011 (2015).

<sup>72</sup> *See* Alstott, *supra* note 10, at 25–26, 32; Appleton, *Forgotten Family Law*, *supra* note 19, at 27–28, 41; Dinner, *supra* note 29, at 83–84; Eichner, *supra* note 71, at 2011; Harris, *supra* note 26, at 1543, 1564; Onwuachi-Willig, *supra* note 47, at 1694; Rosenbury, *supra* note 18, at 1869–70.

intimate life,” often in the service of privatizing dependency, “on the other.”<sup>73</sup> Anne Alstott observes that family law defies “individuals’ intentions” in the service of privatizing dependency, “us[ing] state power to impose lasting obligations on people who are affective or literal strangers, who believe themselves to have contracted around responsibility, or who are actively hostile to one another.”<sup>74</sup> Laura Rosenbury similarly argues that “visions of family dependency and support . . . trump . . . individual intent.”<sup>75</sup> And Angela Onwuachi-Willig has criticized welfare law for enshrining “a narrow, patriarchal definition of family,” rather than “encompass[ing] and support[ing] a broad range of family forms that can give the poor agency in determining how to structure private support to help in escaping from poverty.”<sup>76</sup> But these scholars have focused on the public law context of the relationship between state and family—whether the Fourteenth Amendment requires the state to supply the resources necessary for meaningful family life; which kinds of childrearing arrangements should receive government support; and whether states or the federal government get to define family relationships.<sup>77</sup> Scholars have yet to recognize how privatizing dependency also subverts an emergent conception of autonomy in the private law of family obligations, one that shares the modern private support imperative’s roots in neoliberalism.

### *B. Autonomy as Property Rights*

Autonomy is an “essentially contested concept,” “the proper use of which inevitably involves endless disputes about [its] proper use[] on the part of [its] users.”<sup>78</sup> Family law reflects autonomy’s variegated meanings, with legislatures, judges, litigants, and scholars agreeing on its importance but disagreeing about what it entails. Whereas constitutional law uses many rich concepts to describe the individual’s autonomy interest in protection from “unwarranted government intrusion” in his or her family life,<sup>79</sup> modern family law understands autonomy to comprise an additional component: the right to choose one’s financial obligations to family members. Just as

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<sup>73</sup> Appleton, *Forgotten Family Law*, *supra* note 19, at 41.

<sup>74</sup> Alstott, *supra* note 19, at 3–4.

<sup>75</sup> Rosenbury, *supra* note 18, at 1869.

<sup>76</sup> Onwuachi-Willig, *supra* note 47, at 1683, 1688.

<sup>77</sup> Alstott, *supra* note 10, at 26; Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 922 (2016); Onwuachi-Willig, *supra* note 47, at 1693; Rosenbury, *supra* note 18, at 1837.

<sup>78</sup> W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956).

<sup>79</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).



neoliberalism understands freedom to consist in property holding and therefore to require the right to enjoy one's property without interference, modern family law conceives of autonomy as the freedom to choose not just one's intimate relationships, but also the property consequences of those relationships. Just as neoliberalism holds the alienation of property to be justified only with an owner's consent, a rising strand within modern family law deems redistribution<sup>80</sup> between intimates to be justified only if the richer individual formally chose *ex ante* to take on family obligations. But this property-based vision of autonomy threatens to delegitimize the use of family relationships to privatize dependency.

"Autonomy" motivates and shapes the constitutional law of the family.<sup>81</sup> Although substantive due process jurisprudence does not comprehensively define the interests implicated by state regulation of the family, cases articulate them in terms of individuals' and families' autonomy,<sup>82</sup> liberty,<sup>83</sup> freedom,<sup>84</sup> privacy,<sup>85</sup> intimacy,<sup>86</sup> and dignity.<sup>87</sup> In addition to setting out this constellation of abstract values, constitutional law emphasizes autonomy's function: State interference in questions of "marriage, procreation, contraception, family relationships, child rearing, and education" is circumscribed because such "intimate choices" are "personal decisions" "central to . . . defin[ing] [one's] identity."<sup>88</sup> As the Supreme Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters

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<sup>80</sup> See *supra* note 22.

<sup>81</sup> See Appleton, *supra* note 77, at 921.

<sup>82</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (deriving "the right to personal choice regarding marriage" from "the concept of individual autonomy").

<sup>83</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (describing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (pronouncing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

<sup>84</sup> *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (recognizing Fourteenth Amendment protection for the "freedom of personal choice in matters of marriage and family life").

<sup>85</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992) (describing the "private sphere of the family"); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (describing the Constitution's "guarantee of personal privacy"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting "the private realm of family life which the state cannot enter").

<sup>86</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marriage as "intimate to the degree of being sacred").

<sup>87</sup> *Obergefell*, 135 S. Ct. at 2597.

<sup>88</sup> *Lawrence*, 539 U.S. at 574 ("afford[ing] constitutional protection to personal decisions relating to" family matters); *Obergefell*, 135 S. Ct. at 2597.

could not define the attributes of personhood were they formed under compulsion of the State.”<sup>89</sup> Similarly, “the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life.’”<sup>90</sup> Such relationships also have wide-ranging and lasting consequences, shaping fundamentally the life courses of their members.<sup>91</sup> The Constitution protects the “freedom of personal choice in matters of . . . family life” because our intimate lives could not otherwise fulfill their necessary role in our self-realization and self-determination.<sup>92</sup> In this way, constitutional law reflects a comprehensive and capacious understanding of family autonomy as a requisite for human flourishing.<sup>93</sup>

Respect for autonomy has liberalized family law across many dimensions since the 1960s and 1970s. Although marriage used to be the only permissible form of sexual intimacy,<sup>94</sup> respect for autonomy justified legalizing non-marital sexual activity<sup>95</sup> and cohabitation,<sup>96</sup> as well as lifting bans

<sup>89</sup> *Casey*, 505 U.S. at 851.

<sup>90</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)).

<sup>91</sup> *See, e.g., Rivera v. Minnich*, 483 U.S. 574, 583 (1987) (Brennan, J., dissenting) (describing parenthood as “a lifelong relationship with significant financial, legal, and moral dimensions”).

<sup>92</sup> *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); *see Obergefell*, 135 S. Ct. at 2599 (stating that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy”); *Smith*, 431 U.S. at 845 (stating that “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, . . . in intrinsic human rights”); *cf. Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

<sup>93</sup> *See Obergefell*, 135 S. Ct. at 2602 (describing the “the approach this Court has used in discussing . . . fundamental rights, including marriage and intimacy,” as approaching those rights “in [their] comprehensive sense”); *see also Kenji Yoshino, A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 166 (2015) (describing *Obergefell* as “mov[ing] away from a jurisprudence of ‘unenumerated’ rights and toward a jurisprudence of interpreting the ‘enumerated’ right of liberty”).

<sup>94</sup> Katherine Franke, *The Curious Relationship of Marriage and Freedom, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES* 87, 99 (Marsha Garrison & Elizabeth S. Scott eds., 2012) [hereinafter Garrison & Scott, *MARRIAGE AT THE CROSSROADS*] (“Marriage laws . . . include a set of expectations that are enforced through both civil and criminal laws.”); Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 761 (2006) (discussing “attempts to use marriage to locate and police the boundary between the categories of licit and illicit sex”); Murray, *supra* note 46, at 1 (describing marriage as “state-imposed sexual discipline”); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992) (describing how “the law recruits, builds, shapes, sustains, and promotes social institutions”).

<sup>95</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>96</sup> *See, e.g., Illinois Public Act 86-490, 1986 Ill. Legis. Serv. 86-490 (West) (codified at 720 ILL. COMP. STAT. ANN. 5/11-40 (West 2010)) (deleting “cohabits” from the criminal code); Marvin v. Marvin*, 557 P.2d 106, 112 n.4 (Cal. 1976) (noting repeal of prohibition on “living ‘in a

on interracial and gay marriage.<sup>97</sup> Autonomy also provided an important normative justification for the advent of no-fault divorce<sup>98</sup> and the increased acceptance of private ordering within family law.<sup>99</sup> As a result, adults have much more freedom to organize their intimate lives as they choose than they did one hundred years ago.<sup>100</sup>

This increased intimate autonomy has also reshaped parent-child relationships. Adults' relative freedom to pursue sexual relationships outside of marriage undermined illegitimacy regimes, as courts recognized the futility and unfairness of "attempt[ing] to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."<sup>101</sup> Autonomy also justifies constitutionally protecting access to birth control and abortion, which give women more control over whether and when they become mothers,<sup>102</sup> as well as recognizing parent-child relation-

state of cohabitation and adultery"); see also Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 276–77 ("Criminal statutes punishing cohabitation were repealed in many states after . . . the Model Penal Code . . . criticized the use of the criminal law to punish . . . 'moral violations.'").

<sup>97</sup> *Obergefell*, 135 S. Ct. at 2599; *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>98</sup> See, e.g., UNIF. MARRIAGE & DIVORCE ACT §§ 302, 305, 9A U.L.A. 200, 242 (1998) (permitting judgment of divorce upon a finding that the marriage is "irretrievably broken"); see also Paul R. Amato, *Institutional, Companionate, and Individualistic Marriages: Change over Time and Implications for Marital Quality*, in Garrison & Scott, MARRIAGE AT THE CROSSROADS, *supra* note 94, 107, 109–10 (describing the rise of "individualistic marriage," in which "self-development and personal fulfillment" form "the basis of marriage" and "unions are successful only to the extent that they continue to meet each partner's innermost psychological needs").

<sup>99</sup> See Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 17, 40–41 (2012); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 172–73 (1998); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 251–52 (2010); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 90 (2001); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 280–86 (1982); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1445.

<sup>100</sup> William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1889 (2012) ("American family law in the last century has moved *away from* a monopolistic regime where marriage . . . was the only item on the menu, and it has moved *toward* a pluralist regime where each state offers a larger menu of options for romantic couples . . ."); see also Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 318 (2016) (stating that "family law is moving toward developing a menu of options for legal recognition of relationships" with "greater room for variety and choice *within* each regime").

<sup>101</sup> *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). *But cf.* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346–50 (2011) (arguing that nonmarital children still suffer discrimination).

<sup>102</sup> See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

ships based on intent in the context of assisted reproductive technology and social parenthood.<sup>103</sup>

In light of the law's increasing acceptance of autonomy in family matters and the accompanying increasing diversity of family forms, many scholars advocate for pluralist family law regimes "that . . . allow[] individuals to pursue their own vision of the good life in forming family relationships."<sup>104</sup> Under a pluralist regime, the state's proper role is to respect individuals' self-defining choices about intimate relationships by recognizing and supporting equally their different family organizations.<sup>105</sup>

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<sup>103</sup> Cf. Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 448 (2005) (arguing that courts should use intent to establish legal parenthood for lesbian co-parents); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2269 (2017) (arguing that family law should "ground[] [parental] recognition . . . in social contributions to parenting"); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 642 (2002) (describing how autonomy-based theories support assigning parentage based on intent).

<sup>104</sup> Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 297 (2015).

<sup>105</sup> *Id.* (stating that "fundamental notions of autonomy and fairness support the [pluralists'] claim that the liberal state should offer individuals the freedom to undertake whatever family relationships maximize their utility and then should support those families equally"); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226–36 (1995) (arguing for abolition of marriage and organizing family and dependency around caretaker relationships); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 46–62 (2008) (arguing that marriage's privileged position harms non-marital families); Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 64–66 (2012) (arguing that legal benefits currently attached to marriage should be disaggregated and redistributed either directly to individuals or based on other, non-marital relationships); David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 813–18 (1985) (arguing that government should regulate families according to a principle of "supportive neutrality"); Eskridge, *supra* note 100, at 1900 (stating that "the normative baseline of American family law has moved . . . toward . . . offering romantic couples more choices"); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008) (arguing that "efforts to secure marriage equality for same-sex couples must be undertaken . . . in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire"); Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1401 (2009) (arguing that the state is complicit in causing "the lesser social value of civil unions vis-a-vis marriage"); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 200 (2013) (arguing that "inhibit[ing] the development of novel family structures and interpersonal duties . . . lessens . . . individual freedom"); Onwuachi-Willig, *supra* note 47, at 1693 (suggesting that the state support "custodial cohorts" and "parenting partnerships"); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1240 (2010) ("explor[ing] . . . how a principle of familial nonestablishment could ensure familial and individual freedom"); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 193 (2007) (arguing that family law recognition of non-sexual adult intimate relationships could "reinvent[] individuals' options with respect to both marriage and friendship"); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28

But the diversity of modern intimate associations poses challenges, not only for proper distribution of public family benefits but also for proper assignment of private family responsibilities. In the law of family obligations, litigants increasingly urge a vision of autonomy that understands the concept also to comprise the freedom to choose one's family obligations.<sup>106</sup> Whereas under family law pluralism, respecting "choice" involves equality of state recognition and support for desired family commitments,<sup>107</sup> the new family freedom appeals to "choice" to argue that private-law family obligations are illegitimate unless formally assented to *ex ante*.<sup>108</sup>

Choice-based arguments start from the underlying premise that the ability to control private property is essential to an individual's freedom.<sup>109</sup> Because freedom depends on controlling property, it "would be seriously impeded, and possibly destroyed, if legitimate rights holders who have not acted in a tortious manner could be deprived of their rights by force of law without their consent."<sup>110</sup> For this reason, alienation of property is deemed illegitimate unless accompanied by the rights holder's consent.<sup>111</sup>

The new family freedom transports this logic into the intimate sphere by insisting that only ceremonial marriage—through which an individual undertakes enumerated duties to a spouse and any resulting children—and formal contract demonstrate the requisite consent to family obligation. Without contemporaneous formalities to mark *ex ante* consent, redistribution of resources between individuals whose relationship appears family-like *ex post* is deemed illegitimate.<sup>112</sup> Functioning similarly to nineteenth century subjective theories of contract, choice about obligations insists upon financial freedom from functional-but-not-formal family members.

LAW & INEQ. 345, 349 (2010) (arguing for a "functionalist approach to relationship recognition" combined with "a 'menu' of alternatives to marriage"). *But cf.* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1278–85 (2014) (arguing that state recognition of relationships can harm unmarried partners).

<sup>106</sup> See *infra* notes 125–310 and accompanying text (Part II).

<sup>107</sup> *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1232 (1998) ("A legal regime that constrains the freedom to commit actually limits individual freedom.").

<sup>108</sup> For discussions of the relationship between choice and consent, see generally Barnett, *supra* note 30, and Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999 (2017).

<sup>109</sup> See NOZICK, *supra* note 58, at 163–64.

<sup>110</sup> Barnett, *supra* note 30, at 297–98.

<sup>111</sup> *Id.* at 299 ("[T]he consent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements.").

<sup>112</sup> *Cf.* Eskridge, *supra* note 100, at 1885–86 (describing the libertarian "belie[f] that the optimal goal of family law is to enforce the relationship preferences of mature adults, without governmental meddling").

Insofar as this account of autonomy revolves around individuals' rights to control their property, even vis-à-vis family members, it sounds in neoliberalism. Choice about obligations echoes the "possessive individualism" that C.B. Macpherson identified in the seventeenth century political and economic theories upon which neoliberalism builds:<sup>113</sup>

The individual, it was thought, is free inasmuch as he is proprietor of his person and capacities. The human essence is freedom from dependence on the wills of others, and freedom is a function of possession. Society becomes a lot of free equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise.<sup>114</sup>

This critique is overstated as applied to classical liberalism, which did distinguish "among the criteria for individual moral, associational, and economic actions."<sup>115</sup> The new family freedom, on the other hand, does construct the individual "as an owner of himself," rather than "as part of a larger social whole."<sup>116</sup> For insisting upon ex ante consent to family obligation casts intimates as linked through formal exchange, rather than united in community. In this way, choice about obligations applies a market-based, contractual idea of freedom, pervasive in neoliberal rhetoric, to family relations.

Choice about obligations also finds consonance with Henry Maine's famous status-to-contract hypothesis: "[F]rom a condition of society in which all the relations of Persons are summed up in the relations of Family, we . . . have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals."<sup>117</sup> By requiring even family relations and accompanying obligations to arise out of ex-

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<sup>113</sup> C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (Wynford ed. 2011); see Grewal & Purdy, *supra* note 25, at 1.

<sup>114</sup> MACPHERSON, *supra* note 113, at 3.

<sup>115</sup> BROWN, *supra* note 28, at 42.

<sup>116</sup> MACPHERSON, *supra* note 113, at 3.

<sup>117</sup> HENRY SUMNER MAINE, *ANCIENT LAW* 169 (10th ed. 1885) (1861); see also Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 47 (2006) ("The conventional wisdom is that the progress of U.S. family law has been a steady march 'from status to contract' or from public to private ordering."); Carl E. Schenider, *Moral Discourse and the Transformation of American Family Law*, 83 *MICH. L. REV.* 1803, 1808–09 (1985) (describing family law's shift toward contract); Singer, *supra* note 99, at 1444–46 (describing family law's shift toward contract). *But see* Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256, 256 (F.H. Buckley ed., 1999) ("[W]e are far from a system in which parties are free to contract for any marital arrangement they want . . ."); Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 834–48 (2004) (arguing that the status-to-contract hypothesis is overstated in family law).

PLICIT agreement, choice logic understands intimates to operate within a post-status, assent-based world.

Strands of choice logic are evident in both law and legal scholarship. Private ordering has established itself within family law via the increasing acceptance of pre- and post-nuptial agreements, through which spouses have greater freedom to “themselves determine their postdissolution rights and responsibilities.”<sup>118</sup> Elizabeth Scott and Robert Scott have explored hypothetical bargaining between spouses in order to outline the contours of an ideal marital property regime.<sup>119</sup> Scholars have even adapted the language of consent to other purposes, justifying wide-ranging marital obligations in terms of consent to marital status.<sup>120</sup>

Arguments against imposing family relationships without an individual’s consent also employ choice reasoning and carry increasing weight. Scholars have argued that the Constitution requires consent to marital and parental relationships,<sup>121</sup> and similar autonomy concerns have influenced contract disputes. In a case regarding the disposition of pre-embryos, the Supreme Judicial Court of Massachusetts announced “a public policy . . .

<sup>118</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); see Alstott, *supra* note 10, at 32–38 (describing how family law doctrine enshrines private ordering within the family); Singer, *supra* note 99, at 1460–61 (describing spouses’ freedom to alter state-defined marital obligations). See generally UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (UNIF. LAW COMM’N 2012) (“UPMAA”); Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313 (2012) (reporting state law on premarital and marital agreements and describing the new UPMAA).

<sup>119</sup> Scott & Scott, *supra* note 107, at 1263–80 (describing an ideal marital property regime in terms of contract default rules and explaining how it differs from present law).

<sup>120</sup> See Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 25 (2004) (stating that “the joint decision to enter into a marriage looks more like contract than anything else”); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligations*, 52 UCLA L. REV. 815, 821 (2005) (“Marital obligation is based on mutual consent.”); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 240–41 (“The marital vows . . . represent explicit and implicit promises by each spouse to accept a set of responsibilities that will assure that the other’s dependency needs are met.”); Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1751–52 (2016) (describing the marriage ceremony as “a central moment of marriage’s basic structure” and “a performative speech act” through which “spouses exercise their power to create the [marriage] relationship and its accompanying duties”).

<sup>121</sup> For arguments about marriage, see Matsumura, *supra* note 108, at 2042 & n.269, and Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1544–56 (2016). For arguments about parenthood, see Matsumura, *supra* note 105, at 176 (noting that *Griswold*, *Eisenstadt*, and *Roe* could support “a right to procreational autonomy that could protect a person’s decision to reconsider becoming a genetic parent even over his or her prior commitments to the contrary”), and I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008).

that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired.”<sup>122</sup> The court described this policy as “grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.”<sup>123</sup> The court’s refusal to “compel an individual to become a parent over his or her contemporaneous objection” reflected choice-based reasoning, namely that only appropriately timed formal consent can legitimate family obligations.<sup>124</sup>

Under choice about obligation, only ceremonial marriage and written contracts provide the appropriate basis to impose financial obligations upon family members. But in the absence of these family formalities, the new family freedom’s property-based conception of autonomy conflicts fundamentally with the private support imperative. As Part II will show, the tension between the two principles contributes to some of the most perplexing doctrinal problems in the law of family obligations.

## II. AUTONOMY AGAINST DEPENDENCY

Scholars have debated the proper content of the laws of parentage, cohabitant obligations, and alimony since the 1970s, when marriage’s monopoly on family life began to erode and the welfare state began to contract. Despite extensive attention, however, these three areas—which together constitute the law of family obligations—remain marked by doctrinal contradiction and normative confusion.

The incoherence arises from the insoluble tension between choice about obligations and privatizing dependency. Forced to choose between principles, and against the backdrop of a minimalist state, family law opts fundamentally to privatize dependency. This resolution is unsurprising, as privatizing dependency has always been a foundational pillar of family law.<sup>125</sup> But because of the new family freedom’s rhetorical force, this result is more functionally achieved than openly avowed. Because parentage law deals with children’s inevitable dependency, it often nakedly defies the new family freedom by instituting the private support imperative over parents’

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<sup>122</sup> *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *see also* *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (permitting “either party [to a preembryo agreement] to change his or her mind about disposition up to the point of use or destruction of any stored preembryos”).

<sup>123</sup> *A.Z.*, 725 N.E.2d at 1059.

<sup>124</sup> *Id.*; *see* Appleton, *Between the Binaries*, *supra* note 19, at 113 (stating that “the rhetoric of constitutional autonomy and choice in family matters” supported the Supreme Judicial Court’s “policy of requiring contemporaneous consent for the formation of a new family relationship”).

<sup>125</sup> *See supra* notes 36–77 and accompanying text (Part I.A).



choice-based claims. But rather than admit that lack of support for social reproduction limits family members' financial freedom, the law papers over the problem by equating the fact of sexual activity with consent to parental obligation.<sup>126</sup> Because the laws of cohabitant obligations and alimony involve adults, they can appear to vindicate the new family freedom. Under the auspices of respecting autonomy, courts and legislatures cast intimates as having "assumed the risk" of limited or non-existent family-based obligation by virtue of their choices over the course of a relationship—effectively requiring each party to privatize her own dependency.<sup>127</sup> Yet the law's expectation that all adults leave their relationships self-sufficient not only fails to reflect the realities of intimate relationships, but also turns a blind eye to the difficulties many adults face in surviving on their own market efforts under our current system. Thus, despite attempts to reconcile the new family freedom with privatized dependency through legal fictions, doctrinal work-arounds, and willful ignorance, the tension between the two principles remains unresolved.

#### *A. Parentage: Openly Privatizing Dependency*

When the private support imperative conflicts with choice about obligations in the context of parental obligations, the law makes a clear election: to privatize children's dependency. This priority not only drives paternity law, which makes biological fathers strictly liable for child support, but also underlies doctrines that adopt intent-based approaches to parentage only insofar as adults seek to establish (rather than avoid) obligations. Although the urgency of children's developmental needs provides good reason to limit adults' autonomy, it is difficult to articulate this rationale in terms consistent with the new family freedom. As a result, parentage law appears schismatic, adopting the language of choice when intent aligns with creating obligations and locating choice in sex or denying its importance altogether when adults seek to avoid parenthood. This split focuses the state's most coercive efforts to privatize dependency on precisely those parents least able to financially support their children, with unfortunate results for all concerned. Parentage law's approach to obligation also casts raising children as a choice the costs of which individuals must internalize, rather than a socially valuable endeavor for which the collective might bear some responsibility.

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<sup>126</sup> See *infra* notes 128–197 and accompanying text (Part II.A).

<sup>127</sup> See *infra* notes 198–307 and accompanying text (Parts II.B–C).

## 1. Strict Liability for Sex

Nowhere is family law's focus on privatizing dependency more apparent than in the law of paternity establishment for purposes of child support. Although constitutionally protected access to birth control and abortion has attenuated the connection between sex and parenthood for women,<sup>128</sup> the law holds men strictly liable for financial support when their sexual activity results in the birth of a child.<sup>129</sup> The private support imperative is so strong that the law establishes paternity even in victims of rape or fraud and metes out harsh punishments to men who are unable to meet state standards of financial provision.<sup>130</sup>

Although it is just that men should share financial responsibility for the children they sire, modern family law pursues this end in a historically specific and coercive way. Whereas legal fatherhood originally "existed almost exclusively within marriage," U.S. law has evolved to encompass "non-marital fathers . . . primarily in order to obtain monetary support for children."<sup>131</sup> Under early Roman and medieval continental law, a child born outside of marriage was *filius nullius*, a child of no one.<sup>132</sup> The British Poor Laws passed in 1576 permitted parishes to recoup from biological fathers the cost of supporting non-marital children on public aid.<sup>133</sup> Similarly, U.S. non-marital fathers were generally "liberated from legal obligations" prior to the mid-twentieth century, "except to the extent the state could call upon them to support children who otherwise would depend on public assistance."<sup>134</sup> But rising divorce rates and the welfare state retrenchment of the 1970s made this state of affairs untenable.<sup>135</sup> In response, an "increasingly

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<sup>128</sup> Of course, many women lack effective access to birth control and abortion. See Harris v. McRae, 448 U.S. 297, 326–27 (1980); see also, e.g., Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385, 388, 390 (2013) (arguing that "abortion is in danger of becoming a right without a remedy" because courts and legislatures do not recognize women's "need for access to affordable [reproductive] healthcare"). And many pregnant women do not view maternity as a matter of "choice."

<sup>129</sup> See Appleton, *Between the Binaries*, *supra* note 19, at 105 (describing "background principles that invariably make sexual conceiver 'personally responsible' for supporting their children, no matter how unfair such obligations might seem in a given case"); Baker, *supra* note 120, at 20 ("[P]aternity doctrine and the state's remarkably stingy support of children make children's dependency a private concern.")

<sup>130</sup> See *infra* notes 151–166, 169 and accompanying text.

<sup>131</sup> Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 132–33 (2003).

<sup>132</sup> HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 2–3 (1971).

<sup>133</sup> Baker, *supra* note 120, at 6.

<sup>134</sup> Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2297 (2016).

<sup>135</sup> Baker, *supra* note 11, at 328–29.

coercive federal-state legal apparatus” has developed to “impose[] child support obligations on divorced and never-married fathers.”<sup>136</sup> The modern strict-liability approach to paternity is thus firmly rooted in the present neoliberal moment.

Current paternity doctrine is structured by federal law, which requires states to “operate . . . child support enforcement program[s] that conform[] with” federal statutory and regulatory requirements in order to receive federal welfare funds.<sup>137</sup> These federal standards require states to “establish a comprehensive system to establish paternity, locate absent parents, . . . help families obtain support orders,” and “collect overdue support payments.”<sup>138</sup> Although federal law encourages men to acknowledge paternity voluntarily, it also mandates that states adopt a “presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.”<sup>139</sup> Federal welfare law thus nationalizes a policy of establishing paternity in biological fathers. Taken as a whole, the modern paternity regime casts sexual intercourse as an inherently dangerous activity, with partners declared to have assumed the risk of procreation in order to privatize the dependency of any resulting children.<sup>140</sup>

Men have challenged the current regime on substantive constitutional grounds, to no avail. The New York Court of Appeals has declared that a man’s “constitutional entitlement to avoid procreation does not encompass a

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<sup>136</sup> Dinner, *supra* note 29, at 86.

<sup>137</sup> *Blessing v. Freestone*, 520 U.S. 329, 333 (1997). See generally Child Support Performance and Incentive Act of 1998, Pub. L. No. 105–200, 112 Stat. 645; Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105–187, 112 Stat. 618; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105; Child Support Recovery Act of 1992, Pub. L. No. 102–521, 106 Stat. 3403; Family Support Act of 1988, Pub. L. No. 100–485, 102 Stat. 2343; Child Support Enforcement Amendments of 1984, Pub. L. No. 98–378, 98 Stat. 1305; Social Services Amendments of 1974, Pub. L. No. 93–647, 88 Stat. 2337.

<sup>138</sup> *Blessing*, 520 U.S. at 333–34; see also 42 U.S.C. § 654 (2012) (outlining requirements to which state plans for ensuring payment of child and spousal support must conform); 42 U.S.C. § 666(a)(2), (5)(B), (5)(F) (requiring states to establish “[e]xpeditious administrative and judicial procedures . . . for establishing paternity,” including by genetic testing).

<sup>139</sup> 42 U.S.C. § 666(a)(5)(C)–(D), (G).

<sup>140</sup> Appleton, *Between the Binaries*, *supra* note 19, at 93–94 (describing how “sexual conception makes a genetic father a legal parent” while “nonsexual conception . . . offers opportunities for a genetic father to be simply a donor with no parental rights or obligations”); Baker, *supra* note 120, at 8–9 (“[M]uch [of] paternity law seems to be based on a strict liability theory for genetic contribution.”); cf. Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917, 949, 972, 977 (2010) (describing “[n]onprocreative sex” as “inherently risky” and arguing that “when men share in the price of pleasure, they do a better job of minimizing its risks”); Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 656 (2011) (“It is only logical that one way to reduce unintended pregnancies might be to raise the stakes for men, to make sure *all* pregnancies have concrete consequences for both parties involved.”).

right to avoid a child support obligation.”<sup>141</sup> More recently, the Sixth Circuit rejected the argument that child support laws violate equal protection by “denying men, but not women, ‘the right to initiate consensual sexual activity while choosing to not be a parent.’”<sup>142</sup> Citing the state’s “important interest in providing for . . . support” of a child “already in existence,” the court denied that “any parent, male or female,” has “a fundamental right . . . to sever his or her financial responsibilities to [a] child after the child is born.”<sup>143</sup> As the court had earlier explained, “[f]or reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring . . . remains constitutionally sufficient to support . . . child support requirements.”<sup>144</sup> Because men cannot “opt out of fatherhood,”<sup>145</sup> “[r]eproduction and child support requirements occur without regard to the male’s wishes.”<sup>146</sup> In the context of child support, the Constitution does not recognize the new family freedom; instead, once a child is conceived, her father’s autonomy interests come second to meeting her material needs.

Procedural due process challenges have been similarly unsuccessful. The Supreme Court has concluded that, even though clear and convincing evidence is required to terminate a parental relationship,<sup>147</sup> establishing paternity by a preponderance of the evidence passes constitutional muster.<sup>148</sup> Despite Justice Brennan’s dissenting observation that parenthood is “a life-long relationship with significant financial, legal, and moral dimensions,” the majority reasoned that a “putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.”<sup>149</sup> The Court’s asymmetrical treatment of error risk vis-à-vis parental relationships has the practical effect of funneling adults into, while impeding their exit from, parental obligations—a useful flow pattern for encouraging maximal private provision for children’s dependency needs.<sup>150</sup>

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<sup>141</sup> *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 716 (N.Y. 1983).

<sup>142</sup> *Dubay v. Wells*, 506 F.3d 422, 429–30 (6th Cir. 2007).

<sup>143</sup> *Id.* at 429 n.3, 430; *see also L. Pamela P.*, 449 N.E.2d at 715 (reasoning that “[t]he primary purpose of establishing paternity is to ensure that adequate provision will be made for the child’s needs”).

<sup>144</sup> *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004).

<sup>145</sup> *Dubay*, 506 F.3d at 429 n.3.

<sup>146</sup> *Hedges*, 391 F.3d at 836.

<sup>147</sup> *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

<sup>148</sup> *Rivera v. Minnich*, 483 U.S. 574, 575 (1987).

<sup>149</sup> *Id.* at 583 (Brennan, J., dissenting); *id.* at 580 (majority opinion).

<sup>150</sup> *Cf. Ian Ayres, Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 *YALE L.J.* 2032, 2093, 2095–96 (2012) (explaining how altering rules can “construct[] barriers” to contracting around defaults in service of social ends).

Courts' uniform rejection of tort-based "birth control fraud" claims further demonstrates the strict-liability logic of paternity law. In these cases, men challenge child support orders or seek monetary awards on the ground that their lovers misled them about the potential reproductive consequences of sexual conduct.<sup>151</sup> Despite the women's allegedly tortious actions, courts show no compunction in holding men to child support obligations.<sup>152</sup> In *Wallis v. Smith*, for example, the New Mexico Court of Appeals relied upon "the public policy that governs the economic consequences of sexual relationships that produce children" to reject the father's contraceptive fraud claim.<sup>153</sup> The court described New Mexico's child support guidelines as "impos[ing] a form of strict liability for child support, without regard to which parent bears the greater responsibility for the child's being."<sup>154</sup> Insisting explicitly on "personal responsibility in sexual relationships," the *Wallis* court refused to "allow[] a parent to opt out of the financial consequences of his or her sexual relationships just because they were unintended."<sup>155</sup> The court defended its decision not only on the ground that its position "makes paramount the interests of the child," but also because it "has the added benefit of *insulating the state* from the possibility of bearing the financial burden for a child."<sup>156</sup> By assigning to adults the risk of support obligations if a child results from their sexual activities, these cases make manifest the underlying purpose of modern paternity law: privatizing children's dependency.

The law's strict-liability logic is so strong that paternity attaches even when a man's sexual conduct was in some sense involuntary. At least ten states have held that male victims of statutory rape are liable for child sup-

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<sup>151</sup> *Wallis v. Smith*, 22 P.3d 682, 684 (N.M. Ct. App. 2001) (citing cases and stating that "no jurisdiction recognizes contraceptive fraud or breach of promise to practice birth control as a ground for adjusting a natural parent's obligation to pay child support"); see also *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 619 (Ct. App. 1980) (refusing "to attach tortious liability to the natural results of consensual sexual intercourse").

<sup>152</sup> Because these cases are usually dismissed for failure to state a claim upon which relief can be granted, appellate courts generally assume the facts pleaded in men's complaints to be true. See, e.g., *Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007); *Wallis*, 22 P.3d at 683. *But cf.* *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 714 (N.Y. 1983) (stating that the "Family Court . . . found that petitioner had purposefully deceived respondent with regard to her use of contraception").

<sup>153</sup> 22 P.3d at 684.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 685; see also *id.* at 684 (relating "the view . . . that men would assume individual responsibility in sexual relationships only when they risked incurring a substantial economic burden in the form of child support"); *id.* at 688 (Alarid, J., specially concurring) (stating that "sex partners are strictly liable for the support of any child they engender by voluntarily engaging in sexual activity").

<sup>156</sup> *Id.* at 684 (emphasis added).

port.<sup>157</sup> These courts “uniformly conclude[] [that] legal consent under criminal law is irrelevant in a civil action for support of the child born of a minor father and an adult mother.”<sup>158</sup> They explain that, although a boy’s “youth is basic to the crime” of statutory rape, “it is not a factor in the question of whether he is the father” of a resulting child and thus liable for its support.<sup>159</sup>

One could understand this rule as anti-opportunistic, with courts refusing to allow adolescents’ age to excuse them from the predictable consequences of otherwise consensual sexual conduct. The California Court of Appeals reasoned that “[o]ne who is injured as a result of criminal conduct in which he willingly participated is not a typical crime victim.”<sup>160</sup> The Wisconsin Court of Appeals went further, declaring that “[i]f voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary . . . even if [it] resulted from a sexual assault . . . within the meaning of the criminal law.”<sup>161</sup> Not only did the Wisconsin court deem the teenager before it to have consented to sexual conduct with an adult, it considered his consent also to encompass his resulting fatherhood and justify its concomitant support obligations.

But anti-opportunism cannot explain imposing child support obligations on men who did not knowingly or voluntarily engage in sexual intercourse.<sup>162</sup> In *S.F. v. State ex rel. T.M.*, an Alabama appellate court affirmed a child support order against a man who was unconscious during the child’s conception.<sup>163</sup> Although the evidence at trial suggested that the mother had committed forcible sexual assault, the appeals court insisted that “any wrongful conduct on the part of the mother should not alter the father’s duty to provide support for the child.”<sup>164</sup> In *State v. Frisard*, a Louisiana appellate court upheld a paternity finding even though the man insisted his sexual

<sup>157</sup> *In re Paternity of K.B.*, 104 P.3d 1132, 1133–35 (Okla. Civ. App. 2004) (surveying cases from Alabama, Arkansas, California, Colorado, Illinois, Kansas, Minnesota, New York, and Wisconsin); see also Dep’t of Revenue *ex rel. Bennett v. Miller*, 688 So. 2d 1024, 1026 (Fla. Dist. Ct. App. 1997) (surveying cases).

<sup>158</sup> *In re Paternity of K.B.*, 104 P.3d at 1134.

<sup>159</sup> *Schierenbeck v. Minor*, 367 P.2d 333, 335 (Colo. 1961).

<sup>160</sup> *Cnty. of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843, 844 (Ct. App. 1996); see also *Paternity of K.B.*, 104 P.3d at 1133 (characterizing “the purported victim” as “a willing participant in the sexual misconduct”); *Schierenbeck*, 367 P.2d at 335 (noting the father’s “assent to the illicit act”).

<sup>161</sup> *In re Paternity of J.L.H.*, 441 N.W.2d 273, 276–78 (Wis. Ct. App. 1989).

<sup>162</sup> Cf. Michael J. Higdon, *Fatherhood by Conscriptio: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 413 (2012) (arguing for a consent-based “affirmative defense to child support obligations for those fathers whose parenthood arose as a result of sexual assault”).

<sup>163</sup> *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996).

<sup>164</sup> *Id.*

contact with the mother was limited to oral sex.<sup>165</sup> And although in *Phillips v. Irons* an Illinois appellate court reinstated a suit alleging facts similar to *Frisard's*, the intentional infliction of emotional distress claim did not directly challenge the father's paternity or his obligation to support the resulting child.<sup>166</sup> That even physically involuntary or (typically) non-procreative sexual contact can ground support obligations shows just how strongly the imperative to privatize children's dependency shapes this area of law.

Scholars almost universally criticize paternity law's current approach.<sup>167</sup> They argue that the current child support system neither fulfills the state's goal of meeting children's financial needs nor recognizes the material ways in which low-income fathers do contribute to their children's development.<sup>168</sup> Instead, punitive child support collection efforts, including "wage garnishment, suspension of drivers or professional licenses, or jail," inhibit fathers' ability to earn income and drive them away from their children.<sup>169</sup> Scholars point out rightly that imposing strict paternal liability for sexual conception does little to satisfy, and may even obstruct, a child's need for a stable parent.<sup>170</sup> They also question whether it is just for men to have less

<sup>165</sup> 694 So. 2d 1032, 1035–36 (La. Ct. App. 1997).

<sup>166</sup> No. 1–03–2992, 2005 WL 4694579, at \*2–5 (Ill. App. Ct. Feb. 22, 2005).

<sup>167</sup> *But see* NANCY E. DOWD, REDEFINING FATHERHOOD 115–19 (2000); Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 375–76 (1996).

<sup>168</sup> *See, e.g.*, Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 633 (2012); Dowd, *supra* note 131, at 140 ("Even if all fathers were identified and all child support as currently structured were paid, we would not eliminate a substantial proportion of child poverty."); Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 169–72 (2011); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1000–08 (2006); Onwuachi-Willig, *supra* note 47, at 1684–85 (describing the welfare system's historical failure to "value unemployed fathers' non-monetary contributions to their families").

<sup>169</sup> *Dubay v. Wells*, 506 F.3d 422, 428 (6th Cir. 2007); *see also* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 104 (2014) (describing the current child support enforcement regime as "a vicious cycle, where fathers who are behind in their child-support payments face sanctions that virtually ensure that they will fall even farther behind"); Jill Elaine Hasday, *Parenthood Divided: The Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 357 (2002) (describing how intrusively the child support system polices non-intact families); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 933–35 (2016).

<sup>170</sup> Appleton, *Between the Binaries*, *supra* note 19, at 111 (stating that "the particular means of conception has no inherent connection to a child's affective ties"); Baker, *supra* note 120, at 21 (stating that "a reluctant father . . . is unlikely to assume a meaningful role as father"); Dowd, *supra* note 131, at 135 ("While financial responsibility serves our social, adult needs, what matters most to children is emotional relationships and caregiving.").

choice about incurring parental obligations than women do.<sup>171</sup> For all of these reasons, many scholars advocate basing parentage upon intent to parent, rather than “sex or genes.”<sup>172</sup>

But proposed reforms, which invariably call for greater state financial support for children, reflect the same pervading conflict between neoliberal commitments.<sup>173</sup> For re-centering paternity law around chosen parental relationships would require relaxing the current insistence on privatizing children’s dependency. But because our society is unwilling to take on much collective responsibility for meeting children’s needs, legislatures and courts continue to equate the choice to have sex with the choice to become a parent, and to punish low-income fathers who are unable to provide financially for their children.

## 2. Choice as a One-Way Ratchet

Paternity law’s strict-liability approach seems especially unjust because family law appears to adopt an intent-based approach to parentage in cases involving assisted reproductive technology and social parenthood.<sup>174</sup> Katherine Baker, for instance, argues that contract principles “currently govern[] the law of paternity in almost all cases involving non-traditional means of conception and . . . increasingly . . . govern[] the law of paternity in most cases involving men who have acted like fathers toward a child.”<sup>175</sup>

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<sup>171</sup> Baker, *supra* note 120, at 19. See generally Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 BUFF. L. REV. 465 (2016) (arguing that parenthood should be assigned based on intention in order to achieve equality between parents, whether same-sex or heterosexual, men or women, rich or poor); Melanie G. McCulley, *The Male Abortion: The Putative Father’s Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL’Y 1, 1 n.\*, 7–8 (1998) (explaining the “purpose” of “demonstrat[ing] the inequities involved in the abortion decision,” and arguing “that a putative father should have the same right to escape [family] responsibilities as . . . an unwed mother”); Christopher Bruno, Note, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141, 143 (2008) (arguing for “a privacy right to decide not to be a legal father”).

<sup>172</sup> Baker, *supra* note 120, at 2; see also Dowd, *supra* note 131, at 134 (“Genes should not define fatherhood. . . . [F]atherhood should be defined by . . . acts of nurturing.”).

<sup>173</sup> See Baker, *supra* note 120, at 20; Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 GEO. J. ON POVERTY L. & POL’Y 1, 4–5 (2012) (summarizing reform proposals); Dowd, *supra* note 131, at 135, 138; Jacobs, *supra* note 171, at 468–69 (proposing to abolish federal Title IV–D law and permit some children to have a legal mother only).

<sup>174</sup> Appleton, *Between the Binaries*, *supra* note 19, at 94–95 (“[A]s techniques of assisted reproduction became more sophisticated and arrangements more complex, . . . [t]he parties’ intent when undertaking the reproductive arrangement emerged as a pivotal criterion.”) (citing Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297).

<sup>175</sup> Baker, *supra* note 120, at 22.



But although the law considers parental intent in the context of assisted reproduction, surrogacy, same-sex and step-parenting, it does so only to the extent that an adult takes on responsibility for a child, i.e., only insofar as choice about parental obligations dovetails with privatizing dependency. Despite parentage law's autonomy rhetoric, choice about parenthood remains, at best, a one-way ratchet.

Voluntary paternity affidavits provide a prime example of parentage law's unidirectional recognition of choice. As part of the federal paternity establishment scheme, states must establish procedures by which mothers and putative fathers, given oral and written notice of the legal consequences, may voluntarily acknowledge a man's paternity by joint affidavit.<sup>176</sup> Unless rescinded within sixty days or challenged thereafter on grounds of fraud, duress, or material mistake of fact, these paternity affidavits become equivalent to judicial determinations that are owed full faith and credit.<sup>177</sup> These "[v]oluntary acknowledgments have become the most common way to establish the legal paternity of children born outside marriage."<sup>178</sup> But this scheme permits choice about parental obligations only insofar as it furthers the law's efforts to privatize children's dependency: Whereas a non-biological father may execute a voluntary paternity affidavit, a biological father cannot disclaim paternity unless another adult stands ready to fulfill the parental role.<sup>179</sup> Voluntary paternity affidavits thus recognize parental intent only insofar as doing so creates the family ties that privatize dependency.

The Uniform Parentage Act (or UPA), versions of which have been adopted by twenty-one states, similarly focuses on choice about entry into the parent-child relationship.<sup>180</sup> To effectuate "the principle that . . . all chil-

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<sup>176</sup> 42 U.S.C. § 666(a)(5) (2012).

<sup>177</sup> *Id.*; see also UNIF. PARENTAGE ACT, art. 3, prefatory cmt. (UNIF. LAW COMM'N 2000, amended 2002) (stating that the UPA, too, "contains clear and comprehensive procedures" for voluntary acknowledgement of paternity).

<sup>178</sup> Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 467, 469–70 (2012).

<sup>179</sup> See, e.g., 45 C.F.R. § 303.5(g) (2012) (no federal requirement that voluntary paternity affidavit recite man's biological paternity); Chris Worden, *Rethinking the Paternity Affidavit*, 52 RES GESTAE 14, 14 (2009) (suggesting that voluntary paternity affidavits increase the likelihood that non-genetically related men will become legal fathers); cf. Michael H. v. Gerald D., 491 U.S. 110, 110–11 (1989) (refusing to allow biological father to challenge marital presumption does not violate due process); *supra* notes 128–173 (Part II.A.1).

<sup>180</sup> As of December 2000, nineteen states had enacted the 1973 UPA. UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2000, amended 2002), prefatory note; see also *Legislative Fact Sheet—Parentage Act (1973)*, UNIF. LAW COMM'N (Apr. 13, 2018), [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20\(1973\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(1973)) [<https://perma.cc/W9RZ-6KDU>] (listing enactments by Alabama, California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Montana, New Jersey, North Dakota, Ohio, Rhode Island, Texas, and Washington). Eleven states have enacted the 2002 UPA. *Legislative Fact Sheet—Parentage Act (2002)*, UNIF. LAW COMM'N (Apr.

dren and all parents [should] have equal rights with respect to each other,” the UPA creates a scheme of presumptions and procedures for establishing a child’s parentage at birth or soon after.<sup>181</sup> The 2002 UPA contains some provisions governing parentage of children born from assisted reproduction,<sup>182</sup> and the 2017 revision was undertaken specifically “to ensure the equal treatment of children born to same-sex couples.”<sup>183</sup> In both contexts, the 2017 UPA now establishes parentage based not on adults’ genetic relationships to children, but on their intent to parent.

This intent-based approach seems to conflict with the same Model Act’s Articles on establishing paternity in genetic fathers, until we realize that both sets of provisions serve to privatize dependency. Though conformity with federal law could explain the Model Act’s apparent bifurcation,<sup>184</sup> the UPA’s overarching goal of treating all children equally provides a more profound unifying explanation. For achieving equality between children requires providing all children with at least two parents, and thus the UPA’s emphasis is on *establishing* parent-child relationships. The UPA therefore contains many paths in addition to genetics through which an adult may become a parent, including by agreeing to be or acting as a child’s parent.<sup>185</sup> Similarly, the UPA cabins adults’ ability to avoid parental obligations, including through short statutes of limitations for challenging the Model Act’s parental presumptions.<sup>186</sup> In all of these ways, the UPA prioritizes privatiz-

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13, 2018), [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20\(2002\)](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(2002)) [<https://perma.cc/L3CR-EDNW>] (listing enactments by Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming). Thus far, two states—Vermont and Washington—have enacted the 2017 UPA. *Legislative Fact Sheet—Parentage Act (2017)*, UNIF. LAW COMM’N (Apr. 13, 2018), [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20\(2017\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(2017)) [<https://perma.cc/6DSS-TGSR>]. See generally UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2000, amended 2017).

<sup>181</sup> UNIF. PARENTAGE ACT § 202 cmt. (UNIF. LAW COMM’N 2000, amended 2017) (quoting UNIF. PARENTAGE ACT § 2 cmt. (UNIF. LAW COMM’N 1973)).

<sup>182</sup> UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM’N 2000, amended 2002); *Id.* arts. 7–8.

<sup>183</sup> Memorandum of Jamie Pedersen, Chair & Courtney Joslin, Reporter, Unif. Parentage Act Drafting Comm., to Unif. Law Comm’rs (June 13, 2016), [http://www.uniformlaws.org/shared/docs/parentage/2016AM\\_AmendedParentage\\_Issues%20memo.pdf](http://www.uniformlaws.org/shared/docs/parentage/2016AM_AmendedParentage_Issues%20memo.pdf) [<https://perma.cc/62KX-637P>].

<sup>184</sup> PROPOSED UNIF. PARENTAGE ACT, art. 3, reporter’s cmt. (Comm. Mtg. Draft Oct. 28–29, 2016).

<sup>185</sup> UNIF. PARENTAGE ACT § 204(a)(2) & cmt. (UNIF. LAW COMM’N 2000, amended 2017) (holding out child as one’s own gives rise to presumption of parentage); *id.* § 609(d) (outlining de facto parentage claim); *id.* § 703 (“An individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”).

<sup>186</sup> *Id.* § 608(b) (instituting a two-year statute of limitations for challenging parentage of a presumed or adjudicated parent or an acknowledged father).

ing dependency, with adults' intentions considered only insofar as they seek entry into, not exit from, parent-child relationships.<sup>187</sup>

Functional doctrines like parental estoppel and de facto parenthood similarly work only to confirm, not to discontinue, parental responsibilities.<sup>188</sup> Generally speaking, estoppel functions to prevent an adult from disclaiming a parental role he or she had previously been fulfilling.<sup>189</sup> Similarly, de facto parenthood attaches to an adult who has lived with a child for an extended period of time during which he or she performed significant care-taking for the child.<sup>190</sup> Courts employ these doctrines in a range of contexts—from same-sex parents<sup>191</sup> to step-parents<sup>192</sup> to functional fathers<sup>193</sup>—in order to “protect the parent-child relationship presumed to have devel-

<sup>187</sup> See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) (under UPA and California Family Code, husband and wife became legal parents by contracting with surrogate for implantation of genetically unrelated embryo); cf. ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 5 (2004) (“[S]ociety expects—and needs—parents to persist in their role for 18 years, or longer if needed.”).

<sup>188</sup> See, e.g., Appleton, *Forgotten Family Law*, *supra* note 19, at 43 (describing “family law’s recent functional turn”); see also JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 2 (2011) (stating that “family law follows family life”).

<sup>189</sup> See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) & cmt. b (2002) [hereinafter PRINCIPLES OF FAMILY DISSOLUTION].

<sup>190</sup> See *id.* § 2.03(1)(c); UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM’N 2000, amended 2017).

<sup>191</sup> See, e.g., *Kristine H. v. Lisa R.*, 117 P.3d 690, 695–96 (Cal. 2005) (concluding woman was estopped from challenging her pre-birth stipulation of parentage of her partner’s child); *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (concluding that because woman had acted as children’s mother, she was a presumed mother under California’s UPA).

<sup>192</sup> See, e.g., *Carter v. Brodrick*, 644 P.2d 850, 855 (Alaska 1982) (holding that “where a step-parent has assumed the status of *in loco parentis*, a step-child is a ‘child of the marriage’” within the meaning of the custody statute); *Kilborn v. Carey*, 140 A.3d 461, 467 (Me. 2016) (affirming trial court’s declaration that step-father was child’s de facto parent); *Simmons v. Simmons*, 486 N.W.2d 788, 791 (Minn. Ct. App. 1992) (holding that “a former stepparent who was in loco parentis with the former stepchild may be entitled to visitation under the common law”); *In re Custody of B.M.H.*, 315 P.3d 470, 479 (Wash. 2013) (permitting former step-parent to seek custody under de facto parentage doctrine).

<sup>193</sup> Most states refuse as a matter of public policy to disestablish paternity where legal fathers were mistaken about their biological parenthood, whether courts rely on estoppel or *res judicata* grounds. See, e.g., *Boone v. Ballinger*, 228 S.W.3d 1, 5 (Ky. Ct. App. 2007) (equitable estoppel); *Martin v. Pierce*, 257 S.W.3d 82 (Ark. 2007) (paternity established pursuant to divorce decree is *res judicata*); *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998) (defending *res judicata* based on “the interests of the state, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent-child relationship”); see also Baker, *supra* note 120, at 31 (stating that “a growing number of courts are holding non-biologically related men responsible for the support of children for whom they have been functioning as fathers”).

oped under these . . . circumstances.”<sup>194</sup> These doctrines are intent-based: They recognize an adult’s choice to parent a child to whom he or she was not initially obligated. But parental estoppel and de facto parenthood work only to cement family ties, showing again that the law recognizes parental intent only when it serves to privatize a child’s dependency.

Courts’ refusal to enforce adults’ contracts that disclaim child support provide a further example of how parentage law permits only one kind of choice. States refuse to allow parents to bargain away an existing child’s right to financial support, holding that the right belongs to the child.<sup>195</sup> Nor do courts recognize pre-conception contracts absolving one sexual partner of financial responsibility for the resulting child.<sup>196</sup> Outcomes vary when the mother conceives through do-it-yourself artificial insemination, but courts are generally unwilling to relieve known genetic fathers of parental responsibility when the resulting child requires public support.<sup>197</sup> No matter his or her intent, a sufficiently proximate adult cannot easily decline the state-imposed duty to provide for a child’s dependency. Where private support is at stake, choice is a one-way ratchet.

All of these doctrines make clear that the law of parentage elects to privatize children’s dependency even when the result is to curtail adults’ autonomy. Although the urgency of children’s developmental needs supports this outcome, modern parentage law makes little effort to justify its position in these terms. Instead, the doctrine co-opts the language of choice, relying on intent when adults wish to parent and equating sexual contact

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<sup>194</sup> PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 2.03, cmt. b; *see also* UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. LAW COMM’N 2000, amended 2017) (requiring de facto parent to have “established a bonded and dependent relationship with the child which is parental in nature”).

<sup>195</sup> *See, e.g.*, *Kristine M. v. David P.*, 37 Cal. Rptr. 3d 748, 752–53 (Ct. App. 2006) (voiding parents’ agreement terminating father’s parental rights and responsibilities as against public policy); *In re Carr*, 938 A.2d 89, 97–98 (N.H. 2007) (imposing support obligations despite parents’ agreement to the contrary); *see also* *Frisch v. Henrichs*, 736 N.W.2d 85, 102 (Wis. 2007) (voiding contract setting ceiling on child support because “the child’s best interests transcend an agreement or stipulation of the parties” (internal citation and quotation marks omitted)).

<sup>196</sup> *Budnick v. Silverman*, 805 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 2002) (voiding pre-conception agreement relieving man of all parental responsibilities as against public policy); *Straub v. B.M.T. ex rel. Todd*, 645 N.E.2d 597, 601 (Ind. 1994) (concluding “there is no such thing as ‘artificial insemination by intercourse’” and invalidating non-paternity agreement); *Ferguson v. McKiernan*, 940 A.2d 1236, 1246 (Pa. 2007) (“In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires.”); *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000) (“declin[ing] to recognize a category of ‘artificial insemination by intercourse’” and stating that a child’s right to support “cannot be bargained away before conception any more than it can be bargained away after birth, nor can it be extinguished by principles of estoppel”).

<sup>197</sup> *See* Appleton, *Between the Binaries*, *supra* note 19, at 106 (describing cases).

with consent to parenthood when adults attempt to avoid parental responsibilities. With the overarching imperative to privatize dependency cloaked only sometimes by choice, the law appears bifurcated, with some adults conscripted into parenthood against their will. At the same time, the lack of much collective support for childrearing means that parenthood imposes high personal costs, especially on low-income parents. Modern parentage law thus fails to resolve the tension between privatizing dependency and the new family freedom.

### *B. Cohabitant Obligations: Leaning Toward Autonomy*

Whereas the private support principle predominates in parentage law, choice logic appears to carry more weight in disputes between adult intimates, as the laws of property distribution and alimony show. This Section examines property distribution through the lens of cohabitant, rather than marital, obligations for several reasons. First, the law of marital property distribution has begun to settle around formally egalitarian norms, while the law of cohabitant obligations is doctrinally fractured and normatively contested.<sup>198</sup> Second, marital obligations can be justified consistent with choice about obligations. Consent to a state's equitable distribution or community property regime may be inferred from consent to marital status, and marital agreements allow spouses some latitude to customize their property obligations in deviation from the default regime.<sup>199</sup> Cohabitant property disputes, in contrast, tend to arise at the end of relationships unsanctioned by the formal consent to obligations upon which choice logic insists. Finally and most importantly, neoliberalism's impact on marital obligations is best observed in the context of alimony, discussed in the next Section.

Scholars generally approach the question of what unmarried cohabitants owe one another upon relationship dissolution in terms of status versus contract, debating which legal regime should govern cohabitant liability.<sup>200</sup> Courts, on the other hand, usually refuse to redistribute unless generally

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<sup>198</sup> Compare FINEMAN, *supra* note 105, at 39 (arguing that post-reform divorce law institutes formal equality at the expense of substantive equality), and Carolyn J. Frantz & Hanoeh Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77 (2004) (describing "the ideal of marriage as an egalitarian liberal community"), and Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 (noting the "commonly acknowledged . . . conception of marriage as a partnership of two equals"), and Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1314–15 (2015) (characterizing the current divorce regime as based on equality norms), with *infra* notes 200–273 and accompanying text (describing the generally unequal distributions of property accumulated during cohabitation under various legal regimes).

<sup>199</sup> See *supra* notes 118–120 and accompanying text.

<sup>200</sup> See *supra* note 117 and accompanying text.

applicable legal grounds justify deviating from title theory.<sup>201</sup> But the problem is more fundamentally one of competing neoliberal principles: whether to respect the new family freedom by refusing to impose ex post family-based obligations on the richer party, or to privatize a poorer party's dependency by granting recovery despite ambiguity about family intent.

This problem is intractable, with courts and scholars able to honor, at best, one principle over the other. When courts and scholars vindicate autonomy claims, precluding recovery unless cohabitants have ceremonially married or formally contracted, they ignore the fact of dependency and interdependency in adult relationships. And when courts and scholars take dependency and interdependency into account by redistributing property to the poorer party, choice logic rejects their ex post justificatory logic as coercive and offensive. Even middle-of-the-road equitable approaches cannot effectively mediate the tension. Courts' and scholars' disagreement about how to approach cohabitant obligations reflects the difficulty of honoring the new family freedom while using non-marital relationships to make adult partners responsible for one other's dependency.

As a functional matter, however, the cases tend toward one outcome: Without family formalities, it is very difficult for cohabitants to recover on property division claims.<sup>202</sup> The law of cohabitant obligations appears to vindicate autonomy, as courts deciding property disputes employ assumption of risk logic to assign entitlements according to formal title.<sup>203</sup> But against the backdrop of minimal state support, refusing to redistribute effectively requires poorer partners to survive off their own market earnings. The foundational value governing cohabitant relationships therefore remains privatized dependency, which the law achieves by (unrealistically) deeming all adults capable of self-support.

### 1. Endorsing Choice, Ignoring Dependency

A minority of states, discussed below, take a "strict choice" approach to cohabitant obligations. These jurisdictions refuse to redistribute property unless the parties have expressly indicated their consent to family obligations by either ceremonially marrying or contracting with a requisite degree of specificity. Because the predictable result is to all but preclude the non-

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<sup>201</sup> Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 8 (2017) (arguing that the law of nonmarriage denies or minimizes redistribution to poorer cohabitants, who are usually women); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 56 (2016) (stating that the law "accepts the autonomy of such couples with respect to financial matters and imposes almost no obligations without either an express agreement or evidence of combined assets").

<sup>202</sup> See Antognini, *supra* note 201, at 8.

<sup>203</sup> See Carbone & Cahn, *supra* note 201, at 56.

title holder's ability to recover, these jurisdictions appear to privilege choice over privatizing dependency.

Several jurisdictions protect the richer party's ability to choose his obligations by refusing to enforce cohabitant agreements unless they exhibit certain formalities. Florida, Minnesota, and Texas will enforce cohabitant contracts only if they are executed in writing and signed by the parties.<sup>204</sup> New York will enforce oral agreements between cohabitants only if they are express.<sup>205</sup> These jurisdictions require formalities in order to avoid the evidentiary difficulty described by the New York Court of Appeals in *Morone v. Morone*:

[A]ttempt[ing] through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error. . . . There is . . . substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid.<sup>206</sup>

But because most cohabitants do not negotiate, let alone memorialize in writing, explicit contracts,<sup>207</sup> these states' approaches do little to protect the economically weaker partner, who has no cognizable claim to resources accumulated by the richer partner over the course of the relationship. The default rule against recognizing cohabitant obligations thus becomes a de facto regime of strong property protections for the title holder.

Georgia, Illinois, and Louisiana seem to go further, rejecting any claim arising from a cohabitant relationship.<sup>208</sup> Although these states' courts rea-

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<sup>204</sup> MINN. STAT. ANN. §§ 513.075, 513.076 (West 2018); TEXAS FAM. CODE ANN. § 1.108 (West 2018); *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) (applying Statute of Frauds requirement "that contracts made upon consideration of marriage . . . be in writing . . . to non-marital, nuptial-like agreements"). North Dakota announced, and then retreated from, a similar rule. *Compare Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992) ("If live-in companions intend to share property, they should express that intention in writing."), with *McKechnie v. Berg*, 667 N.W.2d 628, 632 (N.D. 2003) (stating that "joint bank accounts constitute writings evidencing intent").

<sup>205</sup> *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (requiring cohabitant agreements to demonstrate an "explicit and structured understanding").

<sup>206</sup> *Id.*

<sup>207</sup> See Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons or a Preventative and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 436 (1999).

<sup>208</sup> *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977) (stating that "neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration," and that "the fact of cohabitation . . . would constitute immoral consideration");

son from moral disapproval of cohabitation, which predates the substantive due process revolution and may now be constitutionally suspect, they employ choice rhetoric and reach property-protecting results.<sup>209</sup> For courts in these states justify their refusal to redistribute between cohabitants explicitly in terms of the partners' choice not to marry.<sup>210</sup> Illinois even extended this logic to a lesbian couple whose entire relationship preceded the state's recognition of same-sex marriage in a recent case, *Blumenthal v. Brewer*.<sup>211</sup> To encourage marriage, these states impose what could be considered penalty default rules:<sup>212</sup> Courts preclude implied contract and equitable claims between cohabitants, even though they are willing to enforce certain written agreements between them and to consider claims arising "independently" of their intimate relationships.<sup>213</sup> Thus, like states that rely on contract formal-

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*Blumenthal v. Brewer*, 69 N.E.3d 834, 839 (Ill. 2016), *reh'g denied* (Oct. 20, 2016), *aff'g* *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (forbidding courts from "enforc[ing] mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties"); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 323 (La. Ct. App. 1983) (stating that cohabitants "have no rights in each other's property").

<sup>209</sup> See *Blumenthal*, 69 N.E.3d at 861 (Theis, J., concurring in part and dissenting in part) (criticizing the majority for "reaffirm[ing] an oddly myopic and moralistic view of cohabitation"); *Schwegmann*, 441 So. 2d at 326 ("[D]iscouraging the establishment of a sexual relationship without ceremonial marriage is in the interest of protecting the moral fabric of society . . ."); see also *Abrams v. Massell*, 586 S.E.2d 435, 441 (Ga. Ct. App. 2003) ("[A]s long as binding precedent from the Supreme Court of Georgia continues to define sexual relationships between unmarried consenting adults as *immoral*, we must set aside contracts . . . that are founded upon or that are in furtherance of such relationships.").

<sup>210</sup> *Blumenthal*, 69 N.E.3d at 856, 859 (adducing in support of ruling "the legislative intent to provide certain rights and benefits to those who participate in the institution of marriage" and Illinois "public policy . . . disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants"); *Schwegmann*, 441 So. 2d at 326 ("Unwed cohabitators involved in concubinage relationships have voluntarily chosen not to marry and they should not expect to receive the civil effects flowing by virtue of a marital state."); cf. *Van Dyck v. Van Dyck*, 425 S.E.2d 853, 855 (Ga. 1993) (Sears-Collins, J., concurring) (describing law permitting modification of alimony upon recipient's cohabitation in a meretricious relationship as "a penalty accorded unwed heterosexual couples who live together who have the choice of taking advantage of the benefits of marriage").

<sup>211</sup> 69 N.E.3d at 869 (Theis, J., dissenting upon denial of rehearing); see also *id.* at 868 (suggesting it may be "irrational and discriminatory to deny the protections of the common law to persons who never could have used the marriage provisions because of their sexual orientation").

<sup>212</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) ("Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.").

<sup>213</sup> Compare *Blumenthal*, 69 N.E.3d at 852 (stating that "individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits"), with *Abrams*, 586 S.E.2d at 441 (enforcing cohabitants' written contract to make a will because "any romantic or sexual involvement between the parties was . . . 'incidental to the contract rather than required by it'"), and *Phillips v. Blankenship*, 554 S.E.2d 231, 233 (Ga. Ct. App. 2001) (authorizing cohabitants to pursue equitable claims not "based on sexual intercourse"), and *Blumenthal*, 69 N.E.3d at



ties, states that regulate from morality require intimate partners formally to choose their obligations through marriage or contract, or assume the risk of walking away from the relationship empty-handed.

Scholars prioritizing choice do not suggest adopting “strict choice” legal regimes, but their approach to cohabitant obligations is structurally similar. Emphasizing the importance of protecting intimate partners’ expectations, they argue that the law should not impose relationship-based obligations unless cohabitants chose to take them on through contract.<sup>214</sup> Scholars advocating family law pluralism also value choice about obligations. In their view, the state should provide a menu of relationship statuses and enforce partners’ contracts precisely so that intimate partners are free to self-define their rights and responsibilities toward one another.<sup>215</sup>

Respecting intimate partners’ ex ante decisions about how to order their affairs may, however, result in denying an economically vulnerable partner recovery upon relationship dissolution. “Choice” scholars address this concern, which sounds in equity as well as dependency, in several ways. Marsha Garrison tackles it head on, arguing that because cohabitation generally does not result in pooling of resources, dependency, or unjust enrichment, already-established remedies can provide recovery in the rare cases when redistribution is appropriate.<sup>216</sup> June Carbone and Naomi Cahn go even further, arguing that because cohabitants may eschew marriage precisely to avoid mutual property obligations, it “makes sense for courts to treat [them] as two independent units who have not assumed responsibility for each other after a break-up.”<sup>217</sup> Other scholars would supplement a menu of state-recognized “alternatives to marriage,” whose availability would presumably decrease the frequency of legally unstructured cohabitation, with a “functionalist approach to relationship recognition” when par-

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856 (permitting cohabitants to bring common-law claims that “ha[ve] an independent economic basis apart from the parties’ relationship”), and *Schwegmann*, 441 So. 2d at 325 (allowing cohabitants to “assert [their] rights in [a] common endeavor” if it is a “commercial enterprise . . . independent of the illegal cohabitation”).

<sup>214</sup> See, e.g., Garrison, *supra* note 120, at 884–97 (arguing against conscripting cohabiting couples into marital property regimes); Howard O. Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1095 (1978) (arguing that contract approach best captures cohabitants’ intent); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1467 (2001) (criticizing status-based treatment of cohabitant relationships as “reflect[ing] a profound distrust for individuals’ efforts to set the terms for intimate relationships to meet their own needs”).

<sup>215</sup> See, e.g., Eskridge, *supra* note 100, at 1886; Franke, *supra* note 105, at 2702–06; Matsu-mura, *supra* note 105, at 203; Stein, *supra* note 105, at 349.

<sup>216</sup> Garrison, *supra* note 120, at 884–85.

<sup>217</sup> Carbone & Cahn, *supra* note 201, at 102.

ties fail nonetheless to enter a status or execute a contract.<sup>218</sup> In seeking to defuse worries that prioritizing formal *ex ante* intent creates injustice, these scholars implicitly recognize the tension between respecting property rights and providing for dependency. But insofar as their attempts to mediate this tension fall short, economic harm to the vulnerable partner remains an unavoidable cost of privileging choice about obligations.

States and scholars prioritizing choice emphasize cohabitants' intentions before and during their relationship, but the result is to ignore the problem of dependency upon its dissolution. Strict-choice states, which deny recovery when intimate partners fail to formalize their family intentions, end up elevating the richer cohabitant's property rights over the poorer cohabitant's claims for economic justice. Scholars sympathetic to choice propose reforms to minimize its effects on poorer parties, but their willingness to let some costs lie where they fall shows that they, too, fail to resolve the conflict between privatized dependency and choice about obligations.

## 2. Recognizing Dependency, Fictionalizing Choice

The majority of states permit cohabitants to bring a variety of legal claims against a former partner.<sup>219</sup> Although litigants pursue and scholars advance many theories of recovery, these tend to sound in three general categories: relationship-based entitlements, implied-in-fact contract claims, and equitable obligations. I discuss the first two categories together because they approach the tension between dependency and autonomy similarly. Neither, however, predictably results in recovery.

Scholars discussing and courts applying relationship-based and implied-in-fact contract doctrines speak the language of choice: Lacking formal indicia such as a marriage license or written contract, they scrutinize the cohabitants' relationship for signs that the partners intended to take on family obligations.<sup>220</sup> But because subjective intent is difficult to discern, courts and scholars often impute it *ex post*, via functional analyses of the parties' objectively observable conduct.<sup>221</sup> And since choice logic understands only *ex ante* formal consent to legitimate financial obligations, when courts and

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<sup>218</sup> Stein, *supra* note 105, at 349; *see also* Matsumura, *supra* note 105, at 203 (“favor[ing] recognizing additional forms of intimate relationships and a more flexible spectrum of intimate duties through the expansion of status regimes,” complemented by contract law).

<sup>219</sup> *Blumenthal*, 69 N.E.3d at 863 (Theis, J., concurring in part and dissenting in part) (“Courts in a vast majority of . . . states . . . have chosen to recognize claims between former domestic partners . . .”); PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 6.03, reporter’s notes, cmt. b.

<sup>220</sup> *See infra* notes 232–237, 239–252 and accompanying text.

<sup>221</sup> *See, e.g., In re Marriage of Pennington*, 14 P.3d 764 (Wash. 2000); *Barnett*, *supra* note 30, at 305; *Matsumura*, *supra* note 108, at 2048.

scholars prioritize dependency provision, they offend the new family freedom.

Relationship-based doctrines attach marital or marriage-like status, and therefore obligations, to certain classes of cohabitant relationships. Common-law marriage jurisdictions recognize as marriages for all purposes the unions of parties who agreed to be married, even without a formal ceremony.<sup>222</sup> Technically speaking, couples satisfying this doctrine are not cohabitants at all; they are spouses, the dissolution of whose relationship the state's divorce regime governs.<sup>223</sup> In the state of Washington, cohabitants living in a "committed intimate relationship," formerly called a "meretricious relationship," are entitled to an equitable distribution of property acquired during the relationship.<sup>224</sup> This generous remedy is roughly equivalent to other jurisdictions' schemes for distributing marital property.<sup>225</sup> Nevada similarly permits cohabitants to "agree to hold property . . . as though it were community property," while Kansas and Oregon allow relationship-based recovery under an implied joint venture theory.<sup>226</sup>

Many scholars advocate relationship-based approaches because they grant the vulnerable party a wide range of valuable legal rights, including rights against third parties.<sup>227</sup> Some scholars argue for using common-law marriage doctrine and variants thereof to resolve cohabitant claims.<sup>228</sup> One

<sup>222</sup> See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 22 (2010). Ten U.S. jurisdictions recognize common law marriage. *See id.* at 26 ("Eleven U.S. jurisdictions still recognized common law marriage as of 2009—Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah."). *But see* ALA. CODE § 30-1-20(a) (2018) ("No common-law marriage may be entered into in this state on or after January 1, 2017.").

<sup>223</sup> *Cf.* Cerovic v. Stojkov, 134 A.3d 766, 777 (D.C. 2016) (clarifying that presumption favoring validity of most recent union does not distinguish between common law and ceremonial marriage); H.B. 1163, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017) (proposing permitting individuals to enter written marriage contract without state solemnization).

<sup>224</sup> *Connell v. Francisco*, 898 P.2d 831, 835–36 (Wash. 1995); *see also id.* at 834 (defining meretricious relationship as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist").

<sup>225</sup> *Cf.* D.C. CODE § 16-910 (2018) (requiring court to "assign to each party his or her sole and separate property acquired prior to the marriage" and equitably distribute the rest upon divorce).

<sup>226</sup> *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224 (Nev. 1992); *Eaton v. Johnston*, 681 P.2d 606, 610–11 (Kan. 1984); *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978); *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) ("[I]n distributing the property of a domestic relationship, we are not precluded from exercising our equitable powers to reach a fair result based on the circumstances of each case."); *see also* Strauss, *supra* note 198, at 1280 (describing schemes).

<sup>227</sup> *See* BOWMAN, *supra* note 222, at 69–80.

<sup>228</sup> *Id.* at 223–29 (proposing that couples should be treated as married after two years of cohabitation or birth of a common child, unless they contract out of marriage-like obligations); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1166–67 (1981) (arguing that cohabitation longer than two years or resulting in a

scholar has recently proposed a draft Uniform De Facto Marriage Act that “would entitle de facto spouses to all marital rights and obligations under both federal and state laws.”<sup>229</sup> Perhaps the best-known status-based approach to cohabitant claims is set forth in the American Law Institute’s *Principles of the Law of Family Dissolution*. The ALI’s approach, adopted by no jurisdiction, would establish a “domestic partnership” status—giving rise to mutual relationship-based obligations—for partners “who for a significant period of time share a primary residence and a life together as a couple,” with the latter determined by their conduct during the relationship.<sup>230</sup>

Although relationship-based doctrines do a reasonably good job of addressing dependency when the poorer party prevails,<sup>231</sup> they effectively reject the richer party’s claim to choose his family obligations. To be sure, these approaches attempt to assuage autonomy concerns by claiming to effectuate the parties’ intent. Common-law marriage doctrine gives legal effect to the parties’ “express mutual agreement” to be spouses.<sup>232</sup> Recovery under the committed intimate relationship doctrine requires “the mutual intent of parties to be in” such a relationship.<sup>233</sup> And scholarly proposals “treat committed behavior occurring over time as signifying . . . intent to acquire the rights of formal marriage.”<sup>234</sup> But it is difficult to prove a subjective state of intent without the contemporaneous objective signals of that intent which family formalities provide.<sup>235</sup> As a result, these approaches

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child’s birth should be treated as lawful marriage unless the couple has agreed otherwise); Scott, *supra* note 120, at 259 (proposing that the law integrate cohabitants into the divorce property regime when relationships last longer than five years); *see also* Garrison, *supra* note 120, at 885 (proposing that “a revived common law marriage doctrine” govern those “couples who express marital commitments privately”).

<sup>229</sup> Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 246 (2016).

<sup>230</sup> PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 6.03(1) & cmt. b; *see also* Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1377–79 (2001) (describing ALI approach).

<sup>231</sup> Most cohabitants do not prevail on their claims, even in states with more generous legal regimes. Antognini, *supra* note 201, at 8; Carbone & Cahn, *supra* note 201, at 56; *cf.* Strauss, *supra* note 198, at 1279 (discussing relationship-based doctrines’ limited scope and the “special hurdles” plaguing implied-in-fact contract cases).

<sup>232</sup> *See, e.g.,* *Bansda v. Wheeler*, 995 A.2d 189, 198 (D.C. 2010) (stating that “the proponent of the [common-law] marriage must show that the parties cohabitated as husband and wife, following an express mutual agreement, which must be words of the present tense”).

<sup>233</sup> *In re Marriage of Pennington*, 14 P.3d 764, 771 (Wash. 2000).

<sup>234</sup> Waggoner, *supra* note 229, at 235–36.

<sup>235</sup> *See* Barnett, *supra* note 30, at 305 (“[W]e never have direct access to another individual’s subjective mental state.”); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975) (describing Wills Act formalities as serving “[t]he primary purpose of . . . provid[ing] the court with reliable evidence of testamentary intent”); Matsumura, *su-*

must employ a functional ex post analysis, examining the totality of the parties' relationship to determine whether a state-defined regime of marital or quasi-marital obligations should attach to it.<sup>236</sup> These approaches thus risk "conscript[ing]" the richer party into family obligations that he did not choose ex ante and may have actively sought to avoid, rendering consent to obligation a legal conclusion rather than a subjective fact.<sup>237</sup> Though these doctrines aid the poorer party by making the richer party responsible for her dependency, they violate the new family freedom by rendering "choice" a legal fiction.

Most contract claims between cohabitants involve implied-in-fact, rather than express, contracts.<sup>238</sup> An implied-in-fact contract is one in which the parties' "mutual agreement and intent to promise . . . have . . . not been expressed in words," and thus must be "inferred in whole or in part from" the parties' "course of dealing."<sup>239</sup> Under this approach, as famously stated in *Marvin v. Marvin*, courts "inquire into the conduct of the parties to determine whether that conduct demonstrates . . . some . . . tacit understanding between the parties."<sup>240</sup> Because litigants often plead agreements for equal property division and post-relationship support,<sup>241</sup> cohabitant contract claims seek functionally to create marital obligations, and thereby to graft marriage's approach to dependency onto cohabitant relationships.

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*pra* note 108, at 2048 ("Proof that a couple has engaged in the required legal formalities is usually a reliable indicator of the mutual assumption of marital duties because these acts have a broadly recognized social and legal significance: they serve to highlight the legal relevance of the acts that are performed, warn people away from making legal commitments they don't intend, and ultimately serve as proof of the choice the couple has made.").

<sup>236</sup> See Ellman, *supra* note 230, at 1378 (describing ALI *Principles*' approach as "identifying those nonmarital relationships which bear a sufficient resemblance to marriage to justify and require similar, post-relationship legal obligations"); see also *Pennington*, 14 P.3d at 770 (considering factors like "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for mutual benefit, and the intent of the parties" to determine whether relationships were meretricious); Barnett, *supra* note 30, at 301 (describing "the inescapable need of individuals in society and those trying to administer a coherent legal system to rely . . . on an individual's behavior that apparently manifests their assent to a transfer of entitlements").

<sup>237</sup> Garrison, *supra* note 120, at 818.

<sup>238</sup> Strauss, *supra* note 198, at 1293 ("If intimate partners are going to regulate their economic lives by contract, almost all of these agreements will be implied-in-fact contracts for which the court infers the parties' promises from their conduct.").

<sup>239</sup> 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2017); RESTATEMENT (SECOND) OF CONTRACTS § 4 & cmt. a (AM. LAW INST. 2018); cf. *id.* § 4 cmt. b (distinguishing implied contracts or contracts implied in fact from quasi-contracts or contracts implied in law, which "are obligations created by law for reasons of justice" and better classified under the law of restitution).

<sup>240</sup> 557 P.2d 106, 110 (Cal. 1976).

<sup>241</sup> See, e.g., *id.*

But analogizing cohabitation to marriage can run afoul of the new family freedom. For in seeking to imply contracts for marital obligations, poorer cohabitants ask courts to read marriage-like intent from their partners' conduct. Elizabeth Scott argues that "[a] couple who live[s] together for many years, sharing a life and financial resources, . . . can be presumed to intend to share the property acquired during the relationship," and that the law should enforce this implicit agreement.<sup>242</sup> But this proposition is empirically debatable; it may reflect majoritarian assumptions or further socially valued ends, rather than represent the actual views of the parties themselves.<sup>243</sup> As a result, implied contract theories violate the new family freedom's stringent definition of "choice," which borders on a subjective or will theory of contract.<sup>244</sup> As explained above, "ascertain[ing]" "the parties' intention" via an ex post "inquiry into the nature of their relationship" contravenes the new family freedom's rigid insistence upon formal ex ante consent to family obligations.<sup>245</sup>

Implied contract claims between cohabitants are problematic under even an objective theory of contract.<sup>246</sup> Autonomy-minded scholars criticize the *Marvin* court's suggestion that courts "presume" that cohabitants "intend to deal fairly with each other" for potentially inviting "wholesale interference with private contracting because of wide ranging judicial perceptions of what is 'fair.'"<sup>247</sup> Even scholars who favor redistribution between intimates recognize that cohabitants' implied contract claims tend to shade into equity. Because several traditional contract doctrines—including the requirement of bargained-for consideration and the presumption that intimates render services gratuitously—frustrate these kinds of claims,<sup>248</sup> those decisions that do find implied contracts between cohabitants sometimes "appear to vindicate an equitable rather than a contractual principle."<sup>249</sup> Ira Ellman describes such cases as "stretching contract doctrine beyond recog-

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<sup>242</sup> Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in RE-CONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTES' PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331, 342 (Robin Fretwell Wilson ed., 2006).

<sup>243</sup> Carbone & Cahn, *supra* note 201, at 108.

<sup>244</sup> See Barnett, *supra* note 30, at 272 ("Will theories [of contract] maintain that commitments are enforceable because the promisor has 'willed' or chosen to be bound by his commitment.").

<sup>245</sup> *Marvin*, 557 P.2d at 117 n.11.

<sup>246</sup> See Barnett, *supra* note 30, at 300–09 (outlining a consent theory of contract).

<sup>247</sup> *Marvin*, 557 P.2d at 121; Westfall, *supra* note 214, at 1471.

<sup>248</sup> Strauss, *supra* note 198, at 1279, 1293; see, e.g., *Williams v. Ormsby*, 966 N.E.2d 255, 263–64 (Ohio 2012); *Featherston v. Steinhoff*, 575 N.W.2d 6, 9 (Mich. Ct. App. 1997).

<sup>249</sup> PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 6.03, cmt. b (stating that "having concluded that a particular set of facts demands a remedy," courts "may stretch ordinary contract principles to fit the remedy within a contractual rubric").

dition in order to justify a remedy,”<sup>250</sup> while Hanoch Dagan pronounces the “contractual framework . . . merely rhetorical in cases where courts use only flimsy ‘evidence’ for implying a contract.”<sup>251</sup> The muddled way in which courts approach these particular claims suggests that the implied contract framework often smuggles in concerns external to an intent-based inquiry. As a result, judges adjudicating such claims may risk conflating their own *ex post* assessment of a relationship and its equities with the parties’ *ex ante* intentions.<sup>252</sup> For all of these reasons, in the rare instances when courts grant plaintiffs recovery on implied contract claims, they do so in a way that choice about obligations deems illegitimate.

Most often, though, the implied contract approach fails to result in recovery. Because courts struggle to fill in ambiguous or silent contract terms without reliable evidence of shared intent, proving and collecting on an implied cohabitant agreement is notoriously difficult, even in cases where recovery appears to be justified.<sup>253</sup> The implied contract “inquiry tends to yield an outcome of no recovery, especially in (the not infrequent) cases where there is a power relationship between the parties that allows” one party “to capture systematically a disproportionately high share of the benefits of their relationship . . . and bear a disproportionately low share of its costs.”<sup>254</sup> In *Friedman v. Friedman*, for example, the California Court of Appeal found insufficient evidence to support an implied agreement for the man to provide post-relationship *pendente lite* financial support to his disabled female partner, despite the parties’ twenty-one years of marriage-like cohabitation.<sup>255</sup> Because the implied-in-fact contract approach most often fails to provide recovery for the vulnerable partner but violates choice about obligations when it does, it succeeds in neither addressing dependency nor satisfying the new family freedom.

### 3. Seeking an Elusive Balance

Courts also use equitable doctrines to do rough justice between cohabitants. Indeed, “[t]he various restitutionary headings,” which include “unjust

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<sup>250</sup> Ellman, *supra* note 230, at 1372.

<sup>251</sup> HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 169 (2004).

<sup>252</sup> *Cf. Marvin*, 557 P.2d at 124 (Clark, J., concurring and dissenting) (“[W]e should stop and consider the ramifications before creating economic obligations which may . . . contravene the intention of the parties . . .”).

<sup>253</sup> *See, e.g., Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (describing the high “risk of error” in adjudicating cohabitant contract claims).

<sup>254</sup> DAGAN, *supra* note 251, at 170; *see also* BOWMAN, *supra* note 222, at 51 (questioning efficacy of contract remedies).

<sup>255</sup> 24 Cal. Rptr. 2d 892, 899 (Ct. App. 1993); *see also Marvin v. Marvin*, 176 Cal. Rptr. 555, 559 (Ct. App. 1981) (vacating rehabilitative award as lacking legal basis).

enrichment, resulting trust, constructive trust, *quantum meruit*,” and quasi- or implied-in-law contract, supply “the main source of” cohabitant recovery.<sup>256</sup> These doctrines share a flexible, ex post approach aimed at containing and remedying a party’s opportunistic behavior.<sup>257</sup> Although some scholars champion equitable remedies as a “middle-of-the-road approach” to cohabitant claims, these doctrines fail either to satisfy the new family freedom or to effectively provide for a poorer partner’s material needs.<sup>258</sup>

Equitable remedies work to prevent exploitation when an individual’s efforts increase the property of another, who by legal title alone would retain the enhanced value. Equity is thus concerned primarily with contribution. Because liability in equity does not turn on the parties’ intent, this doctrinal framework avoids some of the difficulties plaguing other approaches to cohabitant obligations.

But equitable remedies threaten to infringe the new family freedom in a different way. Section 28 of the recent *Restatement (Third) of Restitution and Unjust Enrichment*, which governs restitution between cohabitants, provides as follows:

If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.<sup>259</sup>

Section 28 conducts an explicitly ex post analysis focused on objectively observable facts and the demands of justice, and thus cannot be accused of fictionalizing choice. But it relaxes two of restitution’s “traditional constraints,” which make recovery “[un]available for . . . voluntary transfers” or “to claimants who reasonably could have negotiated a consensual ex-

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<sup>256</sup> DAGAN, *supra* note 251, at 166–67.

<sup>257</sup> *Id.* at 165 (“Unjust enrichment claims facilitate informal intimate relationships by protecting interpersonal relationships of reciprocity, trust, and reliance and shielding the parties to such relationships against the lingering risks of opportunism and abuse of trust.”); Henry E. Smith, *Property, Equity, and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 224, 225 (Lisa M. Austin & Dennis Klimchuck eds., 2014) (stating that “the law must employ a . . . set of moral standards that sound in anti-deception and anti-evasion” to “prevent . . . opportunism,” and arguing that “the equitable decision-making mode can serve this function”).

<sup>258</sup> See DAGAN, *supra* note 251, at 167; cf. Carbone & Cahn, *supra* note 201, at 78; Garrison, *supra* note 120, at 891.

<sup>259</sup> 1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28(1) (AM. LAW INST. 2011).



change.”<sup>260</sup> Under these traditional assumptions, “neither [cohabitant’s] contributions could unjustly enrich the other.”<sup>261</sup> The *Restatement* justifies its position on the ground that, in the cohabitant context, even an “essentially gratuitous” “transfer . . . may be made in the expectation that the donor will share, directly or indirectly, in the resulting benefits,” and that a “claimant should not be held to have assumed the risk that things would turn out as they did.”<sup>262</sup> Whereas Candace Kovacic-Fleischer supports the provision as “a good step toward protecting the frustrated expectations of financially vulnerable, trusting people,”<sup>263</sup> Emily Sherwin argues that Section 28 “test[s] the scope and meaning of the concept of unjust enrichment” in a way that risks encroaching on individual property rights.<sup>264</sup> At the core of Sherwin’s argument is the well-accepted premise that restitution is “a unified body of law” providing a “theory of legal recovery,” just as contract and tort law do.<sup>265</sup> Thus, traditional restitution law establishes “a distinct set of limits on benefit-based liability” whose purpose is to protect the owner’s autonomy to choose his own financial obligations.<sup>266</sup> But because Section 28 relaxes these rules in cohabitant relationships, courts adjudicating restitution claims are left with “nothing to guide them but their own unanchored sense of injustice,” which will inevitably take into account the claimant’s “state of hardship.”<sup>267</sup> Insofar as restitution law sheds its protective doctrinal limits, it risks violating the new family freedom.

And because equity’s benchmark is contribution, it fails to impose obligations sufficient to meet dependency needs. Even when claimants prevail on unjust enrichment claims, their recoveries are relatively limited. Cynthia Grant Bowman characterizes relief in restitution as “hard to obtain or pitifully small,” while Albertina Antognini argues that unjust enrichment awards “generally” amount to “much less than half of the assets accumulated during the relationship.”<sup>268</sup> In *Watts v. Watts*, for example, a jury awarded the woman

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<sup>260</sup> Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712 (2006).

<sup>261</sup> Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 55 (1978).

<sup>262</sup> 1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. c.

<sup>263</sup> Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1409 (2011).

<sup>264</sup> Sherwin, *supra* note 260, at 712.

<sup>265</sup> *Id.* at 713; *see also* Barnett, *supra* note 30, at 293 n.100 (“Other bases of obligation are possible besides contractual obligation, . . . such as those recognized under the law of tort and restitution.”); Kovacic-Fleischer, *supra* note 263, at 1410 (“Just as breach of contract and tort are substantive areas providing sources of liability, so too is restitution.”).

<sup>266</sup> Sherwin, *supra* note 260, at 717; *see* Casad, *supra* note 261, at 56–57.

<sup>267</sup> Sherwin, *supra* note 260, at 731–32.

<sup>268</sup> BOWMAN, *supra* note 222, at 42; Antognini, *supra* note 201, at 43.

only ten to thirteen percent of the property accumulated during the couple's "marriage-like relationship."<sup>269</sup> Similarly, in *Gazvoda v. Wright*, the woman received less than twenty-five percent of the relationship assets.<sup>270</sup> The law of restitution thus fails to do justice between cohabitants from the perspective either of choice about obligations or dependency provision.

#### 4. The Functional Result: Requiring Self-Support

The inevitable conflict between the new family freedom and privatized dependency both shapes and frustrates states' and scholars' attempts to resolve cohabitant claims. Beneath the imperative to respect cohabitants' choices not to marry or formally contract lies a commitment to strong property entitlements, which renders redistribution of assets anathema unless the title holder consents to the transfer.<sup>271</sup> On the other hand, assigning the richer partner responsibility for the poorer partner's economic well-being would further neoliberalism's strict allocation of dependency provision duties to the family.<sup>272</sup> The tension between these conflicting principles goes far toward explaining why neither states nor scholars can agree about which legal rules should govern cohabitant relationships.

Despite its lack of formal consensus, however, the law of cohabitant obligations leans toward a single functional outcome. Because various doctrines preclude, limit, or otherwise render uncertain non-title holders' claims to property acquired during a cohabitant relationship, the law as a whole effectively disfavors redistribution between intimates who neither ceremonially married nor formally contracted.<sup>273</sup> At least superficially, this body of law appears to vindicate autonomy. As a foundational matter, however, the private support imperative prevails, with the law expecting each former partner to support herself—a trend even more evident in the modern law of alimony.

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<sup>269</sup> *Watts v. Watts*, 405 N.W.2d 303, 306 (Wis. 1987); *Watts v. Watts*, 448 N.W.2d 292, 294 & n.1 (Wis. Ct. App. 1989).

<sup>270</sup> *Gazvoda v. Wright*, No. 07A01-0607-CV-288, 2007 WL 2284722, at \*3 (Ind. Ct. App. Aug. 10, 2007); see also Antognini, *supra* note 201, at 41-42, 44-45 (describing cases and noting unequal distributions of property accumulated during cohabitation).

<sup>271</sup> See *supra* notes 109-111 and accompanying text.

<sup>272</sup> See *supra* notes 52-72 and accompanying text.

<sup>273</sup> Cf. Antognini, *supra* note 201, at 8; Carbone & Cahn, *supra* note 201, at 56 ("Existing legal regulation of nonmarriage . . . accepts the autonomy of such couples with respect to financial matters and imposes almost no obligations without either an express agreement or evidence of combined assets.").

### C. Alimony: Enforcing Post-Marital Independence

Like the laws of parentage and cohabitant obligations, alimony doctrine reflects the tension between the new family freedom and privatizing dependency. Unlike parental and cohabitant obligations, alimony could be considered “chosen,” since it imposes support duties upon former spouses who, in marrying, consented to provide for one another.<sup>274</sup> But alimony contravenes no-fault divorce law’s “clean break” norms by granting recipients a lien on payors’ post-marital income streams.<sup>275</sup> Not only does alimony increasingly offend neoliberal ideas about property entitlements, but it often does so with the explicit goal of privatizing dependency.<sup>276</sup> Scholars seek to resolve this tension by justifying long-term alimony in egalitarian terms, but recent state reform efforts concentrate instead on encouraging formerly dependent spouses to achieve economic self-sufficiency.<sup>277</sup> Modern alimony doctrine seeks to protect property rights by shifting the private support responsibility onto poorer spouses post-divorce—a development that shows just how profoundly neoliberal commitments are reconstructing the family.

Justifying spousal support has always been a difficult task.<sup>278</sup> As June Carbone and Naomi Cahn note, “alimony is deeply rooted in the inferior status of women, and even considering its role in protecting vulnerable women, it has been the subject of claims of incoherence in every generation.”<sup>279</sup> Defined as a “court-ordered allowance that one spouse pays to the other spouse for maintenance and support” during separation or after divorce, alimony originated as a remedy granted upon a couple’s legal separa-

<sup>274</sup> Garrison, *supra* note 120, at 817 (“Marital commitment explains why married couples have legal obligations to each other . . .”).

<sup>275</sup> Alstott, *supra* note 10, at 35 (“The law of divorce . . . has come to privilege . . . a ‘clean break,’ with each party returning to the marketplace to make his way.”); Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 704 (describing no-fault divorce law’s “‘clean break’ policy”); see also Dinner, *supra* note 29, at 139–40 (describing how divorce law reforms “constructed . . . divorced mothers as presumptive breadwinners . . . without fully transforming gender roles within marriage,” thus “deepen[ing] the economic insecurity of poor mothers and children”).

<sup>276</sup> Although some jurisdictions peg alimony to the marital standard of living, see, e.g., *Miller v. Cox*, 607 S.E.2d 126, 131 (Va. App. 2005) (“The purpose of spousal support ‘is to provide a sum for such period of time as needed to maintain the spouse in the manner to which the spouse was accustomed during the marriage, balanced against the other spouse’s ability to pay.’”), other jurisdictions understand alimony as provision for a former spouse’s reasonable needs, see, e.g., *Leftwich v. Leftwich*, 442 A.2d 139, 142 (D.C. 1982) (“[A]limony is intended to provide ‘reasonable and necessary’ support to the recipient.”).

<sup>277</sup> See *infra* notes 296–301 and accompanying text.

<sup>278</sup> See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 252–57 (2d ed. 1988) (noting “how difficult it is to assign a single social policy to alimony” and describing several functions alimony may serve).

<sup>279</sup> June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEXAS L. REV. 925, 929 (2015).

tion.<sup>280</sup> Since this ecclesiastical “‘divorce’ from bed and board” did not sever marital bonds, a wife remained under the legal disabilities of coverture and a husband’s common-law duty to support her continued.<sup>281</sup> As civil divorce “from the ‘chains of matrimony’” became more common, however, English courts ceased to distinguish between legal separations and absolute divorces and began to award alimony in both causes of action.<sup>282</sup> Courts making this shift failed to “explain,” however, “why parties, who [a]re no longer married, remain[] economically bound to one another.”<sup>283</sup>

The most fundamental rationale for alimony is privatizing dependency. Alimony places the responsibility for supporting the poorer ex-spouse on the richer ex-spouse, rather than the public fisc. As the Supreme Court of Pennsylvania declared in the era of coverture, the husband’s “duty of maintenance . . . is not to be released, and thrown upon the public, without a good reason,” because “as the head of the family and the maker of its wealth, he is not to be relieved from a duty which humanity and the rights of society demand him to fulfil.”<sup>284</sup> “[P]rovid[ing] help for needy spouses” through alimony remains “a legitimate and important governmental objective” under modern law,<sup>285</sup> and this concern is obvious on the law’s face, with most states defining alimony in terms of a recipient’s need and an obligor’s ability to pay.<sup>286</sup> But requiring an obligor to provide for a former spouse’s material needs runs headlong into his claim, also grounded in neoliberalism, to retain his post-divorce market gains.

Scholars attempt to resolve this conflict by justifying post-marital spousal support as a function of partners’ choices during marriage. Under some theories, alimony encourages good marital behavior. In states that forbid or limit alimony awards in cases of the would-be recipient’s fault, alimony incentivizes the poorer spouse to remain sexually faithful.<sup>287</sup> Other theories cast alimony in terms of detrimental reliance, with spousal support repre-

<sup>280</sup> *Alimony*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>281</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN’S L.J. 23, 28–29 (2001); see Chused, *supra* note 45, at 1361.

<sup>282</sup> Collins, *supra* note 281, at 28, 30.

<sup>283</sup> *Mani v. Mani*, 869 A.2d 904, 909 (N.J. 2005).

<sup>284</sup> *Miles v. Miles*, 76 Pa. 357, 358 (1874).

<sup>285</sup> *Orr v. Orr*, 440 U.S. 268, 280 (1979).

<sup>286</sup> See, e.g., MASS. GEN. LAWS ch. 208, § 48 (2018); *Foster v. Foster*, 506 S.W.3d 808, 814–15 (Ark. 2016).

<sup>287</sup> See Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 651 (1996); Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2529–30 (1994); see also, e.g., VA. CODE ANN. § 20-107.1(B) (2018) (barring award of support to adulterous spouse unless the result “would constitute a manifest injustice”).

senting compensation for opportunities lost through marriage, whether to develop a career rather than specialize in home production,<sup>288</sup> to ally oneself with a different partner,<sup>289</sup> or both.<sup>290</sup> Still other scholars cast alimony as insurance for the spouse who undertakes a financially insecure marital role<sup>291</sup> or ground the obligation in partnership theory.<sup>292</sup> Although propelled by egalitarian impulses, each of these accounts speaks the language of economics.<sup>293</sup> Scholars point to benefits the obligor received or harms he created to justify extending support obligations after marriage, whose at-will termination may create enduring financial inequality between former marital partners.

Although this reasoning can make good sense, especially in light of the modern vision of marriage as an “egalitarian . . . community,”<sup>294</sup> it fails to convince payors, whose alimony obligations continue to rankle.<sup>295</sup> Perhaps for this reason states take a different tack, seeking to limit the tension between privatizing dependency and property rights by reimagining the purpose, and thereby restricting the duration, of alimony. Since the no-fault divorce revolution, states have moved toward alimony regimes in which judges choose between different kinds of time-limited awards, all of which are

<sup>288</sup> PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 5.05 cmt. a & reporter’s notes, cmt. c (alimony compensates for “reliance upon continued market labor by” the other spouse “result[ing] in a residual loss in earning capacity”); Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 49 (1989) (alimony compensates a former spouse for “loss in earning capacity that arises from . . . economically rational marital sharing,” loss that “survives the marriage”); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL. STUD. 35, 35 (1978) (arguing that, in a world of high transactions costs, “alimony serves as an efficient means of redistributing the property rights and assets of the marriage partnership between the spouses”); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 80–84 (1991) (suggesting that alimony could be understood as spreading the financial costs of divorce between low- and high-income spouses).

<sup>289</sup> Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, “I Gave Him the Best Years of My Life,”* 16 J. LEGAL STUD. 267, 276 (1987).

<sup>290</sup> Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 881–82, 894–99 (1988).

<sup>291</sup> Scott & Scott, *supra* note 107, at 1309–10.

<sup>292</sup> CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 156 (2014) (likening marriage to a partnership and proposing that the partner leaving the relationship with the higher income stream should “buy out” the other); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 141–46 (2004); *cf.* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2229 (1994) (arguing that the higher-earning spouse’s wage actually “reflects the work of two adults: the ideal-worker’s market labor and the marginalized-caregiver’s unpaid labor”).

<sup>293</sup> See Grewal & Purdy, *supra* note 25, at 1.

<sup>294</sup> Frantz & Dagan, *supra* note 198, at 75.

<sup>295</sup> See Julie-Anne Geraghty Stebbins, Note, *FAMILY LAW—The Rehabilitation Illusion: How Alimony Reform in Massachusetts Fails to Compensate for Caregiving*, 36 W. NEW ENG. L. REV. 407, 412–15 (2014) (describing the rise and lobbying efforts of Massachusetts’ Alimony Reform Movement).

meant to assist a poorer spouse in attaining post-divorce financial independence.<sup>296</sup>

Consider, for example, the Massachusetts Alimony Reform Act of 2011.<sup>297</sup> The Massachusetts Act defines four kinds of alimony: (1) “general term alimony,” or long-term alimony; (2) “rehabilitative alimony,” which helps the poorer spouse become economically self-sufficient through further education or job training; (3) “reimbursement alimony,” or restitution for a spouse’s investment in her partner’s ability to earn income; and (4) “transitional alimony,” which eases the poorer spouse’s transition into her post-marital life.<sup>298</sup> By statutorily defining alternative forms of alimony, Massachusetts encourages judges to order shorter-term awards, the purpose and effect of which is to shift the private support responsibility from obligor to recipient.

The Massachusetts Act eschews the lifelong-alimony model not only by establishing a menu of short-term alimony options, but also by imposing durational limits on long-term alimony. The Act sets the presumed maximum period of general term alimony as a defined percentage of the marriage’s length, with only unions longer than twenty years giving rise to indefinite alimony.<sup>299</sup> General term alimony also terminates automatically upon an obligor’s reaching full retirement age.<sup>300</sup> Finally, the Act’s durational limits may apply retroactively to alimony judgments entered before its effective date—including to actions for modification of marital settlement agreements that were incorporated and merged into a divorce judgment.<sup>301</sup>

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<sup>296</sup> See, e.g., N.J. STAT. ANN. § 2A:34-23(b) (West 2018) (allowing court to award permanent, rehabilitative, limited duration, or reimbursement alimony); *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008) (describing purposes of various kinds of alimony).

<sup>297</sup> Alimony Reform Act of 2011, c. 124, 2011 Mass. Acts 574 (codified at MASS. GEN. LAWS ch. 208, §§ 34, 48–55 (2018)). See generally Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK U. L. REV. 13 (2013) (discussing Massachusetts Act). New Jersey has also recently reformed its alimony law. See 2014 N.J. Sess. Laws Serv. ch. 42 (West) (“An Act concerning alimony and amending N.J. Stat. 2A:34-23.”).

<sup>298</sup> MASS. GEN. LAWS ch. 208, § 48 (2018) (defining kinds of alimony); see also *id.* § 49 (general term alimony); *id.* § 50 (rehabilitative alimony); *id.* § 51 (reimbursement alimony); *id.* § 52 (transitional alimony).

<sup>299</sup> *Id.* at § 49(b); cf. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 5.06(1)(b) (determining award length based in part on length of marriage).

<sup>300</sup> MASS. GEN. LAWS ch. 208, § 49(f).

<sup>301</sup> Alimony Reform Act of 2011, c. 124, § 4(b)-(c) (barring modification of “an existing alimony judgment in which the parties have agreed that their alimony judgment is not modifiable, or in which the parties have expressed their intention that their agreed alimony provisions survive the judgment and therefore are not modifiable”); *Van Arsdale v. Van Arsdale*, 75 N.E.3d 1123, 1125 (Mass. 2017) (upholding constitutionality of Act’s retroactive durational limits).

This last aspect of the Act illustrates just how complicated it can be for the law to accommodate the new family freedom. In order to protect an obligor's property entitlements by time-limiting alimony, the Act upends pre-enactment marital settlements in which parties contracted for permanent alimony.<sup>302</sup> In relieving obligors from the responsibility to meet an ex-spouse's dependency needs, the Act sacrifices one former family member's property interest in service of the other's.

Viewed in its entirety, the Massachusetts Alimony Reform Act frees obligors from long-term post-marital financial obligation by requiring each former spouse to support him- or herself after divorce. But limiting alimony awards represents, at best, an uneasy truce between privatizing dependency and protecting property rights. Although courts may deviate from durational limits "in the interests of justice,"<sup>303</sup> or style one form of award as another to reach results they consider appropriate,<sup>304</sup> the "new alimony" effectively requires the lower-income spouse to privatize her own dependency.<sup>305</sup> But this expectation can be unrealistic, especially in long-term marriages: After dedicating herself to raising children or supporting a spouse's acquisition of assets, a would-be alimony recipient may never become a self-sufficient seller of market labor, resulting in poverty that the minimalist state leaves her to endure alone.<sup>306</sup> Modern alimony law requires one former spouse to internalize the cost of choices that benefitted the whole family, effectively importing assumption of risk principles into even the most intimate of relationships. This "disproportionate" allocation of marital gains and losses is not only unjust, but also seriously undermines the supposedly egalitarian and coopera-

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<sup>302</sup> See Alimony Reform Act of 2011, c. 124, § 4(b)-(c).

<sup>303</sup> MASS. GEN. LAWS ch. 208, § 49(b).

<sup>304</sup> *Foster v. Foster*, 506 S.W.3d 808, 817 (Ark. 2016) (finding no statutory requirement "that a rehabilitation plan contain specific goals or requirements regarding education or training on the part of the payee" and upholding ten-year rehabilitative alimony award); *id.* at 822, 823 (Brill, C.J., dissenting) (arguing that the statute requires a trial court to establish a "feasible" rehabilitative plan for recipient with "requirements for [her] to fulfill" but that "under the facts and circumstances of this case, the circuit court should have awarded permanent, not rehabilitative, alimony").

<sup>305</sup> Cf. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80–89 (1987); see also Brinig & Carbone, *supra* note 290, at 877 n.94 (suggesting that "the ability of women to support themselves and the societal insistence that they do so is the single biggest change underlying alimony awards").

<sup>306</sup> See Dinner, *supra* note 29, at 84 ("By mandating formal equality in divorce laws, in the absence of a parallel transformation in the gendered division of labor within marriage, the divorce bargain deepened women's economic insecurity."); Hasday, *supra* note 169, at 866–70 (arguing that gender-neutral divorce laws do not result in substantive equality because women continue to perform more caregiving).

tive nature of the marital enterprise.<sup>307</sup> In the end, the new family freedom protects property entitlements over former family members.

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The laws of parentage, cohabitant obligations, and alimony each reflect the conflict between core neoliberal commitments to strong property entitlements and to privatized dependency. In each of these doctrinal areas, the law must elevate one value over the other. If the law opts to make family members responsible for each other's material needs, it risks infringing a libertarian vision of autonomy by imposing obligations to which individuals did not formally consent *ex ante*. If the law elects to respect choice about obligations, it risks leaving vulnerable dependents without necessary resources unless the state steps in to supply them. These doctrinal problems are so difficult because each possible resolution carries a significant cost: the first undermines the law's legitimacy, while the second's toleration of potential suffering threatens the very project of social reproduction.<sup>308</sup>

In the face of this conflict, modern family law is consistent in pursuing one principle: the private support imperative. Because children depend on adults to survive and thrive, the law of parentage explicitly elevates privatizing children's inevitable dependency over adult autonomy.<sup>309</sup> Because the minimalist state expects all adults to be self-supporting, however, the law can appear to vindicate autonomy claims between them, declaring adults to have assumed the risk of economic loss by virtue of their intimate "choices."<sup>310</sup> But the tension remains, and creates real doctrinal damage: a schismatic law of parentage; a confused law of cohabitant obligations; and an unrealistic law of alimony.

Recognizing how privatized dependency and choice about obligation shape modern family law allows us better to understand the doctrine's current structure, its inherent limitations, and why they persist. Armed with this knowledge, we can ask both how well these approaches to dependency and autonomy suit family law and whether other approaches might be more in keeping with intimate life. The next Part takes up these questions.

### III. EVALUATING MODERN FAMILY LAW

The tension between the new family freedom and privatizing dependency does more than sow doctrinal confusion in the law of family obliga-

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<sup>307</sup> See Carbone & Cahn, *supra* note 279, at 926 (citing STARNES, *supra* note 292, at 40–42, 69–73, 156); Ellman, *supra* note 230, at 48.

<sup>308</sup> See *infra* notes 335–337 and accompanying text.

<sup>309</sup> See *supra* 128–197 and accompanying text (Part II.A).

<sup>310</sup> See *supra* notes 198–307 and accompanying text (Parts II.B–C).



tions. It also reveals the theoretical incoherence and normative unattractiveness of modern family law's dominant paradigm. Neoliberal ideology conceals a foundational paradox: Although neoliberal rhetoric insists that free market principles should govern all human activity, the minimalist state depends upon a substructure of family redistribution that violates other core neoliberal commitments. And from an external perspective, neoliberalism is a poor framework for family law. Not only have neoliberal policies created conditions that make it impossible for many families to survive without state support, but the outsized emphasis currently placed on families' economic functions also undermines their ability to fulfill other roles more important to intimate and collective life.

Despite these failings, neoliberal precepts continue to shape our polity's, and by extension our family law's, governing principles.<sup>311</sup> I therefore suggest a few incremental reforms to the current laws of parentage, cohabitant obligations, and alimony.<sup>312</sup> Although these proposals address some injustices of the current system, they are partial rather than full measures: Not only do they leave untouched the current system of privatizing dependency, under which many individuals lack the material resources necessary for family life, but they also fail to challenge choice logic, which can corrode affective ties. The very way in which these proposals fall short demonstrates the futility of trying to restructure family law within the minimalist state's artificial constraints. Meaningful reform requires rethinking our approaches to both dependency and autonomy, which requires, in turn, reorganizing our entire political economy around a set of values more suitable to collective life.

### *A. Internal and External Critiques of Neoliberal Family Values*

Neoliberal commitments are a poor fit for family law, no matter one's normative priors. From an internal perspective, the family disproves neoliberal ideology's pretensions to totality, for the conflict between privatizing dependency and choice about obligations reveals a tension at the center of neoliberal political economy. From an external perspective, neoliberalism's approaches to both dependency and autonomy elevate the family's economic functions over its intimate ones, stressing and distorting family life in the process.

Modern family law's inability to fully embrace choice about obligations reveals the profound paradox of neoliberalism: Its precepts cannot be

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<sup>311</sup> See, e.g., Jonathan D. Ostry et al., *Neoliberalism: Oversold?*, 53 FIN. & DEV. 38, 38 (2016) (noting a "strong and widespread global trend toward neoliberalism since the 1980s" and assessing "aspects of the neoliberal agenda that have not delivered as expected").

<sup>312</sup> See *infra* notes 347–372 and accompanying text (Part III.B).

replicated “all the way down.” The new family freedom carries certain strands of neoliberal rhetoric to their logical conclusion, asserting that individuals acquire family obligations in the same way that they acquire market obligations.<sup>313</sup> But as I have shown, the law does not govern all intimate interactions as market transactions—nor should it. Modern family law cannot avoid violating at least one neoliberal commitment because, in an age when not all families are marital, it is impossible to promote a property-rights based vision of autonomy while simultaneously making families responsible for the bulk of dependency needs. The project of organizing society along market principles inevitably requires the existence of some institution to capture and support those who cannot participate in market exchange, i.e., the family. For this reason, the new family freedom puts the “neoliberal” state to an impossible choice: to either ignore vulnerable citizens’ suffering or provide collective support for family life. In the first case, the state’s toleration of misery and failure to cultivate future citizens jeopardizes its long-term survival.<sup>314</sup> In the second, far preferable scenario, the state repudiates core tenets of neoliberalism by stepping in to provide a broader array of public goods.<sup>315</sup> Neoliberal ideals cannot fully govern family relationships, lest they undermine broader neoliberal political and economic structures. Family law thus disproves the fundamental assertion of neoliberal rhetoric, that all aspects of life can be assimilated “into the domain of the market.”<sup>316</sup> Neoliberalism fails on its own terms, both as a framework for organizing family law and as a coherent theory of collective life. This failure proves neoliberalism to be a contingent historical phenomenon, an ideology that supports our current unequal power relations, rather than an expression of political truths.<sup>317</sup>

This insight, in turn, renders neoliberal principles and commitments ripe for challenge. From an external perspective, the present neoliberal sys-

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<sup>313</sup> See *supra* notes 125–310 and accompanying text (Part II).

<sup>314</sup> Fraser, *supra* note 32, at 99 (“No society that systematically undermines social reproduction can endure for long.”). See generally JENNIFER ROBACK MORSE, LOVE & ECONOMICS: WHY THE LAISSEZ-FAIRE FAMILY DOESN’T WORK (2001) (arguing that even the libertarian state depends on families to raise children from helpless infants to citizens capable of self-governance).

<sup>315</sup> Cf. EICHNER, *supra* note 37, at 9–10.

<sup>316</sup> HARVEY, *supra* note 30, at 3; see also BROWN, *supra* note 28, at 45 (describing “the shift neoliberalism heralds from relatively *differentiated* moral, economic, and political rationalities and venues in liberal democratic orders to their discursive and practical integration”); Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 122, 153 (2016), [http://www.californialawreview.org/wp-content/uploads/2016/11/Murray\\_Tani.pdf](http://www.californialawreview.org/wp-content/uploads/2016/11/Murray_Tani.pdf) [<https://perma.cc/QPZ6-RUDD>] (observing that “neoliberalism is anti-statist in principle, but deeply statist in practice”).

<sup>317</sup> Cf. MARX & ENGELS, *supra* note 33, at 79–86; BROWN, *supra* note 28, at 49 (suggesting that “neoliberal rationality has [begun to take] hold as ideology”).

tem ignores, and therefore occludes, the full range of functions that family relationships serve. Although families are and have always been economic units, they also further other vital purposes. Family relationships provide their members with necessary intangible goods such as community, emotional support, and intimacy, thereby promoting their individual well-being and helping them to develop the capacities necessary for collective life. Yet modern family law's approaches to both dependency and autonomy subvert these important functions of intimate life, with unfortunate consequences for individuals, families, and society.

Scholars have long decried how the private support imperative denies many families the material basis for a flourishing family life.<sup>318</sup> Expecting families to fully internalize all market risk has proved unrealistic, as neoliberal economic policies have made it impossible for many families to meet their members' material needs from their own resources.<sup>319</sup> The economic inequality which neoliberalism condones also decreases the prevalence of marriage, the only family form able to reconcile privatized dependency with choice about obligations.<sup>320</sup> Without a more supportive state that insulates families from the brunt of market forces—whether through tax-and-transfer redistribution, protecting workers' bargaining power, or both—family law's inability to ensure even the basics of family life will continue.

While the neoliberal approach to dependency is the more foundational problem confronting modern family life, choice logic plays a supporting and compounding role. The new family freedom rides in tandem with the private support imperative, providing the rhetorical justification for, and instructing citizens how to govern themselves within, the structural constraints of the minimalist state.<sup>321</sup> Consistent with its broader project, this libertarian vision casts family members as obstacles to, rather than facilita-

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<sup>318</sup> See *supra* notes 54–66, 159–160 and accompanying text.

<sup>319</sup> See Harris, *supra* note 26, at 1558 (“Neoliberal policies devolve issues formerly considered collective, such as the management of economic risk, from government to individual families.”); *id.* at 1541 (equating neoliberalism with, *inter alia*, “an economy in which capital’s upper hand over labor has led to dramatically increasing inequalities of income and wealth”).

<sup>320</sup> See generally JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (arguing that changing family structures reflect rising economic inequality).

<sup>321</sup> See, e.g., BROWN, *supra* note 28, at 43 (describing how neoliberal “governmentality,” or “techniques of governing that exceed express state action and orchestrate the subject’s conduct toward him- or herself,” “convenes a ‘free’ subject who rationally deliberates about alternative courses of action, makes choices, and bears responsibility for the consequences of [those] choices”); COSSMAN, *supra* note 56, at 15 (describing a “new modality of sexual citizenship” in which “subjects are required to self-discipline according to the logic of the market” and “[b]ad citizens . . . are those who fail” to “manage[] [their] own risk”); *cf.* KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 20 (1970) (describing the relationship between a society’s base and superstructure).

tors of, one another's autonomy. Thus not only does the new family freedom make no provision for inevitable and derivative dependency, but it also erodes intimacy, enshrines inequality in relationships, and undermines social solidarity.

Choice about obligations creates problems in family law because it cannot accommodate the inevitable dependency of family life. This flaw is apparent on the face of Henry Maine's status-to-contract hypothesis, in which the triumph of "individual obligation" based upon "free agreement" requires the concomitant "dissolution of family dependency."<sup>322</sup> But this precondition cannot be achieved; as long as society's future depends upon children, dependency will remain a fact of social and political life.<sup>323</sup> There are many reasons why, in a society that denies dependents access to collective resources and makes families responsible for caretaking, it is just to redistribute property between intimates. But the new family freedom's insistence on ex ante choice about obligations prevents it from even comprehending such arguments. Because it holds the law to infringe individual liberty when it provides for dependents' needs in the only way currently practicable, the new family freedom is untenable as a measure of "family autonomy."

The new family freedom also takes a distorted view of intimacy and personhood. Conceiving of autonomy as choice about obligations defines the myriad exchanges between family members as discrete and calculated market transactions, rather than recurring interactions in the context of closeness and reciprocity.<sup>324</sup> As Ira Ellman has explained, "[m]utual gifting arising from mutual concern and affection is not the same as a bargained-for exchange."<sup>325</sup> The new family freedom not only fails to grasp the nature of family interchange, but in doing so risks commodifying intimate relationships. Margaret Jane Radin has described commodification as treating "everything people need or desire" as "something that is . . . appropriate to buy

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<sup>322</sup> MAINE, *supra* note 117, at 163–65.

<sup>323</sup> Cf. FINEMAN, *supra* note 19, at 207–08; MORSE, *supra* note 314, at 83–84.

<sup>324</sup> Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 92–93 (1998) (describing the "family economy" as "the daily informal exchange" of "both money and a constant flow of unpaid labor . . . for the betterment of individuals within the family and the family as whole"); cf. MORSE, *supra* note 314, at 62–63 ("Not every relationship with mutuality can be characterized as chosen. Not every relationship with reciprocity can be characterized as an exchange.").

<sup>325</sup> Ellman, *supra* note 230, at 1375; Daniel Markovits, *Promise as an Arm's Length Relation*, in PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295, 295–96 (Hanoch Sheinman ed., 2011) (arguing that "the formal structure of promissory recognition," as epitomized in contract, is "incompatible with the formal structure of recognition among intimates").

and sell through a market.”<sup>326</sup> Commodification’s treatment of “relationships . . . and moral commitments as monetizable and alienable from the self” “undermines personal identity” by denying the centrality of one’s associations to her self-definition.<sup>327</sup> Thus the new family freedom both impoverishes our conceptions of intimate relationships and “do[es] violence to our deepest understanding of what it is to be human.”<sup>328</sup>

The new family freedom further erodes intimacy and personhood by entrenching inequality in relationships. For choice about obligations promotes the interests of one family member only: the one with title to property. In the context of parental obligations, recognizing an adult’s financial freedom would cost an innocent child necessary support, which would threaten her ability to develop into an autonomous adult. And “failure to intervene” in adult relationships “favors the financially better off party.”<sup>329</sup> In cohabitant relationships, the propertied partner likely had greater bargaining power and may have exercised it to prevent formalizing any obligations.<sup>330</sup> Because cohabitants often do not share a common understanding of their relationship, choice logic enshrines the richer party’s vision of the connection upon its dissolution, in derogation of his partner’s understanding and even his own objective conduct.<sup>331</sup> And in the context of alimony, requiring each spouse to support herself post-divorce may allow one partner to reap “a disproportionate share of the [marital] gains while the other . . . is accorded most of the losses,”<sup>332</sup> in contravention of modern marriage’s egalitarian ideals.<sup>333</sup> The problem in all of these cases is not the unequal distribution of financial resources per se, but the way in which the new family freedom fails to consider each family member as of equal worth. One person’s liberty grounds another’s subordination, as the title holder’s property

<sup>326</sup> Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1855 n.24, 1860 (1987).

<sup>327</sup> *Id.* at 1905.

<sup>328</sup> *Id.* at 1906; see also MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012) (arguing that market reasoning and values have crept into spheres that have traditionally been organized according to non-economic values); Michael J. Sandel, *Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy*, 27 J. ECON. PERSP. 121, 125 (2013) (arguing against “the conception of economics as a value-neutral science of social choice”).

<sup>329</sup> Carbone & Cahn, *supra* note 201, at 79.

<sup>330</sup> *Id.* at 63.

<sup>331</sup> *Id.* at 95 & nn.237–40.

<sup>332</sup> Carbone & Cahn, *supra* note 279, at 926. The fact that all jurisdictions exclude a partner’s increased earning capacity—often among a marriage’s most valuable assets—from marital property division exacerbates the problem. Frantz & Dagan, *supra* note 198, at 107–12 (arguing that increased earning capacity should be treated as marital property); N.Y. DOM. REL. LAW § 236(B)(5)(d)(7) (McKinney 2018) (effective Jan. 23, 2016).

<sup>333</sup> Frantz & Dagan, *supra* note 198, at 75.

rights outweigh other family members' interests in living dignified lives.<sup>334</sup> Rather than recognizing the importance of all family members by seeking to encourage each one's self-determination, choice about obligations openly advances one intimate's life projects at the cost of another's.

Modern family law undermines not just intimate life, but also social solidarity. The failure to provide sufficient collective support for childrearing imperils the state's survival both directly, by failing to ameliorate the negative developmental effects of child poverty, and indirectly, by teaching future citizens neither to expect help from nor to provide help to others.<sup>335</sup> The current laws of cohabitant obligations and of alimony reinforce this anomie by requiring each individual to fend for herself, even in intimate relationships. Indeed, the rollback of permanent alimony after long-term marriages reproduces in miniature society's abdication of any responsibility for its citizens' well-being.<sup>336</sup> In this way, modern family law entrenches laws and norms that penalize reciprocity, cooperation, and trust, discouraging sharing in even the closest relationships.<sup>337</sup> With intimate bonds eroded and recourse to social support limited, it becomes difficult for families and communities to help their members develop the capacities necessary for collective life.

Just as the new family freedom prioritizes a certain conception of property rights over family flourishing, modern family law elevates the family's economic function over its affective functions. Healthy intimate relationships are vital to many people's well-being, even more so since the liberalization of family law has allowed individuals greater leeway to define and live their respective visions of family life. But while the family also

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<sup>334</sup> Cf. Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 75 (1998) ("The distribution of familial . . . resources will play a vital role in determining the status and opportunities of family members within the larger commonwealth.").

<sup>335</sup> HUNTINGTON, *supra* note 169, at 38–40; SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 135 (1989) ("If justice cannot at least begin to be learned from our day-to-day experience within the family, it seems futile to expect that it can be developed anywhere else."); Garrison, *supra* note 334, at 75 ("The family . . . serves as one of society's primary sources of moral education. It is in the family that we first encounter issues relating to the allocation of goods and responsibilities, of power, and of justice.").

<sup>336</sup> Cf. HARVEY, *supra* note 30, at 4 (relating "Lyotard's famous description of the postmodern condition as one where 'the temporary contract' supplants 'permanent institutions in the professional, emotional, sexual, cultural, family and international domains . . .'" ).

<sup>337</sup> Cf. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1902–03 (2000) ("No-fault divorce law signals that marriage is a transitory commitment, one that is easily set aside."). See generally Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (describing the law's role in managing social norms).

functions as a unit of production, consumption, and redistribution,<sup>338</sup> the minimalist state understands and interacts with the family almost wholly in these terms.<sup>339</sup> Modern parentage law's approach to children's dependency measures parenting only in terms of financial support and excessively punishes non-provision, which undermines father-child relationships in low-income families.<sup>340</sup> It also blames and punishes poor men and women for their reproductive "choices" to absolve the collective of responsibility for meeting children's needs.<sup>341</sup> Similarly, the modern laws of cohabitant obligations and alimony use "assumption of risk" reasoning to provide only limited protection for relationship-specific investment, discouraging interdependence and destabilizing intimate relationships' cooperative, collaborative qualities.<sup>342</sup> In this way, modern family law makes it difficult for many families to carry out their necessary role in supporting their members' pursuit of the good life.<sup>343</sup>

As the above discussion shows, neoliberalism is both plagued by internal tension and indifferent to the very aspects of intimate relationships that contribute to human flourishing. That combination imposes serious costs on both family life and collective life. Neoliberalism falls short in defining autonomy within the family for the same reason it ensconces a minimalist relationship between family and state: because it adopts a negative, rather than a positive, vision of liberty.<sup>344</sup> Just as focusing on noninterference in intimate life prevents the state from considering how it could encourage a meaningful family life for all, defining autonomy as "freedom from" other family members prevents modern family law from better reflecting how relationships enable intimates to pursue worthy life projects together.<sup>345</sup> Because neoliberal ideology leaves little space for appreciating how loving, caring relationships—when realized—give family life its emotional and social

<sup>338</sup> See, e.g., Margaret Benston, *The Political Economy of Women's Liberation*, MONTHLY REV., Sept. 1969, at 1, 11–13.

<sup>339</sup> Alstott, *supra* note 19, at 4 (arguing that "family law rules that establish financial relationships and liability between individuals constitute a form of social insurance").

<sup>340</sup> See Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 129 (2011); Dinner, *supra* note 29, at 147–51; Harris, *supra* note 168, at 159; Huntington, *supra* note 3, at 229–30; Maldonado, *supra* note 168, at 1013–15.

<sup>341</sup> McCluskey, *supra* note 33, at 807–08; Onwuachi-Willig, *supra* note 47, at 1673–76; Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 873 (1994).

<sup>342</sup> See Scott & Scott, *supra* note 107, at 1312–13; cf. DAGAN, *supra* note 251, at 165 (describing equity as "facilitat[ing] informal intimate relationships by . . . shielding the parties to such relationships against the lingering risks of opportunism and abuse of trust").

<sup>343</sup> See generally HUNTINGTON, *supra* note 169.

<sup>344</sup> ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 121–22 (1969); see *supra* notes 78–124 and accompanying text (Part I.B).

<sup>345</sup> Cf. Alstott, *supra* note 10, at 25; Appleton, *supra* note 77, at 922.

richness,<sup>346</sup> modern family law cannot govern these relationships in a way that supports their necessary work in facilitating intimate and collective life.

### *B. The Poverty of Neoliberal Reforms*

Although neoliberal principles are a poor match for family life, they continue to shape the social, political, and economic structures within which family law operates. I therefore suggest some incremental reforms to the current laws of parentage, cohabitant obligations, and alimony. Although these proposals have some promise, they are inherently limited; their instantiation alone cannot achieve a family law that makes intimate life accessible, meaningful, and dignified for all. The very shortcomings of these reforms demonstrate the fruitlessness of operating within a system of privatized dependency and individualistic freedom. In the end, reorganizing intimate life around different normative commitments will require concomitant transformations in our broader collective life.

#### 1. Parentage Law: Refining the Logic of Incentives

Although choice-based arguments cannot admit it, children's inevitable dependency restricts the law's ability to accommodate parents' autonomy interests. Because children cannot provide for themselves and the minimalist state refuses to invest collectively in social reproduction, parents must provide the bulk of the material resources necessary for childbearing and rearing. Children also require stable emotional relationships with adult caregivers in order to develop normally. For these reasons, "society . . . needs . . . parents to persist in their role for 18 years, or longer."<sup>347</sup> I therefore propose only minor adjustments to make parentage and child support law consistent with its own logic: eliminating or reducing paternal child-support liability in cases of less-than-voluntary sexual conduct and repudiating policies that undermine fathers' ability to provide economic and emotional support.

First, I propose revising our approach to financially supporting children conceived through sexual assault. Strict liability for sex, which works by conflating consent to sex with consent to parenthood, can justify obliga-

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<sup>346</sup> Cf. Hamilton, *supra* note 117, at 67 (stating that "while many of us enjoy having significant freedom from state interference, many others find themselves without social connection or the social supports that would enable true exercise and enjoyment of liberty").

<sup>347</sup> Cf. ALSTOTT, *supra* note 187, at 5 (describing social and legal expectations about parenthood as reflecting a single imperative for parents, "'Do Not Exit'").



tions arising from voluntary sexual conduct only.<sup>348</sup> Rather than imposing child support obligations on male rape victims,<sup>349</sup> which adds financial insult to bodily injury, states could use resources from crime victims' funds to help support children born as a result of sexual assault. These funds, which represent court fines and penalties and private donations rather than tax revenue, are intended to assist crime victims, including by providing compensation for their losses due to crime.<sup>350</sup> Although these funds' resources are limited, conception through male sexual assault is such an outlier that this policy proposal's cost is likely to be small.

We might also reshape the child support obligations of male statutory rape victims. The fact that criminal law deems a minor unable legally to consent to sex suggests that adolescence qualifies sexual conduct's "voluntariness" in a way that civil law should also reflect. For this reason, states might excuse statutory rape victims from paying child support during their own years of minority, when the law considers them to be dependent on their own parents for support.<sup>351</sup> The uncollected sums could be supplied through crime victims' funds or recouped later, by extending the father's liability for a "make-up" period beyond the child's legal emancipation.

Second, and more importantly, states should rescind punitive policies that interfere with low-income fathers' ability to support their children financially and emotionally. Like other scholars, I propose abolishing penalties for non-payment of child support that negatively affect a parent's ability to earn income, such as suspending drivers' and professional licenses and incarceration.<sup>352</sup> These sanctions are doubly counterproductive: Not only do they make current or future support payment less likely, but they also distance children from fathers who fear criminal prosecution for non-payment.<sup>353</sup> The law should instead recognize the ways in which these fathers do contribute to their children's development by providing informal economic support through cash, food, clothing, and diapers, as well as emo-

<sup>348</sup> Cf. Higdon, *supra* note 162, at 451 (arguing that parental liability should not attach where a man "can show, by clear and convincing evidence, that he did not consent to the act of sexual intercourse (or, in the case of home insemination, to the act of self-insemination) that resulted in the conception of the child").

<sup>349</sup> *Contra* S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996) (holding a man who was unconscious during conception liable for child support).

<sup>350</sup> Victims of Crime Act Victim Compensation Grant Program, 66 Fed. Reg. 27,158 (May 16, 2001).

<sup>351</sup> See, e.g., WIS. STAT. § 49.90(1)(a)2 (2018) (requiring "the parent of a dependent person under the age of 18" to "maintain a child of the dependent person so far as the parent is able and to the extent that the dependent person is unable to do so").

<sup>352</sup> See, e.g., Brustin, *supra* note 173 (summarizing reform proposals).

<sup>353</sup> Cf. HUNTINGTON, *supra* note 169, at 104; Huntington, *supra* note 3, at 229–30; Maldonado, *supra* note 168, at 1013–15.

tional support through caregiving and role modeling.<sup>354</sup> Equitable distribution statutes could provide a model for quantitatively valuing low-income parents' non-monetary contributions in the child support context,<sup>355</sup> or better yet, family law and welfare law could rest content with qualitatively valuing these contributions. Refraining from quantifying non-monetary contributions would not only reduce administrative costs, but would also go far toward limiting the state's extreme interference in low-income families' lives.<sup>356</sup> This, in turn, would allow poor parents greater autonomy vis-à-vis the state, despite their continuing responsibility for meeting their children's dependency needs. States could also revise their child-support guidelines to increase non-resident parents' self-support reserve and exercise more caution in imputing income, thereby avoiding the issuance of unrealistic child support orders and their heavy tolls. And because the costs of enforcing such orders can exceed the sums collected, redirecting public monies from inefficient administration to more generous family subsidies could render this proposal low-cost or cost-neutral.

These proposals can blunt some of the current child support regime's worst injustices toward parents, but they do little to ensure that children have the material resources and loving relationships they need to grow into autonomous adults. Casting children as a cost that parents must internalize alone not only stunts the life chances of those born to families of modest means, but also precludes conversations about what society owes to dependents and their caregivers. Failure to take any collective responsibility for social reproduction not only devalues children, but also artificially insulates the law from the urgent need to grapple with the fact of human vulnerability and interdependence.

## 2. Cohabitant Obligations: Recognizing a Spectrum of Intimacy

Because adults, unlike children, are not as a class inevitably dependent, it is easier to respect choice about obligations in disputes between them. But doing so requires cohabitant law to reflect the heterogeneous ways in which adults choose to structure their intimate lives. Cohabitant relationships "occupy a continuum that includes couples who have made an express decision not to marry, couples who thought that they were in a committed

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<sup>354</sup> Dinner, *supra* note 29, at 148; Harris, *supra* note 168, at 164; Maldonado, *supra* note 168, at 995–96, 1004–06.

<sup>355</sup> Cf. D.C. CODE § 16-910(b)(7), (9) (2018) (requiring courts to consider homemaking contributions, as well as effect of homemaking and childcare duties on income, in distributing marital property).

<sup>356</sup> See generally KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017) (arguing that poor mothers do not enjoy privacy rights).

relationship . . . and others who formed contingent relationships that intentionally left open the future of the relationship.”<sup>357</sup> If not all cohabitant relationships reflect the same degree of commitment,<sup>358</sup> and all reflect different “intimate choices that define personal identity and beliefs,”<sup>359</sup> then we have good reason to regulate them disparately. I therefore propose adopting a set of legal rules tailored to different kinds of cohabitant relationships.

The obvious difficulty with this suggestion is determining which rules should govern which relationships. One possible approach is to use length of cohabitation as a proxy for the partners’ interdependence.<sup>360</sup> States might, for example, presume that childless cohabitations of fewer than two years do not entail redistribution,<sup>361</sup> whereas cohabitations lasting five years or longer reflect enough interdependence that the jurisdiction’s marital regime should govern.<sup>362</sup> In cohabitations of intermediate length, neither presumption would apply and partners could bring any applicable legal and equitable claims. Although I suggest using relationship length as a proxy because its objectivity could encourage predictability and therefore settlement, there are likely better methods for tailoring cohabitant obligations. For example, the project to assign discrete and limited obligations based upon cohabitants’ conduct is promising as a more targeted means to balance autonomy and dependency concerns.<sup>363</sup>

Again, however, the failure to challenge neoliberal approaches to dependency and autonomy yields an unsatisfactory result. From a practical perspective, these proposals are both inefficient to administer and deeply invasive of couples’ privacy. The need to operate in the absence of family formalities also increases the risk of erroneous classification, the costs of which can be high and regressive.<sup>364</sup> More fundamentally, these proposals do little to change the underlying economic realities that cause many couples to

<sup>357</sup> Carbone & Cahn, *supra* note 201, at 108.

<sup>358</sup> See Brian J. Willoughby et al., *The Different Effects of “Living Together”: Determining and Comparing Types of Cohabiting Couples*, 29 J. SOC. & PERS. RELATIONSHIPS 397, 400–01 (2001) (describing five different types of cohabiting couples).

<sup>359</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

<sup>360</sup> The attempt to capture interdependence differs from using time as a proxy for intention, which seeks to identify a subjective state of mind and therefore violates choice logic. See *supra* notes 234–237 and accompanying text.

<sup>361</sup> Cf. PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 189, at § 6.03; BOWMAN, *supra* note 222, at 223–29; Blumberg, *supra* note 228, at 1166–67.

<sup>362</sup> Cf. Scott, *supra* note 120, at 259 (five years); Waggoner, *supra* note 229, at 240 (four years).

<sup>363</sup> See, e.g., Matsumura, *supra* note 3, at 1069–71 (proposing a “modular” approach to cohabitant relationships).

<sup>364</sup> See generally Aloni, *supra* note 105 (arguing that legally recognizing unmarried partners’ relationships can result in financial hardship).

cohabit in the first place.<sup>365</sup> Although some couples do avoid marriage for ideological reasons, it is hard to argue that respecting cohabitants' "choices" increases their autonomy when, given sufficient economic resources and security, they might have selected a different intimate arrangement.

### 3. Alimony: Frontloading Spousal Support

Attending to relationship length, as I propose in the context of cohabitant disputes, can also help in assessing recent trends in alimony law. Reforms like Massachusetts' promote obligors' post-divorce financial freedom by decreasing the duration of alimony awards across all lengths of marriages.<sup>366</sup> Alimony intended to rehabilitate, reimburse, or assist a recipient with transitioning after a short-term marriage can promote her autonomy, as well, by aiding her in achieving a reasonable post-divorce status quo. Indeed, judges' ability to award limited-term alimony may even increase the percentage of ex-spouses who receive some form of alimony.<sup>367</sup>

But limiting permanent alimony can be seriously unjust to homemaker spouses in long-term marriages, whose attention to family caregiving leaves them with decreased post-divorce earning capacity. One alternative to permanent alimony in high-asset, long-term marriages is to increase homemaker spouses' portion of the marital estate by codifying differentials in post-divorce incomes as cause to deviate from an equal distribution of marital property.<sup>368</sup> Equitable distribution statutes usually instruct judges to consider whether a distribution "is in lieu of or in addition to alimony,"<sup>369</sup> suggesting that spousal support becomes less necessary when dependent spouses receive large shares of the marital estate.

Redistributing resources between former spouses through unequal division of marital property, rather than long-term alimony, accommodates autonomy concerns in several ways. First, distribution of marital property can be justified by partnership principles as well as by domestic relations law: Because both partners contributed to the joint enterprise of their relationship, each partner has an entitlement in property accumulated during the marriage. Second, because property can be invested to generate income, an

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<sup>365</sup> See generally CARBONE & CAHN, *supra* note 320.

<sup>366</sup> See MASS. GEN. LAWS ch. 208, §§ 34, 48–55 (2018); Alimony Reform Act of 2011, c. 124, § 4(b).

<sup>367</sup> Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 W. NEW ENG. L. REV. 1, 20–29 (2014).

<sup>368</sup> Cf. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 830 (1988).

<sup>369</sup> D.C. CODE § 16-910(b)(4) (2018); see also, e.g., MASS. GEN. LAWS ch. 208, § 34 (2018); N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 2018).

individual receiving a large enough estate upon divorce could become economically self-supporting without further aid from her former spouse or the state. Finally, if a distribution of marital property is in lieu of spousal support, then the marriage's economic ties are severed with divorce, consonant with both choice logic and "clean break" norms. This promotes the payor's autonomy by safeguarding his post-divorce income stream, but also saves the recipient from having to supplicate her ex-spouse for the alimony check on a monthly basis.

This proposal's downside is that it has little effect where the marital estate is small—that is, in most marriages.<sup>370</sup> In these cases, spouses receive little property upon divorce and support claims lie against payors who likely cannot pay.<sup>371</sup> In these families, both former spouses may be struggling to make their way in the market, a state of affairs that redistributing between them cannot remedy. Unequally distributing property in high-asset marriages certainly helps homemaker spouses in the highest income brackets,<sup>372</sup> but does nothing to increase the resources available to less fortunate individuals just as deserving of a meaningful family life.

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Each of these proposed reforms is partial and unsatisfying, for the neoliberal framework's insistence upon privatized dependency and choice about obligations severely limits our scope of action. Truly reforming family law will require dismantling these artificial constraints. An important first step in this project is deconstructing neoliberal ideas and rhetoric and offering in their place a different normative paradigm, one that embraces a less individualistic, more collective approach to both autonomy and dependency. I close with some preliminary thoughts as to how this might look in the law of family obligations.

#### CONCLUSION: TOWARD A SUPPORTIVE LAW OF FAMILY OBLIGATIONS

The conflict between choice about obligations and privatizing dependency reveals an insoluble tension between modern family law's governing principles. This tension, in turn, proves the incoherence of the underlying normative framework, exposing neoliberalism for what it is: an ideology that entrenches current political, economic, and social power structures.<sup>373</sup>

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<sup>370</sup> See STARNES, *supra* note 292, at 39.

<sup>371</sup> See Alstott, *supra* note 10, at 36 ("The hard truth is that alimony makes little practical difference to many people in the middle class and all of those below it . . .").

<sup>372</sup> See Carbone & Cahn, *supra* note 279, at 928, 944 (stating that "neotraditional" family divisions of labor are most common in the top ten percent of earners).

<sup>373</sup> Cf. MARX & ENGELS, *supra* note 33.

Recognizing neoliberalism's ideological function is the first step toward loosening its grip. For modern family law's deepest flaw is not its internal inconsistency, but rather the way in which its normative commitments constrain our moral imagination.<sup>374</sup> Neoliberal principles not only limit the tools we can employ to resolve pressing problems of intimate life and social organization, but also restrict the very questions we can pose about these subjects.<sup>375</sup> In its modern iteration, the private support imperative precludes the possibility of collective responsibility for social reproduction, from which all benefit, by forestalling discussion of redistributive alternatives, such as robust unemployment insurance, collective support for caretaking, or a basic wage.<sup>376</sup> Privatizing dependency also unjustly penalizes individuals for misfortune arising from little or no fault of their own.<sup>377</sup> Similarly, choice logic's embrace of an individualistic, negative conception of freedom prevents us from debating what a good life requires and society's proper role in helping its members achieve it. On multiple levels, the neoliberal governance project undermines both family relationships and collective life.

Freed from neoliberal constraints, however, we could restructure family law to *support* intimate life. Doing so requires an approach to dependency that guarantees to all the material preconditions for family life, as well as a vision of autonomy that both recognizes the value of relationships to individual and collective life and is compatible with substantive equality. With their understanding that true freedom cannot be negative—that individuals require vibrant intimate, social, and political communities in order to live the good life—paradigms based upon human flourishing, human capabilities, and relational autonomy may satisfy these criteria.<sup>378</sup> Under whichever paradigm post-modern family law eventually adopts, the state should rec-

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<sup>374</sup> Radin, *supra* note 326, at 1877 (propounding “the view that our discourse and our reality are interdependent”).

<sup>375</sup> Alstott, *supra* note 10, at 35 (“Negative liberty, market distribution, and the minimal state limit the scope of the law, ruling out of bounds many of the most important questions about families.”).

<sup>376</sup> Cf. NANCY FRASER, *FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS* 1 (2013) (describing how second-wave feminism shifted its focus away “‘from redistribution’ . . . just as a rising neoliberalism declared war on social equality”).

<sup>377</sup> Iris Marion Young, *Equality of Whom? Social Groups and Judgments of Injustice*, 9 J. POL. PHIL. 1, 8 (2001); see also Harris, *supra* note 26, at 1558 (“[N]eoliberalist policies are defended in a rhetoric that . . . attributes responsibilities for the miseries of contemporary post-Fordist capitalism to bad people, not economic and political institutions.”).

<sup>378</sup> See, e.g., GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* 80–101 (2012) (human flourishing); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 282–97 (1999) (human capabilities); MARTHA NUSSBAUM, *CREATING CAPABILITIES* 17–34 (2011) (human capabilities); JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 19–20 (2011) (relational autonomy).

ognize families' vital role in facilitating their members' well-being and actively support their performance of this important work.<sup>379</sup>

Reforming family law begins with rethinking our broader political economy, but it does not end there. A world of robust collective responsibility for social reproduction will not be a world without family obligations, for the simple reason that relationships and intimacy cannot exist without commitments and corresponding duties. Obligations—whether legal or moral—are the gravitational force of relationships and the glue of society, enabling us to engage others' cooperation and collaboration in working toward our projects and goals.<sup>380</sup> Family obligations not only help us instrumentally to pursue our visions of the good life; they also express important aspirations about what that life entails, as well as shape who we are.<sup>381</sup> Indeed, constitutional law seeks to protect family life precisely because of the vital role relationships play in helping us to develop and express our personhood, however we may define it.

Private family law should similarly recognize the ways in which the right kinds of obligations sustain intimate and collective life, and seek to structure family responsibilities accordingly. This project requires answering questions about whom the law considers family members, on what basis, and the proper scope of their entitlements and duties, as well as which distributive principles should guide these decisions.<sup>382</sup> Depending on the answers we give, we may yet succeed in linking family relationships with freedom.

Whereas choice about obligations and the private support imperative cannot be reconciled, richer conceptions of autonomy can co-exist with, and even depend upon, obligation. For a life without obligations is a life without connections, which might be “free” in a negative sense but falls short of

<sup>379</sup> See, e.g., EICHNER, *supra* note 37, at 9 (calling for “the state . . . to expand its purposes to support caretaking and human development . . . through supporting families . . . so that citizens can lead full, dignified lives, both individually and collectively”); JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 273 (2013) (advocating “a constitutional liberalism that aspires . . . to secure conditions favorable to the pursuit of happiness” . . . by taking rights, responsibilities, and virtues seriously”); HUNTINGTON, *supra* note 169, at 223 (arguing that society should “invest in families to foster strong, stable, positive relationships”); Cynthia Grant Bowman, *Recovering Socialism for Feminist Legal Theory in the 21st Century*, 49 *CONN. L. REV.* 117, 165 (2016) (describing socialist feminism’s crucial insight that “capitalism . . . is incompatible with full human flourishing, especially for women”).

<sup>380</sup> See Scott & Scott, *supra* note 107, at 1232 (“A legal regime that constrains the freedom to commit actually limits individual freedom.”).

<sup>381</sup> See Radin, *supra* note 326, at 1905–06 (arguing that a person’s “moral commitments” are “integral to the self”).

<sup>382</sup> See generally, e.g., Frantz & Dagan, *supra* note 198, at 97 (envisioning marriage as an “egalitarian liberal community”); Garrison, *supra* note 334 (exploring theories of parents’ obligations to their children).

flourishing. In its best iteration, the law of family obligations would be neither a historic remnant nor a neoliberal tool, but rather a functional framework that instructs and supports intimates in their interconnected pursuit of a good life.



