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Nonconsensual Family Obligations

Emily J. Stolzenberg*

Even as the pandemic has both highlighted and compounded the challenges many U.S. families face in meeting their members' basic needs, efforts to expand public subsidies for caretaking have gained little traction. Scholars have identified many historical and practical reasons for Americans' entrenched skepticism toward the welfare state. Ideas matter, too, and this Article uncovers and critiques one that works to limit collective financial responsibility for families: the conviction that family support obligations must be legitimated through consent.

In family law, as in liberal political theory, consent works to reconcile state regulation with individual freedom. But because consent is a poor way to conceptualize relations of interdependence, consent-based ideas about what family members owe one another make family law doctrine less generous and justifiable than it could be. Such ideas also insulate citizens from financial obligations toward anyone's family but their own.

Consent-based legitimation endures in part because "consent" can bear different meanings unless it is precisely defined – work that family law scholars have only begun to undertake. Contributing to that project, this Article develops a taxonomy that identifies the distinct roles consent plays in justifying family obligations. It then uses that taxonomy to analyze how uncritical consent-based reasoning contributes to an incoherent body of doctrine that naturalizes economic inequality within and between families.

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To begin to address these problems, family law should incorporate additional principles beyond consent for justifying family support obligations. Adopting such a pluralist approach would allow family law to grapple with important normative questions directly and openly, contributing to more defensible (and potentially more egalitarian) doctrine. Recognizing what this Article calls “nonconsensual family obligations” is also the first step toward advocating for the collective responsibility to make the material inputs of family life available to all – rendering family support obligations both broader and more widely spread than we currently imagine them to be.

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INTRODUCTION

The COVID-19 pandemic has both highlighted and exacerbated the challenges many U.S. families face in meeting their members’

basic needs.¹ Yet efforts to provide more material support for families have gained little traction. Although the American Rescue Plan Act of March 2021 significantly expanded the child tax credit, promising to cut child poverty rates in half, the program lapsed on December 30, 2021, after Congress failed to renew the benefit.² The Build Back Better Bill, pitched as the “most transformative investment in children and caregiving in generations,” was narrowed in the House and stripped down further in the Senate.³ The Biden administration’s proposals to support families through public spending on childcare subsidies, paid family and medical leave, and at-home care of the elderly and disabled have thus far generated more semantic debate about whether care is “infrastructure” than lasting transformation of the social safety net.⁴

1. See, e.g., *The COVID-19 Economy’s Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL’Y PRIORITIES (2021), <https://www.cbpp.org/sites/default/files/8-13-20pov.pdf>; Adam Sonfield et al., *COVID-19 Job Losses Threaten Insurance Coverage And Access To Reproductive Health Care For Millions*, HEALTH AFFS. (Aug. 3, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20200728.779022/full/>; see also JULIE KASHEN ET AL., CTR. FOR AM. PROGRESS, *HOW COVID-19 SENT WOMEN’S WORKFORCE PROGRESS BACKWARD* (2020), <https://www.americanprogress.org/article/covid-19-sent-womens-workforce-progress-backward/>; Lauren Russell & Chuxuan Sun, *The Impact of COVID-19 Childcare Closures and Women’s Labour Supply*, VOX EU (Jan. 22, 2021), <https://voxeu.org/article/impact-covid-19-childcare-closures-and-women-s-labour-supply>.

2. MARGOT L. CRANDALL-HOLLICK ET AL., CONG. RSCH. SERV., R46839, *THE CHILD TAX CREDIT: THE IMPACT OF THE AMERICAN RESCUE PLAN ACT (ARPA; P.L. 117-2) EXPANSION ON INCOME AND POVERTY* (July 13, 2021); Ben Casselman, *Child Tax Credit’s Extra Help Ends, Just as Covid Surges Anew*, N.Y. TIMES (Jan. 2, 2022), <https://www.nytimes.com/2022/01/02/business/economy/child-tax-credit.html>; Jason DeParle, *Pandemic Aid Programs Spur a Record Drop in Poverty*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2021/07/28/us/politics/covid-poverty-aid-programs.html>; Deepa Shivaram, *The Expanded Child tax Credit Expires Friday After Congress Failed to Renew it*, NPR (Dec. 30, 2021, 2:03 PM), <https://www.npr.org/2021/12/30/1069143123/expanded-child-tax-credit-expires-friday-congress>.

3. *The Build Back Better Framework*, THE WHITE HOUSE, <https://www.whitehouse.gov/build-back-better/> (last visited Oct. 23, 2022); Jacob Pramuk, *Biden says he Thinks Congress can pass Parts of Broken-up Build Back Better plan*, CNBC (Jan. 19, 2022, 4:54 PM), <https://www.cnbc.com/2022/01/19/joe-biden-thinks-congress-can-pass-part-of-build-back-better-act.html>; Emily Cochrane, *Here’s How Democrats’ Big Domestic Agenda Bill Has Shrunk*, N.Y. TIMES (Aug. 7, 2022), https://www.nytimes.com/2022/08/07/us/politics/democrats-climate-health-tax-package.html?action=click&pgtype=Article&state=default&module=styleIn-domestic-policy-bill&variant=show®ion=BELOW_MAIN_CONTENT&block=storyline_flex_guide_recirc (programs to provide “child care, . . . federal paid family and medical leave, . . . college financial aid, housing support and home care” and “expanded monthly payments to families with children . . . were scrapped at [West Virginia Senator Joe] Manchin’s insistence”).

4. Cochrane, *supra* note 3 (“Top Democrats . . . vow[ed] to pursue [the scrapped programs] in future legislation, though it was unlikely they could draw the requisite level of Republican support to do so.”); *FACT SHEET: The American Families Plan*, THE WHITE

As welfare states go, ours is a stinting one.⁵ Scholars have adduced many reasons for Americans' entrenched skepticism of economic redistribution. Proposed explanations include property-protective political institutions,⁶ the difficulties of nurturing communal sentiment within a large, diverse society,⁷ and the legacy of systemic racism.⁸ Ideas matter, too, and some scholars have argued that the United States' distinctively individualist political culture makes it difficult to offer convincing justifications for expanded social welfare programs.⁹

This Article uncovers and appraises one individualist idea that works to limit collective financial responsibility for families: the conviction that family support obligations must be legitimated through consent.¹⁰ In liberal political theory—the basis of the

HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>; *Factsheet: What Does the Research say About care Infrastructure?*, WASH. CTR. FOR EQUITABLE GROWTH, (Apr. 15, 2021), <https://equitablegrowth.org/factsheet-what-does-the-research-say-about-care-infrastructure/>; see, e.g., Moira Donegan, *How Domestic Labor Became Infrastructure*, THE ATL. (Apr. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/why-care-work-infrastructure/618588/>.

5. E.g., Alberto Alesina et al., *Why Doesn't the United States Have a European-Style Welfare State?* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8524, 2001) ("European governments redistribute income among their citizens on a much larger scale than does the U.S. government.").

6. *Id.* at 3 ("[The United States] . . . is still governed by an 18th century constitution designed to protect property."); *id.* at 3, 60 (positing effects of federalism, lack of proportional representation, a two-party system, and strong courts).

7. GØSTA ESPING-ANDERSEN, *POLITICS AGAINST MARKETS: THE SOCIAL DEMOCRATIC ROAD TO POWER* 148 (1985) (suggesting that "greater homogeneity is a precondition for social and political unity"); see also Theda Skocpol & Edwin Amenta, *States and Social Policy*, 12 ANN. REV. SOCIO. 131 (1986) (overviewing explanatory hypotheses).

8. Alesina et al., *supra* note 5, at 4 ("America's troubled race relations are . . . a major reason for the absence of an American welfare state."); Bryce Covert, *There's a Reason We Can't Have Nice Things*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/opinion/racism-paid-leave-child-care.html> ("Race has played an outsize role in nearly every debate over the American social safety net.").

9. See GEORGE KLOSKO, *THE TRANSFORMATION OF AMERICAN LIBERALISM* 4 (2017) (arguing that "justifying [social welfare] programs in terms of individual rights and other approaches compatible with individualist political culture has strengthened individualist currents, thereby hampering the development of universal programs in which benefits are provided as a matter of right").

10. By "family support obligations" or "family financial obligations," I mean obligations to share property with or provide financial support for a spouse, intimate partner, or child. For more on these obligations, see *infra* Part I. I sometimes use the term "family obligations" as a shorthand for these financial obligations, even though family law imposes non-financial obligations, as well. Cf. Katharine K. Baker, *Homogeneous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*,

American political imagination—consent works to reconcile state regulation with individual freedom and equality.¹¹ Family law, too, relies heavily on the concept to justify its regulation. Notions of consent shape not only private law obligations to share property with an intimate partner or child, but also public expectations about who should bear the costs of raising the next generation.¹² But consent is a poor way to conceptualize relations of interdependence. As a result, consent-based ideas about what family members owe one another make family law doctrine simultaneously less generous and less justifiable than it could be.¹³ Such ideas also work to insulate citizens from financial obligations toward anyone’s family except their own.¹⁴

This Article exposes and critiques consent-based legitimation’s inordinate role in family law and begins the work of developing normative alternatives. I start by uncovering the longstanding assumption that family-based financial obligations should be justified through consent. Consent has always been used to justify family support obligations, though its precise invocations have changed over time. Even as family law has generally shifted from status- to contract-based regulation,¹⁵ consent has continued to provide an important rationale for state action.¹⁶ Just as a couple’s consent to marry was used to legitimate their subjection to the rules

2012 U. ILL. L. REV. 319, 320 (defining “the law of family obligations” as comprising “child support, property distribution, and alimony”). Similarly, I sometimes use “family law” as a shorthand for the “law of family obligations.”

11. See *infra* Part I; see also RONALD DWORKIN, A MATTER OF PRINCIPLE 205 (1985) (defining liberalism as requiring some kind of commitment to both individualism and equality).

12. Cf. Andrew S. Gold et al., *Introduction*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW xv, xvi (Andrew S. Gold et al. eds., 2021) (recognizing family law as a “field[]” that “sit[s] on the borders of private and public law”). For more on family obligations’ public side, *i.e.*, their use in what family law scholars call “privatizing dependency,” see *infra* notes 27, 228–230 and accompanying text.

13. See *infra* Part I.

14. See *infra* Part III.

15. HENRY SUMNER MAINE, ANCIENT LAW 170 (1861) (describing domestic relations as evolving “from [s]tatus to [c]ontract”); see also Robin West, *Consent, Legitimation, and Dysphoria*, 83 MODERN L. REV. 1, 1 (2020) (glossing Maine’s thesis to state that “while an individual’s rights and responsibilities were once a function of his or her status stemming from . . . family position[,] . . . today” they “are largely a function of to what he or she has contractually agreed to do or refrain from doing”); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012).

16. See *infra* Section I.B.

of coverture, ideas of consent permeate the modern regimes of marital property and spousal contracts, cohabitant obligations, and child support.¹⁷ While scholars have long critiqued both consent in general and its use to justify nineteenth-century patriarchal family structures in particular,¹⁸ this Article shows how the concept also vindicates twenty-first century hierarchies by normalizing distributive inequalities between both family members and fellow citizens.¹⁹

Consent-based legitimation endures not only because of its ideological attractiveness, but also because of its great plasticity.²⁰ The concept of consent lacks much determinate content, meaning that it can bear different meanings in the same conversation unless it is precisely analyzed and defined – work that family law scholars have only begun to undertake.²¹ Contributing to that project, this Article develops a taxonomy of consent and uses it to show how overreliance on the concept constrains family law.²² The taxonomy builds on three questions of political theory, each of which must be answered in order to justify a state-imposed obligation. The first and most fundamental question regards the normative source of an obligation: what principle potentially justifies the exercise of state power against an individual? The second question asks what set of facts causes the obligation to attach, and the third concerns the obligation’s proper content or scope. These three questions correspond to three dimensions of consent: (1) the *realm* of consent, or which obligations must be justified by consent (rather than some other principle) in order to be legitimate; (2) the *manifestations* of consent, or what an individual must do in order to be deemed to have consented to obligation; and (3) the *consequences* of consent, that is, what obligations follow from an appropriate manifestation.

17. See *infra* Part I.

18. See *infra* note 43 and accompanying text.

19. See *infra* Section I.B and Part III.

20. Of course, modern family law’s emphasis on values such as privacy and autonomy has also rendered voluntaristic, individualized bases of obligation increasingly palatable and communal bases less so. See *infra* Part III.

21. Cf. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956) (describing as “essentially contested concept[s]” concepts “the proper use of which inevitably involves endless disputes about their proper use[] on the part of their users”); see also *infra* notes 167–172.

22. See *infra* Section II.A. This taxonomy of consent is potentially applicable in all areas of law, but this Article’s focus is analyzing consent’s role in family law.

The law writ large takes a pluralist approach to obligation, employing a number of different principles to explain the exercise of state power. Family law, in contrast, fails to explicitly consider the full justificatory universe. Instead, it assumes the *realm* of consent to be coterminous with all family support obligations, a position that leaves only questions about consent's appropriate *manifestations* and *consequences* up for discussion. With its scope of inquiry so limited, family law struggles to even address, let alone resolve, fundamental normative questions about what family members owe one another and why. The result is a body of legal rules that not only appears incoherent, but also is insufficiently sensitive to social realities and unable to adequately articulate the collective's interest in family life.²³

Because of the latter drawbacks, consent's primacy in family law also works to perpetuate economic inequality within and between families.²⁴ Following consent-based logic usually results in the state permitting adult family members to arrange their own financial affairs, which tends to favor titleholders and breadwinners at the expense of caretakers.²⁵ At the same time, family law's insistence on individual consent to obligation renders unintelligible children's and caregivers' claims of distributive justice against society.²⁶ While many scholars have shown that family law's predominant purpose is to ensure private responsibility for dependency,²⁷ this Article uncovers how the logic

23. See *infra* Section II.B; see also *infra* Section III.A (arguing that standard critiques of consent apply with special force in family law).

24. See *infra* Section I.B.1 (spouses); Section I.B.2 (cohabitants); Section II.B.3 (children and caretakers); cf. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) (defending the family as a vital object of attention for political theory).

25. See *infra* Section I.B.1 (marital contracts); Section I.B.2 (cohabitant disputes); cf. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836-37 (1985) ("As long as a state exists and enforces any laws at all, it makes political choices. . . . that may benefit one . . . actor, usually at the expense of another.").

26. For example, consent-based justifications for child-support obligations position meeting children's needs as the sole province of their parents. See *infra* Section I.B.3 (justifications for child support).

27. Family law scholars also describe this purpose as "privatizing dependency." See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 33, 228 (2004); MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 67-117 (2017); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 5 (2006) (arguing that in the U.S., "there is insufficient recognition of a public responsibility to support families' efforts"); Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 4 (2010);

behind those rules—that of consent-based obligation—also works in the opposite direction to insulate the collective from family members’ claims for resources. By foreclosing family members’ public-facing claims for material assistance, the logic of consent entrenches the current division between private and public responsibility for dependents’ needs. This state of affairs simultaneously discounts the social significance of families and makes it difficult for poor families to fulfill their most vital social function: helping their members to flourish.

To begin to address these problems, family law should embrace a pluralist theory of family obligations. This Article begins the work of articulating such a theory, offering a preliminary sketch that I will develop further in future projects. Here, I argue that family law must incorporate additional principles beyond consent for justifying financial obligations—permitting the imposition of what I call *nonconsensual family obligations*.²⁸ Properly cabined, consent has an important role to play in family law, for some obligations are so personal and extensive that only an individual’s voluntary undertaking can render them legitimate. However, the fact that an individual failed to appropriately manifest consent should not automatically preclude obligation. Instead, a no-consent finding should trigger further inquiry into whether some other source of family obligation is implicated. These grounds might include the imperatives to avoid or remedy harm, to protect those in relationships of trust, or to fairly spread the costs of caring for the vulnerable. Because such obligations would be justified through principles other than consent, they are likely to involve different legal structures. For example, nonconsensual family obligations might be actualized through frameworks analogous to tort or fiduciary duties of care or redistributive taxation. Because these

Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L. Q. 93, 97 (2015); Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 YALE J.L. & FEMINISM 1, 28 n.185 (2016); Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 84 (2016) (“[T]he United States tilts strongly in the direction of private responsibility for social reproduction”); Melissa Murray, *Family Law’s Doctrines*, 163 U. PA. L. REV. 1985, 1990, 2015–17 (2015); Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866–67 (2014); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1985 n.4 (2018); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409–12 (2009); see generally Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213 (2017).

28. See *infra* Part III.

kinds of duties unavoidably reflect the values and needs of the collective, their precise content and concomitant remedies would be up for democratic debate in a way that consent-based obligations often are not. As a result, such obligations might – though of course need not – be more reflective about and attentive to background conditions of social and economic inequality.

A pluralist approach to family obligations could contribute to not only a more defensible family law, but also a more just society. While consent would continue to justify some family financial regulation, recourse to *nonconsensual* family obligations would allow legislatures, courts, and scholars to grapple with important normative questions directly and openly. The practical result would be to reduce the distorting pressure to fit all doctrine into consent's mold, thereby increasing family law's ability to promulgate sensible regulations. On the level of ideas, alternative modes of normative and doctrinal analysis would enable family law to critically examine the material world that consent-based obligation currently constructs and naturalizes.²⁹ In particular, consent renders social reproduction – “the biological reproduction of the next generation along with the subsistence, socialization, education, and caregiving of existing generations”³⁰ – a private choice rather than a public good, helping to cast its inevitable costs as the responsibility of the individuals who engage in it.³¹ Getting at questions that consent currently conceals would allow us to acknowledge the social goods realized through family life, and by extension a just society's collective obligation to make the minimum material inputs of family life available to all. Reordering society to reflect this recognition, in turn, would render family law and family support obligations much broader and more widely spread than we currently imagine them to be.³²

29. Cf. West, *supra* note 15, at 11-12 (describing critical legal scholarship on consent's power to legitimate and thereby insulate from criticism a wide range of underlying social arrangements).

30. Dinner, *supra* note 27, at 84.

31. Cf. West, *supra* note 15, at 15 (arguing that “the ethic of consent” makes childbearing and caregiving a “choice,” rather than “a necessary or essential life activity worthy of support”).

32. Cf. Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 *YALE J.L. & HUMAN.* 1, 1 (2011) (arguing that “family law should be restructured to connect it . . . to domains of law more readily understood to relate directly to the market: economically significant productivity, social security provision, and the fair or unfair distribution of economic

This Article proceeds as follows. Part I uncovers consent's primacy in justifying family obligations and demonstrates the concept's normative plasticity. Part II develops a taxonomy of consent and employs it to show how, in family law, discussions of "consent" are often proxy debates about other values. Part III advocates a pluralist approach under which family law would rely on a range of normative principles to conceptualize family obligations. The Article concludes with a cautionary note about consent's limitations in emancipatory projects.

I. EXPOSING AND CRITIQUING CONSENT'S ROLE IN FAMILY LAW

When family law requires intimate partners to share property and parents to financially support their children, it exercises the coercive power of the state. Thus family law, like all bodies of law in a liberal polity, must answer a foundational question: "[H]ow and why a free and equal individual can ever legitimately be governed by anyone else."³³ The standard response to this problem of political obligation, offered since the seventeenth century social contract theorists, is *consent*.³⁴ To be consistent with freedom and equality, an "obligation must be grounded in" an individual's "voluntary acts or commitments."³⁵ Under consent-based theories of political obligation, the normative power of voluntarism transforms the exercise of state authority into the legitimate

resources"); Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 26 (2014) ("imagin[ing]" a family "law that looks beyond the minimalist task of settling private disputes and instead aims to correct market distributions and promote a family life open to all"); Laura T. Kessler, *Family Law by the Numbers: The Story That Casebooks Tell*, 62 ARIZ. L. REV. 903, 918 (2020) (noting that "family law, as conceptualized within legal practice and law school curricula," does not "include the many areas of law that have significant distributive impacts on family members").

33. CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 72 (1989); see also DWORKIN, *supra* note 11, at 205 (defining liberalism as requiring some kind of commitment to both individualism and equality).

34. THOMAS HOBBS, *LEVIATHAN* ch. XVII (1668); JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* § 119 (1689); JOHN RAWLS, *A THEORY OF JUSTICE* (1972); see also DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989); CAROLE PATEMAN, *THE PROBLEM OF POLITICAL OBLIGATION: A CRITICAL ANALYSIS OF LIBERAL THEORY* (1985); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); cf. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 7 (2019) ("In societies which value individual freedom, consent plays a singular role.").

35. PATEMAN, *supra* note 33, at 72; see also GORDON J. SCHOCHET, *THE AUTHORITARIAN FAMILY AND POLITICAL ATTITUDES IN 17TH-CENTURY ENGLAND: PATRIARCHALISM IN POLITICAL THOUGHT* 9, 262 (1975) (differentiating between contract and consent).

extension of a person's internal will.³⁶ Indeed, this potential to square individual liberty with collective regulation has made consent the default principle for legitimating liberal governance.³⁷

Because modern family law is arguably liberal, that is, concerned with freedom and equality,³⁸ it relies on consent to legitimate the imposition of family support obligations. As this Part shows, today's laws of marital property regimes and spousal contracts, cohabitant obligations, and child support invoke varying conceptions of consent to justify the financial consequences of family relationships.³⁹ Legislatures, courts, and scholars debating questions of family members' responsibilities to one another all assume that any financial obligations imposed must originate in individual voluntarism.⁴⁰

But consent's connection to freedom and equality cannot be assumed, for family law's reliance on consent-based obligation preceded its liberalization. Under the common law of domestic relations, consent to enter the status relationship of marriage justified a range of obligations that subordinated wives to their husbands and children to their fathers.⁴¹ Even accepting nineteenth-century historian Sir Henry Maine's influential contention that the field of domestic relations has evolved from immutable status toward individualizable contract,⁴² the fact that both status- and contract-based family regulation rely upon consent should make us skeptical of the concept's emancipatory potential.

Although many scholars have described and critiqued the use of consent to justify nineteenth-century patriarchal family

36. Cf. John Kleinig, *The Nature of Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 5 (Franklin G. Miller & Alan Wertheimer eds., 2009) (describing consent as a "transformative moral notion"); Heidi M. Hurd, *The Moral Magic of Consent*, 2 *LEGAL THEORY* 121 (1996); Franklin G. Miller & Alan Wertheimer, *Preface to A Theory of Consent Transactions: Beyond Valid Consent*, in *THE ETHICS OF CONSENT*, *supra*; West, *supra* note 15, at 2 (describing "the felt moral authority of consent"); see also KIM, *supra* note 34, at 7 (describing the "consensus that consent is legally and ethically transformative").

37. West, *supra* note 15, at 2 ("Today . . . [i]ndividual consent, rather than democratic law . . . is emerging as the main source of legitimate authority.").

38. See *infra* notes 86-91 and accompanying text; see also Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 35 (2006) (arguing that family law "embod[ies]" both "Biblical traditionalism and liberal individualism").

39. See *infra* Section I.B.

40. See *infra* Section I.B.

41. See *infra* Section I.A.

42. MAINE, *supra* note 15, at 168.

structures,⁴³ the concept's predominance in modern family law has thus far gone unchallenged.⁴⁴ Yet as this Part shows, family law's overreliance on consent promotes economic inequality both within and between families. Prizing individual consent to family support obligations not only sanctions financial disparities between former spouses and disadvantages economically vulnerable partners in long-term cohabitant relationships;⁴⁵ it also justifies placing financial responsibility for children almost entirely on their parents, rather than providing more collective support for social reproduction.⁴⁶ Today's invocations of consent not only fall short of promoting all family members' autonomy and equal standing, but also actively further twenty-first century socioeconomic hierarchies.

A. Justifying Domestic Relations Law: Consent and Subordination

Under the nineteenth-century common law of domestic relations, the concept of consent worked to justify the fixed obligations that attended the husband-wife, parent-child, and master-servant relationships.⁴⁷ Recourse to the idea of consent did not, however, render the common-law system a liberal one. To the contrary, "consent" was used to legitimate the status-based subordination of women, children, and enslaved persons to white male heads of household. Consent's history of naturalizing systems of inequality demonstrates that consent-based regulation cannot alone guarantee just outcomes.

43. See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* (G. Edward White, ed., 1985); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *CALIF. L. REV.* 1373 (2000); see also *infra* notes 69–7174 and accompanying text.

44. Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 *N.C. L. REV.* 1013, 1022 (2018) ("Consent's role in the regulation of intimate relationships has received minimal attention.").

45. See *infra* Sections I.B.1–2.

46. See *infra* Section I.B.3.

47. See generally 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 410–47 (1765) (describing the husband-wife, parent-child, and master-servant relations). For a history of how domestic relations evolved into family law, see Halley, *supra* note 32. Because the master-servant relationship is now the subject of employment law, I do not address it here. For an illuminating juxtaposition of status regulation in family and employment law, see Kaiponanea T. Matsumura, *Breaking Down Status*, 98 *WASH. U. L. REV.* 671 (2021).

Under common law, marriage was a private civil contract, the legitimacy of which turned on consent. Entry into the husband-wife relationship was governed by canon law,⁴⁸ which made the free consent of both parties the only element necessary to contract a marriage.⁴⁹ Although Lord Hardwicke's Marriage Act established additional formal requirements for marriage in 1753,⁵⁰ the parties' consent still remained a central concern, as rules about who could marry demonstrated. Because entering marriage required mutual consent, only those with contractual capacity could marry.⁵¹ Thus a would-be spouse who was underage or without "reason" could not contract a valid marriage.⁵²

Consent not only created marriage; it also legitimated the imposition of state-defined marital obligations. In the new American states, "[m]arital unions were increasingly defined as private

48. See 1 BLACKSTONE, *supra* note 47, at 434 (observing that "common lawyers . . . have borrowed . . . almost all their notions of the legitimacy of marriage from the canon and civil laws").

49. *Id.* at 434 (stating the maxim "[c]onsensus . . . facit nuptias") (internal quotations omitted); see also Leah Leneman, *The Scottish Case That Led to Hardwicke's Marriage Act*, 17 LAW & HIST. REV. 161, 162 (1999) (noting that "[n]either the consent of parents nor the presence of witnesses were required" for a valid marriage).

50. An Act for the Better Preventing of Clandestine Marriage, 1753 (26 Geo. II. c. 33) (Marriage Act of 1753 or Lord Hardwicke's Marriage Act) (requiring clergy celebration, publication of banns or a special license, and in some cases parental consent for valid marriage); 1 BLACKSTONE, *supra* note 47, at 437.

51. As evidence of marriage's continuing consensual nature, consider the persistence of both common-law marriage and capacity-protective doctrines in U.S. marriage law. Ten jurisdictions still recognize informal unions created by the parties through their mutual consent alone, without the need for registration or attestation. See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 22 (2010); *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* ALASKA STAT. § 30.1.20(a) (2018) ("No common-law marriage may be entered into in this state on or after January 1, 2017."). The District of Columbia, for instance, will recognize a common-law marriage when the parties "cohabit[] as husband and wife, following an express mutual agreement . . . in words of the present tense." *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993); see also D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 210 (4th ed. 2010) (listing elements as "capacity to enter a marriage contract, present agreement to be married, cohabitation, and holding out to the community as [spouses]"). No formalities are necessary, and courts do not give preference to formal over informal unions. *Cerovic v. Stojkov*, 134 A.3d 766, 777 (D.C. 2016) (presumption favoring validity of most recent union does not distinguish between common law and ceremonial marriage). The vast majority of states also safeguard the quality of spouses' consent to marry by establishing age minimums for marriage, as well as setting aside marriages contracted through fraud or duress. WEISBERG & APPLETON, *supra*, at 190, 195, 196. The endurance of these doctrines demonstrates consent's continued centrality to marriage.

52. 1 BLACKSTONE, *supra* note 47, at 424, 427.

compacts with public ramifications.”⁵³ Writing in the 1830s, Supreme Court Justice Joseph Story described marriage as “*an institution of society* founded upon the consent and contract of the parties.”⁵⁴ In 1874, the Supreme Court described marriage as “an institution founded upon mutual consent,” a contract only insofar as “the consent of the parties is necessary to create the relation.”⁵⁵ For as the Supreme Court famously explained in 1888 in *Maynard v. Hill*, husbands and wives were subject “to various obligations and liabilities” “determined by the will of the sovereign” in order to protect “the public[’s] . . . deep[] interest[]” in the “institution” of marriage.⁵⁶ Although marital “rights, duties, and obligations” were fixed by the state, they were “founded upon the agreement of the parties” because they only attached to a couple upon their “consent” to marry.⁵⁷

Nineteenth-century marital obligations were justified through consent, but they were far from autonomy-enhancing (at least for wives).⁵⁸ In return for her husband’s duty to support her and their children, the wife took on obligations that constituted her total subordination to her husband, a legal condition referred to as coverture.⁵⁹ In Blackstone’s famous and influential words, “the

53. GROSSBERG, *supra* note 43, at 20; *see also id.* at 19, 20 (noting that although “marriage law rested on . . . the consent of the parties,” “marriage was never conceived of as a purely consensual agreement”); *id.* at 19 (describing colonial legal sources as “emphasiz[ing] the secular, contractual nature of matrimony while at the same time endorsing strict public nuptial vigilance”).

54. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 164 (1865) (emphasis added).

55. *Randall v. Kreiger*, 90 U.S. 137, 147 (1874).

56. *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888); *cf. Baker’s Executors v. Kilgore*, 145 U.S. 487, 491 (1892) (“The relation of husband and wife is . . . formed subject to the power of the State to control and regulate both that relation and the property rights directly connected with it . . .”).

57. *Maynard*, 125 U.S. at 210–11 (quoting *Adams v. Palmer*, 51 Me. 481, 483 (1863)); *see, e.g., COTT, supra* note 43, at 11 (2000) (“The man and woman consented to marry, but public authorities set the terms of the marriage . . .”); GROSSBERG, *supra* note 43, at 5; HARTOG, *supra* note 43, at 99 (“Once married, you had only the rights and remedies derived from an identity as a wife or a husband.”); *see also* Matsumura, *supra* note 44, at 1067 n.296 (“Consent historically operated to justify the imposition of all the legal rules comprising the marital status.”).

58. *Cf. HARTOG, supra* note 43, at 101 (remarking that a man “remained a man whether married or not”); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1456 (“The state-imposed terms of the traditional marriage contract were both hierarchical and rigidly gender-based.”).

59. *Cf. COTT, supra* note 43, at 12 (“By consenting to marry, the husband pledged to protect and support his wife, the wife to serve and obey her husband.”); HARTOG, *supra* note

husband and wife are one person in law . . . the very being or legal existence of the woman is suspended during the marriage, . . . incorporated and consolidated into that of the husband.”⁶⁰ On marrying, “a wife lost control over property”⁶¹; her “assets became her husband’s[.]” as “did her labor and future earnings.”⁶² A wife could not bring suit, contract, or “execute legal documents without her husband’s collaboration.”⁶³ A husband could “chastise,” or physically discipline, his wife, and was entitled to her sexual services on demand.⁶⁴ Spouses had only limited scope to deviate from these duties and obligations, and they could not exit their unions without state permission, which was granted only in cases of grievous marital fault.⁶⁵ These rigid constraints led Alexis de Tocqueville to observe that “[i]n America[,] the independence of woman is irrevocably lost in the bonds of matrimony.”⁶⁶ Yet even this keen observer accepted that consent could validate such a state of affairs, writing that American women exercised their “cold and stern reasoning power” to “freely . . . enter” into “the bonds of

43, at 115 (“[I]n exchange for gaining full ownership of all of his wife’s personal property and absolute control for life over her real estate, a husband was bound to support her . . .”).

60. 1 BLACKSTONE, *supra* note 47, at 442; *see id.* at 443–45; 2 BLACKSTONE at 433–36; 3 BLACKSTONE at 139–40; 4 BLACKSTONE at 28–30; *see also* HARTOG, *supra* note 43, at 121 (“In nineteenth-century America, nearly everyone (that is, everyone except for a few equitably oriented and highly sophisticated lawyers, like James Kent and Tapping Reeve) agreed that Blackstone’s *Commentaries* captured the central features of the received law of husband and wife.”); *cf.* JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture XXVIII, 109 (1827) (“[T]he husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union.”); TAPPING REEVE, THE LAW OF BARON AND FEMME 53–55, 143–47, 152 (1862).

61. HARTOG, *supra* note 43, at 99.

62. COTT, *supra* note 43, at 12.

63. *Id.* at 11.

64. *See* 1 BLACKSTONE, *supra* note 47 at 444; 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (Sollom Emlyn ed., 1736), 629 (explaining that “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”); *see also* Siegel, *supra* note 43, at 2121–29; Hasday, *supra* note 43, at 1389, 1392, 1402.

65. *See, e.g.,* Maynard v. Hill, 125 U.S. 190, 211 (1888); Singer, *supra* note 58, at 1457; *id.* at 1470–71 (“[D]ivorce was not the recognition of a private decision to terminate a marriage; it was a privilege granted by the state to an innocent spouse against a guilty one.”).

66. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Bk 3, Ch. X (Henry Reeve, trans., Gutenberg EBook 2013) (1835) (ebook), <https://www.gutenberg.org/files/816/816-h/816-h.htm>.

marriage,” “attach[ing] a sort of pride to the voluntary surrender of their own will”⁶⁷

The consent that legitimated domestic relations law, under which marriage worked a “free relinquishment of [the] will,” was a particular kind of consent.⁶⁸ As Jill Hasday has explained, the “status rules” of marriage “operated automatically, subjecting every husband and every wife to predetermined constraints without permitting individual negotiation.”⁶⁹ Rather than “securing actual consent from any particular couple,” these rules “conclusively inferred consent, as a matter of law, from the couple’s initial agreement to marry.”⁷⁰ Consent to marry gave rise to “a legal presumption of permanent and irrevocable consent to marital status law.”⁷¹ The system of coverture depended on what today we might call implied consent,⁷² working its subordination in part through a mass of irrebuttable presumptions that attached at the moment of marriage to legitimate socially predetermined duties and obligations.

The concept of consent was also used to legitimate children’s subordination to their parents, in particular to their fathers. Two kinds of consent attended parent-child relations: the parents’ actual consent to marriage, and the child’s implied consent to parental governance. Because the common law traditionally recognized filial relationships within marital families only, a couple’s agreement to marry established their children’s place in the family, including the right to parental support.⁷³ And because the common law family was a hierarchical one, legitimate children were subjected to their fathers’ patriarchal authority. Early domestic

67. *Id.*

68. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 592–94 (Jacob Peter Meyer ed., George Lawrence trans., Doubleday 1969) (1835).

69. Hasday, *supra* note 43, at 1398.

70. *Id.* at 1387.

71. *Id.* at 1399; *cf. id.* at 1399 (describing how Hale’s theory “acknowledged the potential divergence between a wife’s actual state of mind at any particular moment during a marriage, and the legal rule conclusively inferring consent from her initial agreement to marry”).

72. *Cf.* Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 *CASE W. RES. L. REV.* 17, 37–38 (2010) (discussing implied consent).

73. *See, e.g.*, GROSSBERG, *supra* note 43, at 197 (“The bastard had no recognized legal relations with his or her parents, particularly not those of inheritance, maintenance, and custody. Nor did the illicit couple have any rights or duties toward their spurious issue.”); 1 BLACKSTONE, *supra* note 47 at 447–50; REEVE, *supra* note 60, at 274 (discussing illegitimate children’s legal disabilities).

relations law cast children as “dependent, subordinate beings, assets of estates in which fathers had a vested right. Their services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance.”⁷⁴

Although the parent-child relation could be described as one of reciprocal responsibility, it was also justified in terms of the child’s “presumed consent.”⁷⁵ In his 1836 book *Legal Outlines*, University of Maryland law professor David Hoffman described the relation as a kind of contract:

The parent shows himself ready, by the care and affection manifested to his child, to watch over him, and to supply all his wants, until he shall be able to provide for them himself. The child, on his part, receives these acts of kindness; a tacit compact between them is thus formed; the child engages, by acts equivalent to a positive undertaking, to submit to the care and judgment of his parent so long as the parent, and the manifest order of nature, shall coincide in requiring assistance and advice on the one side, and acceptance of them, and obedience and gratitude, on the other.⁷⁶

Rejecting Puffendorf’s argument that “implied consent . . . suppose[s] a freedom of choice which cannot be supposed” of a minor child, Hoffman insisted that the law could properly impute children’s consent to parent-child obligations.⁷⁷ He argued that “reason, or the law of nature, supposes a contract on the part of the child, because it presumes a contract on the part of every individual of mankind, to do that which is proper for the particular interest, and conducive to the general good.”⁷⁸ For Hoffman, a child’s consent to obey his parent could be inferred from natural

74. GROSSBERG, *supra* note 43, at 235; *see generally* MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994); Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992); Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 263 (2010).

75. DAVID HOFFMAN, LEGAL OUTLINES 156 (1836); *see also* GROSSBERG, *supra* note 43, at 235 (describing Hoffman’s argument).

76. HOFFMAN, *supra* note 75, at 156.

77. *Id.*

78. *Id.*

law—a version of consent even more attenuated than the wife’s actual consent to enter marriage.⁷⁹

Consent’s centrality to establishing family obligations also meant that enslaved persons were prohibited from marrying. Because enslaved persons lacked the legal capacity to direct their own actions, they could not properly consent to marriage.⁸⁰ As Nancy Cott explains,

To be able to marry one had to be free enough to take on obligations, for consent in marriage meant acceptance of the responsibilities that came along with . . . the institution. This was impossible for a slave; his or her obligations as a spouse might be trumped at any time by the master’s legal right of command.⁸¹

Indeed, “[s]lavery and marriage were so incompatible that a master’s permission for a slave to be (legally) married was interpretable as manumission.”⁸² Without the ability to contract valid marriages, enslaved persons could not form legally recognized families—and by extension, could claim no legal protection for their family relationships.⁸³

Even as nineteenth-century family obligations instantiated illiberal, patriarchal principles, they were justified in terms of consent. Marital relations of “hierarchical authority and obedience,”⁸⁴ minor children’s subjection to extensive paternal

79. Today, we might call this hypothetical consent. See Cynthia A. Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313, 315 (2000) (“Hypothetical-consent theories have a counterfactual structure: a rule is justified if ideal agents in ideal circumstances would have agreed to it.”); Gideon Yaffe, *Hypothetical Consent*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT 95, 96 (Andreas Müller & Peter Schaber eds., 2018) (“Let’s reserve the term ‘hypothetical consent’ for . . . cases in which the affected party consents in some relevant possible world.”); cf. Bell, *supra* note 72, at 19 (arguing that “[w]e tend to . . . regard” “transactions backed by . . . implied consent . . . as more worthy of enforcement than transactions justified by mere hypothetical consent”).

80. COTT, *supra* note 43, at 33 (“To marry meant to consent, and slaves could not exercise the fundamental capacity to consent.”).

81. *Id.* at 33; see also HARTOG, *supra* note 33, at 93.

82. COTT, *supra* note 43, at 33; see also *Dred Scott v. Sandford*, 60 U.S. 393, 397–98, 600–01 (1857) (Curtis, J., dissenting); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1041, 1104–05 (1997); cf. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015).

83. See, e.g., DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 306 (5th ed. 2019)

84. Hasday, *supra* note 43, at 1389; cf. HARTOG, *supra* note 43, at 120 (suggesting that “coverture had, compared with other marital property regimes, a distinctively repressive patriarchal cast”).

governance, enslaved persons' exclusion from legal family relations—all could be explained by recourse to consent. Under domestic relations law, consent-based rationales worked to naturalize a thick and extremely sticky set of state regulations intended to further a particular normative conception of the public interest.⁸⁵ The fact that we imagine the public and its interests very differently today shows clearly that consent-based regulation need not be liberal, egalitarian, or autonomy-enhancing.

B. Justifying Modern Family Law: Consent and Economic Inequality

Regulation of families has changed significantly since the era of coverture.⁸⁶ Shaped by multiple movements for women's equality, developments in substantive due process jurisprudence, the advent of no-fault divorce and same-sex marriage, and the increasing prevalence of nonmarital families, modern family law looks quite different from the world of Blackstone's *Commentaries*.⁸⁷ As a doctrinal matter, spouses can now exit marriage relatively freely, own property individually or jointly during marriage, and alter some of their respective financial rights and responsibilities through contract.⁸⁸ Adults can pursue sexual relationships outside of marriage, and nonmarital children are no longer tarred with the brush of illegitimacy.⁸⁹ Same-sex couples can marry and raise children.⁹⁰ And instead of celebrating patriarchal hierarchy, family law now employs the language of voluntarism, appealing to principles like liberty, privacy, autonomy, and choice.⁹¹

Yet despite these dramatic transformations, consent has remained the primary mode through which legislatures, courts, and scholars conceptualize and justify family obligations. Consent legitimates the financial obligations of marriage, regardless of whether these are established by the state's background spousal

85. *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (noting “the public[’s] . . . deep[] interest[]” in the “institution” of marriage); cf. Eskridge, *supra* note 15.

86. *But see* Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019).

87. *See, e.g.*, Halley, *supra* note 32; Kessler, *supra* note 32, at 904–10 (describing transformations); *supra* note 60 and accompanying text.

88. *See, e.g.*, Eskridge, *supra* note 15.

89. *See, e.g., id.*

90. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Pavan v. Smith*, No. 16-992, 582 U.S. __ (June 26, 2017).

91. *See* Stolzenberg, *supra* note 27, at 1987.

property regime or contracted for by the spouses themselves.⁹² Competing visions of consent underlie and drive most approaches to property disputes between former cohabitants.⁹³ And consent—whether to marriage or to potentially procreative sexual activity—justifies parents’ support obligations to their children, while simultaneously minimizing collective responsibility for social reproduction.⁹⁴ The cumulative effect of modern family law’s reliance on consent is to legitimate financial inequality within and between families.

1. Spouses

Although spousal obligations have changed greatly since the days of coverture, they continue to be justified in terms of consent. A couple’s consent to marry legitimates application of the state’s background marital or community property system during marriage, as well as its laws of equitable distribution and spousal support in the case of divorce. At the same time, widespread enforcement of spousal agreements means that spouses may individually determine their respective property rights through consent to contract. Thus, whether in relation to marriage or contract, consent continues to legitimate spouses’ financial obligations.

Just as it did under coverture, consent to marriage still justifies the imposition of state-defined marital obligations. Consider, for example, how courts rebuffed constitutional challenges to newly adopted equitable distribution statutes in the 1970s and 1980s. Divorcing spouses who had married under the prior common-law regimes, in which property rights followed title, challenged the statutes on due process grounds, arguing that they had consented to the obligations of that regime only—alimony perhaps, but not property-sharing in derogation of title.⁹⁵ Courts universally

92. See *infra* Section I.B.1.

93. See *infra* Section I.B.2.

94. See *infra* Section I.B.3.

95. See, e.g., *Addison v. Addison*, 399 P.2d 897 (Cal. 1965); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978); *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977); *Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974); *Bacchetta v. Bacchetta*, 445 A.2d 1194, 1199-1200 (Pa. 1982) (Nix, J., dissenting) (“Where one voluntarily enters into a marital relationship and is aware that such a step may affect ownership in property acquired thereafter, the decision to undertake such a step is a knowing and voluntary one.”); see also Emily J. Stolzenberg,

rejected these assertions, often explicitly relying on *Maynard v. Hill*'s pronouncement that "the legislature . . . prescribes" the "effects" of marriage "upon the property rights of both [spouses], present and prospective."⁹⁶ These courts not only vindicated the state's traditional prerogative to determine the obligations of marriage, but also affirmed its power to update those incidents as social conditions change. In this way, courts confirmed that spouses' consent to marry subjects them to marital status law, including the new property distribution regimes.⁹⁷

Consent also justifies enforcement of contracts through which spouses may deviate from the state's property regime to define their own, individualized financial obligations.⁹⁸ Although historically courts were skeptical of premarital agreements, today all states "agree . . . that couples can enter into enforceable prenuptial agreements that spell out the economic consequences of divorce."⁹⁹ The vast majority of divorcing couples now settle their property disputes through negotiated separation agreements, and most states will also recognize postnuptial agreements executed

Properties of Intimacy, 80 MD. L. REV. 627, 644-48 (2021) (describing effects of equitable distribution regimes).

96. *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (emphasis added) (cited in *Rothman*, 320 A.2d at 501 (describing marriage as "a social relationship subject in all respects to the state's police power"); *Bacchetta*, 445 A.2d at 1197 (establishment of equitable distribution regimes is "manifestly within the Legislature's broad control over the marital relationship"). Analogously, courts have rejected arguments against the application of no-fault divorce statutes to couples who had married under prior, purely fault-based divorce regimes. See, e.g., *Gleason v. Gleason*, 256 N.E.2d 513, 519 (N.Y. 1970) ("Marital rights . . . have always been treated as inchoate or contingent and may be taken away by legislation before they vest").

97. Cf. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 113 n.174 (1998) (noting "the degree to which status . . . describes property distribution at divorce").

98. See, e.g., HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 61 & n.19, 121-22 (2017); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 299-300 (1986); Brian H. Bix, *Family Law: Values Beyond Choice and Autonomy?*, LAW & PHIL. 163, 173-82 (2021); Singer, *supra* note 58, at 1460-61, 1508-13 (describing developments in marital contracting and linking family law private ordering to the increased importance of privacy and individual autonomy); West, *supra* note 15, at 1-3; see also *infra* Section II.B.1.

99. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 210 (2011) (emphasis omitted); see also Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 14 (2012) (noting trend toward greater enforceability of marital contracts); 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, 148-58 (1998).

during marriage.¹⁰⁰ As a result, “individuals and couples have gained greater power to fix the terms of their relationships,”¹⁰¹ including to vary the financial obligations that flow from marriage.

The general acceptance of marital contracting has further cemented consent’s justificatory power in two ways. First, courts explain their enforcement of such agreements in terms of the spouses’ contractual consent to certain property rights and financial responsibilities.¹⁰² Second, spouses’ legal ability to contract around the background spousal property and support regimes makes their failure to do so seem potentially meaningful. A couple who marries without executing a marital contract could be construed as knowingly consenting to the state’s definition of marital obligations.¹⁰³ Thus consent continues to justify spouses’ financial obligations, regardless of whether those obligations are determined by marital status law or individually designed marital contracts.

Yet though the justificatory rationale is the same, spousal obligations incurred through contractual consent can differ greatly from those incurred through consent to marriage. While modern spousal property regimes at least attempt to achieve equity,¹⁰⁴ the terms of spousal contracts can diverge quite widely from state background regimes.¹⁰⁵ Thus when spouses define their respective obligations through contract, consent can end up legitimating stark financial disparities between current and

100. GROSSMAN & FRIEDMAN, *supra* note 99, at 212–13; *see generally* Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827. *But see* OHIO REV. CODE § 3103.06 (“A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.”).

101. GROSSMAN & FRIEDMAN, *supra* note 99, at 209.

102. *Cf. Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990) (“We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what they regard as an acceptable distribution scheme for their property.”).

103. *Cf., e.g.*, 23 PA. CONS. STAT. § 3501(a)(2) (excluding from “marital property” subject to equitable division all “[p]roperty excluded by valid agreement of the parties”).

104. Stolzenberg, *supra* note 95, at 644 & n.101 (common-law states and the majority of community property states distribute marital or community property “equitably”).

105. *See infra* Section II.B.1; *see also* *Spires v. Spires*, 743 A.2d 186, 192–95 (D.C. 1999) (Schwelb, J., concurring) (appending to opinion copy of parties’ “deprav[ed]” “Marital Agreement” “requiring total subordination by the wife to the husband’s caprice”).

former spouses—despite the widespread conception of modern marriage as a relationship of equals.¹⁰⁶

2. Cohabitants

Just as consent justifies marital obligations, it also plays an outsized role in shaping cohabitant obligations. Since the 1970s, states have struggled with whether and how to redistribute property between nonmarital partners when their cohabiting relationships end. Although approaches to cohabitant claims vary widely, most rest on some vision of consent.

Some states refuse to recognize economic claims arising out of a nonmarital relationship based on their insistence that only consent to marriage can ground family obligations.¹⁰⁷ To stake out this position, courts make two consent-based moves. First, they invoke the traditional status view that while individuals consent to enter family relations, the legal incidents of those relations are society's to define.¹⁰⁸ Second, they emphasize the import of an individual's choice not to marry, but rather to live outside the strictures of legally recognized family relations.¹⁰⁹ Taken together, these two propositions justify refusing to extend marriage-like property rights to partners who did not marry.

For an illustration of the first move, consider Illinois, which insists upon the state's central role in defining family relationships and obligations. Illinois refuses to "enforce mutual property rights" arising from nonmarital relationships based on its "public policy . . . disfavoring private contractual alternatives to marriage

106. Cf. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77 (2004) (describing "marriage as an egalitarian liberal community"); 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").

107. These states are Georgia, Illinois, and Louisiana. *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994); *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016), *reh'g denied* (Oct. 20, 2016), *aff'g* *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983).

108. See *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[C]ontracting parties . . . enter[] into . . . a new relation, the rights, duties, and obligations of which rest . . . upon the general law of the state.").

109. See *infra* notes 116–119 and accompanying text.

or the grant of property rights to unmarried cohabitants.”¹¹⁰ As the Illinois Supreme Court explained, the question of cohabitants’ property rights “can not [sic] . . . be regarded realistically as merely a problem in the law of express contracts” because interactions between unmarried partners generally do not instantiate “the kind of arm’s length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind.”¹¹¹ Not only is family contracting circumscribed, but so are alternative intimate statuses, for “the legislature intended marriage to be the only legally protected family relationship under Illinois law.”¹¹² And because the state has repudiated common-law marriage, parties can consent to take on family obligations only through the formalities of ceremonial marriage.¹¹³ Cohabitants thus remain outside of state family law. Illinois’s strict control over family relationships elevates the importance of consent to marital status: Intimate partners cannot create other family-like institutions through their actions alone, but rather must take—or leave—legal relations on the state’s terms.

Courts also rely on consent to make such status-based regulation more palatable to modern liberal sensibilities. Consider Louisiana, which, like Illinois, refuses to recognize relationship-based property rights between unmarried partners, often referred to as “paramour[s]” or “concubine[s].”¹¹⁴ While Louisiana’s pro-marriage stance reflects concern for “the very structure of . . . civilized society,”¹¹⁵ its reasons for denying relief go beyond public policy to additionally invoke the individual cohabitants’ actions. In *Schwegmann v. Schwegmann*, for example, the state Court of Appeal

110. *Blumenthal*, 69 N.E.3d at 839; *id.* at 851–52 (citing *Hewitt*, 394 N.E.2d at 1210); *see also Long*, 441 S.E.2d at 476 (“Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor.”).

111. *Hewitt*, 394 N.E.2d at 1207, 1209.

112. *Blumenthal*, 69 N.E.3d at 851.

113. *Id.*; *Hewitt*, 394 N.E.2d at 1211.

114. *Schwegmann v. Schwegmann*, 441 So. 2d 316, 325 (La. Ct. App. 1983), *writ denied sub nom.* *Blackledge v. Schwegmann*, 443 So. 2d 1122 (La. 1984).

115. *Compare id.* at 326 (“Without the family, the State cannot exist and without marriage the family cannot exist. Thus, aside from religious or moralistic values, the State is justified in encouraging . . . marriage . . . over . . . concubinage . . .”), *and id.* (“[D]iscouraging the establishment of a sexual relationship without ceremonial marriage is in the interest of protecting the moral fabric of society and its preservation against those who flaunt its standards and values.”), *with Hewitt*, 394 N.E.2d at 1210 (noting the State’s “strong continuing interest in the institution of marriage”).

noted that “[a]lthough it was theoretically and legally possible for the parties to marry . . . , the facts here are that the parties did not marry.”¹¹⁶ Rejecting a proposed analogy between the legal treatment of illegitimate children and unmarried partners, the court insisted that “the status of concubine was a voluntary and desired one, for the parties neither married, wanted to marry, nor believed they were married.”¹¹⁷ Because “[u]nwed cohabitators involved in concubinage relationships have voluntarily chosen not to marry, they should not expect to receive the civil effects flowing by virtue of a marital state.”¹¹⁸ Thus a specific couple’s refusal to consent to marriage justifies the socially preferred result that they “have no rights in each other’s property.”¹¹⁹ By justifying non-intervention between cohabitants in terms of their individual choice not to consent to marriage, these states modernize status-based regulation for a legal age that emphasizes liberty and autonomy.

Unlike Illinois, Louisiana, and Georgia, the majority of states profess willingness to hear cohabitants’ property claims.¹²⁰ These jurisdictions recognize a variety of legal theories, most of which also rely on consent. Some of these theories are status-like, in that regulatory consequences follow from the parties’ consent to take part in an intimate relationship. Other theories are more contractual, with obligations following from a partner’s consent to be bound to specific terms. The final set of theories, based in restitution, does not turn on consent—a difference that only helps to highlight the difficulties of consent-based approaches to family obligation.

For status-like theories of recovery, consent to the joint enterprise of an intimate relationship can justify property sharing upon its dissolution. Washington State, which allows for property distribution between cohabitants in a “committed intimate relationship,” does so based in part on the “mutual intent

116. *Schwegmann*, 441 So. 2d at 322.

117. *Id.* at 324.

118. *Id.* at 326.

119. *Id.* at 323; *cf.* *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994) (“Elvis rejected Travis’ proposals of marriage. . . . When opportunity knocks, one must answer its call. Elvis Davis failed to do so and thus her claim is all for naught.”); *Blumenthal v. Brewer*, 69 N.E.3d 834, 869 (Ill. 2016) (Theis, J., dissenting) (criticizing majority’s “application of *Hewitt* to same-sex domestic partners who separated before they could legally marry”).

120. See Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 927–29 (2019) (describing “state-to-state variation”).

of parties to be in such a relationship.”¹²¹ States that allow recovery under an implied partnership or joint venture theory similarly effectuate “the intention of the parties.”¹²² And Nevada permits “adults who voluntarily live together” to “agree to hold property . . . as though it were community property.”¹²³ The required intent or agreement need not be express, but rather may be “manifested by conduct.”¹²⁴ Thus the intimate relationship itself may provide proof of the consent upon which family obligations are based.

Many states allow claims between cohabitants based on express or implied agreements. These contractual theories of recovery rely explicitly on consent to obligation, though what states deem to be appropriate indicia of consent differs. Florida, Minnesota, New Jersey, and Texas, which enforce cohabitant contracts only if they are executed in writing and signed by the parties, require high levels of legal formalities to find the requisite consent to obligation.¹²⁵ New York will enforce oral agreements between cohabitants only if they are express, to avoid the “great . . . risk of error” run by “courts . . . attempt[ing] through hindsight to sort out the intentions of the parties.”¹²⁶ States that accept implied-in-fact contracts, on the other hand, are willing to “inquire into the conduct of the parties to determine whether” it “demonstrates . . .

121. *Connell v. Francisco*, 898 P.2d 831, 835 (Wash. 1995); *In re Marriage of Pennington*, 14 P.3d 764, 773, 770 (Wash. 2000) (listing “five relevant factors to analyze” as “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties”).

122. *In re Thornton’s Estate*, 499 P.2d 864, 867 (Wash. 1972); *see also* *Eaton v. Johnston*, 681 P.2d 606, 611 (Kan. 1984); *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978) (“[A] division of property accumulated during a period of cohabitation must be begun by inquiring into the intent of the parties, and if an intent can be found, it should control that property distribution.”); *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) (describing “intent of the parties” as “[t]he primary consideration” in property distribution).

123. *W. States Const., Inc. v. Michoff*, 840 P.2d 1220, 1224 (Nev. 1992).

124. *Id.*; *see also In re Thornton’s Estate*, 499 P.2d at 867–68 (noting that the “contract of partnership,” “[w]hile . . . essential to the creation of the partnership relation,” can be “ascertained from all of the facts and circumstances and the actions and conduct of the parties”); *Beal*, 577 P.2d at 510 (“[A]bsent an express agreement, courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon.”); *Pennington*, 14 P.3d at 771, 772 (analyzing parties’ conduct to determine intent).

125. 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) (holding that the state’s Statute of Frauds applies “to non-marital, nuptial-like agreements”); *Moynihan v. Lynch*, 269 A.3d 435 (N.J. 2022) (upholding writing requirement for enforcement of cohabitant agreements).

126. *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980).

some . . . tacit understanding.”¹²⁷ These differing approaches reflect states’ varying levels of comfort with inferring consent to obligation from the parties’ conduct alone, versus requiring heightened signals of consent via stringent adherence to contract formalities.¹²⁸ But because partners rarely execute written agreements and courts are rarely willing to imply agreements between intimates, consent to contract only infrequently results in state-imposed cohabitant obligations.¹²⁹

Indeed, cohabitants rarely succeed on their economic claims unless they plead causes of action sounding in restitution.¹³⁰ Generally speaking, this group of equitable remedies reflects the legal principle that under certain circumstances, one may not justly retain the voluntarily transferred property of another. Because restitution’s goal is to “contain[] and remedy[] a party’s opportunistic behavior,” it imposes obligations based on principles of contribution and desert, rather than consent.¹³¹ Courts’ preferences for restitution-based recovery thus demonstrate the limits of consent-based approaches to cohabitant obligations.

In the meantime, the relative success of restitution-based theories is just that: relative. Scholars have critiqued relief in restitution as “hard to obtain” and “pitifully small,”¹³² in part because the doctrine’s structure produces obligations that are only

127. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976); cf. 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2017); RESTATEMENT (SECOND) OF CONTRACTS § 4 & cmt. A (AM. L. INST. 2018).

128. *Matsumura*, *supra* note 44, at 1020 (“Courts seldom recognize implied contracts because they hold litigants to stringent standards . . .”).

129. *Bix*, *supra* note 98, at 167 (“[O]n the whole, plaintiffs rarely succeed in obtaining significant recoveries.”). Sometimes, even formal contracts do not yield obligations. See *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).

130. HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 166–67 (2004) (noting that “the various restitutionary hearings” supply “the main source of” cohabitant recovery).

131. *Stolzenberg*, *supra* note 27, at 2029; see also Henry E. Smith, *Property, Equity, and the Rule of Law*, in *PRIVATE LAW AND THE RULE OF LAW* 224, 225 (Lisa Austin & Dennis Klimchuck eds., 2015) (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”); cf. *Developments – Restitution at Home*, HARV. L. REV. 2124, 2135 (2020) (describing unjust enrichment as “an alternative to (not a replacement for) contract law”).

132. *BOWMAN*, *supra* note 51, at 42; see also Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 43 (2017) (arguing that awards “generally” amount to “much less than half of the assets accumulated during the relationship”); *id.* at 41–42, 44–45 (describing cases and noting unequal distributions of property accumulated during cohabitation).

minimally “family-like.”¹³³ Consider Section 28 of the *Restatement (Third) of Restitution and Unjust Enrichment*, which permits recovery between cohabitants 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.¹³⁴

Although Section 28 provides some recovery for those cohabitants who “formerly lived together in a relationship resembling marriage,”¹³⁵ awards arising under it cannot be truly described as family-based obligations. For the unwinding permitted under Section 28 is an attempted return to the status quo ante, before the parties became intimately and economically intertwined. Not only does this orientation expressively denigrate unmarried couples by proceeding as though their relationships never happened, but it also fails to account practically for the ways in which joining one’s life with another’s can leave one in a fundamentally different position when the shared life ends.¹³⁶ Restitution is backward-looking, and thus doctrinally incapable of protecting the weaker partner when a relationship of financial interdependence dissolves—an important family-law goal in the context of spouses.¹³⁷

Despite the wide variety of approaches to cohabitant property disputes, most theories of recovery turn on consent to obligation. But requiring consent makes it difficult to impose obligations between intimate partners in the absence of legal formalities like

133. I intend to explore further what makes an obligation “family-like” in future work.

134. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28(1) (AM. L. INST. 2011) (emphasis added).

135. *Id.* For a critique of this requirement, see *Developments—Restitution at Home*, *supra* note 131.

136. *Cf.* Stolzenberg, *supra* note 95, at 677.

137. See, e.g., Martha A. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 17–18 (1998) (noting the problem of “homemakers who become indigent, or nearly so, upon divorce, despite their years of helping to provide a significantly higher quality of life for their families than they are able to sustain post-divorce,” as well as “extensive scholarly dialogue” about how to solve it).

ceremonial marriage or written contracting — even in cases in which such obligations might seem justified.¹³⁸ The relative success rate of claims in restitution, the sole non-consent-based theory of recovery, further underscores just how limited consent-based obligation can be. Though not all economic disparities attendant to cohabitant relationships are unjustified, family law's focus on consent constrains its ability to adequately protect vulnerable partners when long-term, committed nonmarital relationships end.

3. Parents

Consent is also used to legitimate parents' support obligations to children. Through the marital presumption, consent to marriage justifies parental obligations to the children born of the union. And through the state's punitive child support and welfare apparatuses, consent to sex and to maternity, respectively, are used to legitimate men's and women's financial obligations to any resulting children. Not only is the idea of consent stretched far to justify the heavy burdens imposed on poor parents, but this individualistic approach to providing for children's needs also exacerbates widespread social and economic inequality.

Just as it did in the time of Blackstone, consent to marriage continues to serve as an important avenue for establishing the parental obligation to support children.¹³⁹ The marital presumption, which is a "core component of the law governing parentage in the United States," works to establish parentage in the spouse of a woman who gives birth.¹⁴⁰ Although conceptually related to biology, the presumption is most strongly connected to marital status. Under English common law, the presumption was so strong that it could be overcome only by a showing of the husband's "non-access to his wife during the time of conception,

138. See, e.g., Stolzenberg, *supra* note 95, at 637 (describing *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 899 (Ct. App. 1993), in which "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").

139. As a historical matter, men were obliged to provide financial support for only marital children; consent to marriage was thus necessary to create the parent-child relationship and obligations between the spouses and the issue of their union. See *supra* note 73-74 and accompanying text.

140. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 243 (2019).

the husband's sterility or impotence, or adultery on the part of the wife."¹⁴¹ Even today, in the era of DNA testing, the marital presumption sometimes trumps a husband's showing that he is not the biological father – for example, in cases in which courts refuse to allow divorcing fathers to disestablish paternity of marital, but non-biological, children.¹⁴² And in *Pavan v. Smith*, the Supreme Court ruled that states must apply their marital presumptions to establish parentage of children born to married same-sex parents.¹⁴³

While often sufficient, consent to marriage is no longer necessary to ground parental support obligations toward children. Instead, child support and welfare law obligate unmarried parents to support their children on the basis of consent to sex, for fathers, and consent to maternity, for mothers. This arrangement “has the . . . benefit of insulating the state from the possibility of bearing the financial burden for a child.”¹⁴⁴

Consider, for example, the federal-state child support collection apparatus, which has developed to “impose[] child support obligations on divorced and never-married fathers.”¹⁴⁵ Federal law requires states to “operate . . . child support enforcement program[s] that conform[] with” federal requirements in order to receive federal welfare funds.¹⁴⁶ Among these requirements is the directive that states “establish a comprehensive system to establish paternity, . . . help families obtain support orders,” and

141. *Id.*

142. Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 623 (2009) (“If the presumption is challenged by the offer of genetic evidence, a number of states have held that a court can refuse to admit that evidence if contrary to the child’s best interests. Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped to deny parentage because of the detrimental reliance of the other party or, sometimes, the child.”).

143. No. 16-992, 582 U.S. ___, slip op. at 4 (June 26, 2017) (rejecting Arkansas’ argument that “a birth certificate is simply a device for recording biological parentage”).

144. *Wallis v. Smith*, 22 P.3d 682, 685 (N.M. Ct. App. 2001).

145. *Dinner*, *supra* note 27, at 86.

146. *Blessing v. Freestone*, 520 U.S. 329, 333 (1997); see generally Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305; Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343; Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618; Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645.

“collect overdue support payments.”¹⁴⁷ Federal law encourages men to acknowledge paternity voluntarily,¹⁴⁸ but it also mandates that states adopt a “presumption of paternity upon genetic testing results indicating a threshold probability” that a man “is the father of the child.”¹⁴⁹

Under this system, consent to sex grounds biological fathers’ obligation to financially support any resulting child. Because sex is an inherently consequential activity, carrying the ineliminable risk of conception, those who engage in it are deemed responsible for its outcome.¹⁵⁰ Indeed, a New Mexico court described that state’s child support guidelines as “impos[ing] a form of strict liability for child support.”¹⁵¹ Paternity law’s “strict-liability logic” is further evident in cases in which “paternity attaches even when a man’s sexual conduct was in some sense involuntary”¹⁵²—for example, when male victims of statutory rape or sexual assault are found liable for child support.¹⁵³ Although the premise that sex was consensual is questionable in these cases, courts plow ahead nonetheless. A Wisconsin appeals court declared in a statutory rape case 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.”¹⁵⁴ And despite evidence that the man was unconscious during the act that led to conception, an Alabama appeals court insisted that “any wrongful conduct on the part of the mother should not alter the father’s duty to provide support for

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

148. *Id.* § 666(a)(5)(C)-(D).

149. *Id.* § 666(a)(5)(G).

150. Stolzenberg, *supra* note 27, at 2008.

151. *Wallis v. Smith*, 22 P.3d 682, 684 (N.M. Ct. App. 2001).

152. Stolzenberg, *supra* note 27, at 2010; see also Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 8–9 (2004) (“[M]uch [of] paternity law seems to be based on a strict liability theory for genetic contribution.”).

153. *In re Paternity of K.B.*, 104 P.3d 1132, 1133–35 (Okla. Civ. App. 2004) (surveying cases from Kansas, Colorado, Wisconsin, Illinois, California, Arkansas, Minnesota, and New York); *Dep’t of Revenue ex rel. Bennett v. Miller*, 688 So. 2d 1024, 1026 (Fla. Dist. Ct. App. 1997); see also *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996).

154. *In re Paternity of J.L.H.*, 441 N.W.2d 273, 277 (Wis. App. 1989).

the child.”¹⁵⁵ As these cases show, the fact of biological fatherhood makes a man financially liable for his genetic children, regardless of his mindset toward the possibility of paternity.

Consent also grounds mothers’ financial duties to their children, but in the form of consent to maternity. Technological advances in birth control and legal protection for access to it and abortion¹⁵⁶ have attenuated the links between sex and pregnancy and pregnancy and birth, leading much of society to regard reproduction as optional.¹⁵⁷

Family caps on welfare grants epitomize and institutionalize this attitude.¹⁵⁸ Such caps penalize childbearing in families already receiving public assistance, either by limiting additional assistance for the newborn or awarding flat-rate cash grants regardless of family size.¹⁵⁹ Enacted to further the policy goal of “lowering the number of children born into families receiving public assistance,” family caps reflect the assumption “that welfare recipients weighed the costs of having a child against the benefits of public assistance

155. *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996).

156. Legal protection for abortion access is, of course, now greatly decreased after the Supreme Court’s recent rescission of the constitutional right articulated in *Roe* and reformulated in *Casey*. *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, 597 U.S. ____ (2022) (holding that “the Constitution does not confer” a “right to obtain an abortion”). Whether *Dobbs* will lead to a societal rethinking of the connections between sex, motherhood, and financial responsibility for children remains to be seen and is a question far beyond the scope of this article. See, e.g., Emily Badger, Margot Sanger-Katz & Claire Cain Miller, *States With Abortion Bans Are Among Least Supportive for Mothers and Children*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html>; Elizabeth Williamson, *Who Will Help Care for Texas’ Post-Roe Babies?*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/us/politics/texas-abortion-roe-wade.html>.

157. West, *supra* note 15, at 12 (describing perceived “consensuality of the pregnancies that proceed maternity, given the reproductive rights created by *Roe* and *Griswold*”); Katherine Hanson, *The Opportunity Cost of Fertility Under the Rhetoric of Choice 2* (Nov. 15, 2018) (unpublished manuscript) (<https://ssrn.com/abstract=4043851>) (“American . . . rhetoric . . . suggests that if fertility is a choice, so are motherhood and subsequent consequences of motherhood”); see also *infra* notes 238–242 and accompanying text.

158. *Dandridge v. Williams*, 397 U.S. 471 (1970) (permitting states to cap welfare awards under Aid to Families with Dependent Children, regardless of family size); CTR. ON REPROD. RTS. & JUST. AT BERKELEY L., BRINGING FAMILIES OUT OF ‘CAP’TIVITY: THE PATH TOWARD ABOLISHING WELFARE FAMILY CAPS (Aug. 2016) (hereinafter OUT OF ‘CAP’TIVITY); Teresa Wiltz, *Family Welfare Caps Lost Favor in More States*, PEW CHARITABLE TRUSTS (May 3, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states> (noting that “Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Mississippi, North Carolina, North Dakota, South Carolina, Tennessee and Virginia still have family caps in place”).

159. OUT OF ‘CAP’TIVITY, *supra* note 158, at 1.

when deciding whether or not to get pregnant or carry a pregnancy to term.”¹⁶⁰ Not only does this policy erroneously assume that human beings act entirely rationally in “matters so fundamentally affecting a person as the decision whether to bear or beget a child,”¹⁶¹ but it can also increase economic suffering for poor families whose membership exceeds their state’s cap.

Parental support obligations, like all family financial obligations, are couched in terms of consent. Indeed, parental obligations demonstrate most clearly the pitfalls of depending on consent to justify family obligations. In this context, not only has the law moved furthest from its historical interpretation of what obligations consent requires in this context,¹⁶² but it also stretches the farthest to find consent.¹⁶³ The fact that we justify child support liability in terms of parental consent, rather than admitting that these are duties the collective chooses to impose in response to perceived social exigencies, shows just how strongly consent logic is entrenched in family law. Today, parental voluntarism in the sphere of reproduction—whether engaging in potentially procreative sex, carrying a pregnancy to term, or both—is used to focus the duty to support children squarely on individual parents, making meeting children’s needs a predominantly private responsibility. In this way, family law legitimates a system of privatized dependency and deflects questions of distributive justice. With childbearing and -rearing cast as a personal choice, rather than a social good, the collective is relieved of much responsibility toward its youngest citizens and their caregivers.¹⁶⁴

* * *

160. *Id.* at 1, 3; Wiltz, *supra* note 158 (“The idea was to discourage out-of-wedlock births and encourage self-sufficiency.”).

161. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

162. *See supra* notes 73–74, 139 and accompanying text (discussing evolution from bastardy law, which insulated nonmarital parents from child support obligations, to modern child support law, which imposes strict liability for sex, and “consensual maternity”).

163. *See supra* notes 144–161 and accompanying text (discussing ideas of consent to sex, pregnancy, and maternity).

164. *Cf. West, supra* note 15, at 18 (“[T]he move . . . to consent in reproductive life legitimates a regime in which impoverishment is not just a predictable but also a fully acceptable consequence of the individual’s choice to expend part of her commodifiable life . . . immersed in the work of giving care to dependents.”).

As this Part has shown, consent-based legitimation is as central to twenty-first-century family law as it was to the nineteenth-century law of domestic relations. Moreover, “consent” has naturalized unjust family relations under each system. The concept’s endurance over time—its utility to governance regimes based not only on liberal principles, but also on social subordination—is proof of its remarkable plasticity. For consent is what W.B. Gallie has described as an “essentially contested concept[]”—a concept “the proper use of which inevitably involves endless disputes about [its] proper use[] on the part of [its] users.”¹⁶⁵ Thus the first step toward challenging consent’s centrality in family law is pinning down what exactly legislatures, courts, and scholars are doing when they appeal to “consent.”

II. CONSENT’S DIMENSIONS AND DISTRACTIONS

Consent’s malleability means that the concept requires rigorous definition. Yet while “consent” is ubiquitously invoked to justify family obligations, it is rarely investigated, let alone critically analyzed.¹⁶⁶ Without careful attention to the concept’s functions and forms, debates about consent to family obligation tend to obfuscate more than they illuminate. To enable those referencing consent to talk to, rather than past, one another, this Part sets out a taxonomy of consent as the concept is employed in family law.

Before introducing my taxonomy, I note that many scholars have observed that consent’s contours change depending on its context.¹⁶⁷ Multiple scholars have also offered schematic analyses of various forms of consent, often focused on a particular body of doctrine or human activity.¹⁶⁸ These accounts tend to focus on the act of consent, seeking to define what factors must be present or

165. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956).

166. Matsumura, *supra* note 44, at 1022 (“Consent’s role in the regulation of intimate relationships has received minimal attention.”).

167. See, e.g., KIM, *supra* note 34, at 8 (noting “consent’s contextual, incremental and variable nature”); Bell, *supra* note 72 (developing a theory of “graduated consent”); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 69 (2012) (describing “a spectrum of consent, from informed consent to increasingly problematic consent”).

168. See, e.g., KIM, *supra* note 34 (contract law); Bell, *supra* note 72 (contract and tort law); Leonhard, *supra* note 167 (contract law); Hurd, *supra* note 36 (sexual activity); Matsumura, *supra* note 44 (family law).

absent to justify a legal conclusion of consent.¹⁶⁹ In contrast, I analyze consent to identify the roles that it plays in justifying legal obligation.¹⁷⁰ As a result, my account may be at times compatible with, and at other times orthogonal to, others' accounts of consent.

I begin with three questions of political theory, the answer to each of which may be disputed but must be supplied in order to justify a state-imposed obligation. The first and most fundamental question regards the obligation's source: What principle or principles potentially justifies the exercise of state power against an individual? The second question asks what causes the obligation to attach, and the third question concerns the obligation's content or scope. When obligations are presumptively based on consent, as they are in family law,¹⁷¹ these questions can be rephrased to reveal three different dimensions of the concept: (1) the *realm* of consent, or which obligations can only be justified by consent to be legitimate; (2) the *manifestations* of consent, or what an individual must do in order for the law to find consent; and (3) the *consequences* of consent, that is, what obligation follows from an appropriate manifestation of consent. Each of these dimensions admits of a spectrum of approaches, as I illustrate below.¹⁷²

Breaking consent down in this way makes clear that, by assuming that family financial obligations must be justified by consent, family law holds the *realm* of consent to be coterminous with family financial obligations. Thus, family law offers a circumscribed response to the first and fundamental question which principles justify the exercise of state power—a choice that not all bodies of law make.¹⁷³ And by artificially limiting its normative sources of obligation, family law straightjackets its ability to engage in moral and legal reasoning. With consent the only justificatory principle, unavoidable normative disagreements about the purposes and limits of family obligations are reduced to narrow, often technical debates about consent's *manifestations*

169. See, e.g., KIM, *supra* note 34, at 9; Matsumura, *supra* note 44, at 1013, 1021 (describing consent as a “context-dependent” “conclusion about the nexus between will, conduct, and consequence”).

170. Cf. Leonhard, *supra* note 167, at 58 n.3 (noting the distinction between “consent as an act” and “consent as the central concept of a consent theory”).

171. See *supra* Part I. Again, while this taxonomy may shed light on consent's meaning in multiple fields, my focus here is on illuminating its functions in family law.

172. See *infra* Section II.A.

173. See *infra* notes 174–177 and accompanying text.

and *consequences*. This diminished mode of discourse contributes to a body of legal rules that appears doctrinally incoherent, is insufficiently sensitive to social realities, and fails to acknowledge the collective's interests in family life. The latter two flaws are significant in any doctrinal area, but they are especially serious failings in family law, which governs conduct that is both incredibly intimate and broadly consequential.

A. Three Dimensions of Consent

1. Justifying State Power: The Realm of Consent

The first and fundamental inquiry when considering the legitimacy of a legal obligation is to determine its ground: What principle can justify this particular exercise of state power against that particular individual? Not all bodies of law employ consent to justify state action; rather, a range of other principles may be brought to bear. Depending on the context, these principles may include (among others) values such as preventing harm,¹⁷⁴ countering subordination,¹⁷⁵ promoting distributive justice,¹⁷⁶ and protecting vulnerable parties in relations of trust.¹⁷⁷ Thus, what I

174. Both tort law and criminal law have, as one purpose, preventing harm. Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423, 1425 (2021); H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY (1968); Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFFS. 327, 338 (1985) (describing criminal punishment as a “a practice of self-protective threats” designed to prevent “violations of our moral rights”); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955) (describing “the utilitarian view” of punishment).

175. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976) (arguing that the lay may not “aggravate” or “perpetuate” “the subordinate position of a specially disadvantaged group”); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (describing the “antisubordination” or “equal citizenship principle” as demanding “reform” of “institutions and practices that enforce the secondary social status of historically oppressed groups”).

176. See, e.g., David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1, 2 (2014) (noting existence of “a wide literature analyzing how we might reform income taxes so as to more efficiently raise revenues and ‘promote distributional equity’ while causing less economic harm”); *id.* at 2 n.6 (defining “promoting distributional equity” as “refer[ring] to government attempts to advance goals related to distributive justice, . . . especially . . . attempts at combatting income or wealth inequities or related forms of inequity or inequality, in accordance with the government’s social welfare function”).

177. See, e.g., D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1397, 1400 (2019) (“[C]ourts regularly impose fiduciary obligations ad hoc in relationships where one person trusts another and becomes vulnerable to harm as a result.”).

call the “realm of consent” – the totality of the legal obligations that, within a given body of law, must be based on consent—varies between different areas of law.

For an example of this variation, contrast contract law, in which most obligations are justified by consent, with tort law, in which relatively few obligations are justified by consent.¹⁷⁸ Consent is the major source of contractual legitimacy because the goal of contract law is to further social cooperation by enforcing parties’ self-determined agreements.¹⁷⁹ Some theories of contract law turn specifically on consent, while others are even more protective of promisor prerogative.¹⁸⁰ Contract doctrine, too, reflects the prime importance of consent. Not only does the “meeting of the minds” requirement seek to ensure that individuals assent to their bargains,¹⁸¹ but even so-called “objective” contract law is filtered through the lens of consent. When courts interpret ambiguous contract language or supply missing background terms, they try to either divine what the particular contracting parties intended or decide what most parties would have reasonably intended. In the former case, courts are determining what the parties consented to as a factual matter; in the latter case, courts impute the parties’ hypothetical consent to majoritarian default rules.

While the realm of consent encompasses the vast majority of contract law, whose purpose is to enable individuals to customize

178. Compare Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994) (“Consent is the master concept that defines the law of contracts in the United States.”), with Bell, *supra* note 72, at 36 (“Only about six percent of the sections in the *Restatement (Second) of Torts* grapple with defining the scope or effect of consent.”), and *id.* at 37 (noting that consent’s “vital role in tort law” is as a *defense* to, rather than a source of, legal obligation).

179. See, e.g., Leonhard, *supra* note 167, at 58–59; cf. Thomas W. Merrill, *Private and Public Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW, *supra* note 12, at 575, 591 (describing “the critical role private law plays in facilitating private ordering”). But see Brian Bix, *Consent and Contract Law*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, *supra* note 79, at 222–34 (arguing that many contract doctrines are driven by concerns other than consent).

180. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) (arguing that “[c]onsent is the moral component that distinguishes valid from invalid transfers of alienable rights”); *id.* at 272 (describing will theories of contract, which “maintain that commitments are enforceable because the promisor has ‘willed’ or chosen to be bound by his commitment”).

181. Cf. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010 (1985) (discussing the idea that contracts are controlled by the parties).

their obligations,¹⁸² tort law lies toward the opposite end of the spectrum. Tort has been described as the law of unbargained-for harms,¹⁸³ intended to provide remedies for damages caused by the unreasonable or dangerous conduct of others.¹⁸⁴ Thus, society sets tort standards of care and measures actors' conduct according to explicitly objective standards. Consent does play a role in tort, but rather than justifying obligations, it circumscribes them. In battery, for example, consent removes the duty not to touch another's person; in a waiver of liability, consent to risk can excuse some violations of the set standard of care.¹⁸⁵ The realm of consent is relatively constrained in tort law because the doctrine's primary focus is shifting the costs of accidents and deterring harmful activities.¹⁸⁶ These goals address the potential negative effects of an individual's actions, and therefore have more to do with the harm principle and distributive justice than consent.

Family law lies toward the contract end of the spectrum. As explained above, by assuming that obligations should be justified by consent, family law holds the realm of consent to be coterminous with all family-based financial liability.¹⁸⁷ This failure to consider obligations based on other principles forces important normative debates into narrow, more technical discussions of consent's other two dimensions, described below.

2. *Incurring Liability: The Manifestations of Consent*

Any doctrinal field must determine what actions are sufficient to expose an individual to legal consequences. I use the term "manifestations of consent" to refer to what an individual must do

182. Cf. Daniel Markovits & Emad H. Atiq, *Philosophy of Contract Law*, STANFORD ENCYC. OF PHIL. (Nov. 23, 2021), <https://plato.stanford.edu/entries/contract-law/> (describing conception of "[c]ontract law . . . as a body of rules empowering individuals to shape their own rights and responsibilities").

183. Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 67 (1985) ("Restitution deals with nonbargained benefits; tort law with nonbargained harms; contract law with bargained benefits and harms.").

184. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 4 (2021) (describing torts as "legally recognized, injury-inclusive, and relational wrongs"); *id.* at 265 (describing "tort law" as "empower[ing] private persons to bring complaints and . . . to obtain remedies").

185. See, e.g., Bell, *supra* note 72, at 36-37; Schuck, *supra* note 178, at 910.

186. GOLDBERG & ZIPURSKY, *supra* note 184, at 213-14 (glossing and rejecting Prosser's view of torts law as "deliver[ing]" the "social goods" of "deterrence and compensation").

187. See *supra* note 173 and accompanying text.

in order for the law to find that he or she consented to a particular obligation. Depending upon context, the law may require extensive and formalized external signs of individual assent before finding liability, or a court may infer consent to obligation from a pattern of dealing. For a concrete example, think of the difference between parties executing a written contract before a notary, and a court implying a contract in fact from their course of conduct.¹⁸⁸ In the case of hypothetical consent, no manifestations of consent may be required at all.¹⁸⁹

As this example shows, in this second dimension, the concept of consent is the gateway to legal obligation, and the difference between its presence and absence is of great consequence. The question how to demarcate the threshold of consent thus becomes extremely important.

Because family law operates almost entirely within the realm of consent, many normative debates and policy disputes get channeled into disagreements about what kind of manifestations of consent are necessary to trigger family obligation.¹⁹⁰ More formal manifestations tend to be required where a court or scholar perceives family obligation to be inappropriate, often because of doubts that an individual intended to obligate himself to the extent alleged, as in the case of cohabitant property disputes.¹⁹¹ Less formal or more attenuated manifestations are often accepted where family-based obligations seem uncontroversial, as in the case of child support liability.¹⁹²

3. Defining an Obligation's Scope: The Consequences of Consent

In addition to determining whether liability should attach, the law must also define the consequences of that liability. Again, the approaches that the law could take lie on a spectrum: consent could

188. Cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) (noting the evidentiary function of legal formalities).

189. Cf. Alan Meiser, *The Exceptions to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413, 433 (noting exceptions to informed consent requirement in emergencies and for incompetent patients); *id.* at 434 ("Since a reasonable person would consent to treatment in an emergency if he were able to do so, it is presumed that any particular patient would consent under the same circumstances.").

190. See *infra* Section II.B.

191. See *infra* Section II.B.2.

192. See *infra* Section II.B.3.

give rise to a limited number of narrow, self-defined obligations, or it could trigger an expansive array of state-defined obligations.¹⁹³ Contrast, for example, the minimal obligations set forth in a standard contract for sale of a widget with the extensive property sharing and spousal support obligations of a state's default divorce distribution regime.¹⁹⁴

Moreover, the second and third dimensions of consent can, but need not, operate independently of one another. Just because an obligation is the product of consent does not mean that the precise content of the obligation must also be consented to. Recall how consent to marriage justifies subjecting spouses to marital status law, then contrast that approach with permitting spouses to define, even waive, their marital property rights through contract.¹⁹⁵ As this example shows, the content of consent-based obligations may be set by the parties, or fixed by society, or derived from both sources.¹⁹⁶ Indeed, the extent to which spouses may agree to deviate from a set of state-defined obligations is a key normative question in family law, as the debate over marital contracting shows.¹⁹⁷

* * *

By assuming that all family obligations must be justified by consent, family law leaves itself only the concept's second and third dimensions, its required manifestations and appropriate consequences, to invoke in legitimating regulation. As a result,

193. Cf. Neil C. Manson, *The Scope of Consent*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT, *supra* note 79, at 65, 67 (noting that consent "can create an exception to one kind of right, without thereby creating an exception to other rights," and that "each kind of right applies to a range of distinct entities, objects, regions, and so on").

194. Outside the realm of consent, the scope of the obligation may be measured by something else entirely – the extent of a plaintiff's injury, for example, in the case of tort law. See, e.g., Steve P. Calandrillo & Dustin E. Bueler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 374, 377 (2013) ("[A] defendant at fault is liable for the full extent of [a] plaintiff's injuries, even if the plaintiff possesses preexisting conditions that dramatically worsen the harm.").

195. See *supra* Section I.B.1.

196. Contract law, for example, both supplies default terms to govern matters on which agreements are silent and occasionally overrides parties' "manifested assent" "for reasons of principle or policy." Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 825, 826 (1992); cf. Eskridge, *supra* note 15, at 1888–89 (describing family law as "a mixture of mandatory rules and default rules," supplemented by "legal steps or requirements that the parties must follow or meet to override a legal default") (emphasis omitted).

197. See *infra* Section II.B.1.

courts and scholars examining family obligations are constrained to consider important normative issues in roundabout ways. But because family law is a domain in which normative questions are especially ubiquitous and often outcome-determinative, this approach only distorts, rather than avoids, debates about the field's underlying principles and values.

B. Consent Conflicts as Normative Proxy Battles

This section offers three examples of how family law's focus on consent-based legitimation funnels important normative inquiries into narrow discussions of consent's manifestations and consequences. In the context of premarital agreements, debates about appropriate levels of contracting formalities and the necessity of ex post judicial review subsume the questions what spouses owe one another and why.¹⁹⁸ In cohabitant property disputes, disagreements about what kinds of conduct should give rise to liability reflect dissent about whether unmarried partners owe one another anything at all.¹⁹⁹ And in the context of children and caregivers, consent-based reasoning is used to deflect any suggestion that the collective should bear some responsibility for the costs of social reproduction.²⁰⁰

Family law's failure to engage directly with these fundamental questions has real practical effects. Because family law cannot avoid normative questions, barely articulated underlying moral and policy commitments cause the required manifestations of consent to vary by doctrinal context. This makes family law look incoherent, which in turn undermines consent's justificatory power. These legitimacy gaps are widened by family law's inability to react with sufficient sensitivity to the realities of modern family life. Applied to today's expanding number of increasingly complex family forms, consent-based approaches to financial obligations produce both under- and overinclusive doctrine, leaving some families without legal protection while overregulating others. Finally, consent-based legitimation's focus on individual voluntarism makes it difficult for family law to take account directly of the broader community's interests in family life – a serious problem

198. See *infra* Section II.B.1.

199. See *infra* Section II.B.2.

200. See *infra* Section II.B.3.

for a field in which communal interests are particularly prevalent and pressing.

1. Premarital Agreements

In the context of spousal obligations, the costs of consent-based legitimation are most visible in the decades-long debate about the permissibility of premarital agreements. Such agreements lay out, before the parties marry, their respective financial rights and responsibilities when the union ends in either death or divorce.²⁰¹ And although not always the case, these agreements' terms may specify economic outcomes that deviate quite widely from the likely results under a state's background divorce or inheritance regime. The legal question whether the state should enforce such agreements necessarily implicates the normative question what spouses owe one another when their marriage ends. Yet family law's focus on consent means that disagreements about the nature and substance of marital obligations are funneled into narrower debates about the proper *manifestations* of consent to, and the appropriate *consequences* of executing, a premarital agreement.

States will generally enforce premarital agreements as long as the spouses-to-be manifested appropriate consent to the contract.²⁰² The requirements for manifesting consent vary according to a state's comfort with allowing parties to set their own marital obligations.²⁰³ Jurisdictions generally adopt one of three positions: the pure contract approach, the protective formalities approach, or the "second look" approach.²⁰⁴ The pure contract approach, whose exemplar is in the Pennsylvania case of *Simeone v. Simeone*, treats premarital agreements like commercial contracts, rejecting close scrutiny of an agreement's substance as "a paternalistic and

201. Cf. Rosenbury, *supra* note 106, at 1230 ("[T]here are two ways to end a marriage: divorce or death.").

202. Some states also review premarital agreements for fairness at the time of divorce. Bix, *supra* note 98, at 164 (noting that almost every jurisdiction "subject[s]" premarital agreements "to procedural and substantive restrictions beyond those imposed on commercial agreements") (citing LINDA J. RAVDIN, *PREMARITAL AGREEMENTS: DRAFTING AND NEGOTIATION* (2d ed. 2011)); see *infra* note 208 and accompanying text.

203. *Id.* (noting that the "level and kinds of scrutiny" applied "vary significantly from state to state").

204. *Id.*; UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT § 9(f) cmt. (2012) [hereinafter UPMAA] (describing as a "second look" the option to "consider[] the fairness of enforcing an agreement relative to the time of enforcement").

unwarranted interference with the parties' freedom to enter contracts."²⁰⁵ The protective formalities approach, embodied in Section 9 of the Uniform Premarital and Marital Agreement Act (UPMAA),²⁰⁶ attempts a compromise between freedom of contract and protecting vulnerable parties by requiring various contract formalities to ensure that spouses' consent to their agreement is voluntary and informed.²⁰⁷ Under the least deferential approach, as set forth in the UPMAA's optional "second look" provision, courts may analyze an agreement for excessive deviation from the state's divorce regime, stepping in to invalidate economic terms that depart too far from the state's definition of marital obligations.²⁰⁸ Only this last approach insists on the community's prerogative to defend a mandatory conception of the marital relationship, rather than deferring to the spouses' determination of their respective rights and responsibilities. Yet relatively few states have adopted this approach, perhaps because family law's focus on consent puts a thumb on the scale in favor of the individual's prerogative and against the interests of the collective. Thus, in the majority of states that follow the pure contract or protective formalities approaches, the consequences of consenting to a premarital contract are set forth in the agreement itself.

Although scholars disagree about spousal contracts in more openly normative terms than states do, these discussions, too, are constrained by consent-based reasoning. Proponents of premarital contracting enthusiastically deploy consent-based legitimation.

205. *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990). Although its decision left intact a contract provision severely limiting the wife's entitlement to alimony *pendente lite*, the court reasoned that not only were the spouses in the best position to assess the reasonableness of their agreement, but also that they "might not have . . . marri[ed] . . . if they did not expect their agreement to be strictly enforced." *Id.*

206. Although the 2012 UPMAA has been enacted only in Colorado and North Dakota, its predecessor, the 1983 Uniform Premarital Agreement Act (UPAA), has been adopted in twenty-seven states. *Premarital and Marital Agreements Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2e456584-938e-4008-ba0c-bb6a1a544400> (last visited Oct. 26, 2022); *Uniform Premarital Agreement Act*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=77680803-bd1c-4f01-a03b-64db132a35fa> (last visited Oct. 26, 2022).

207. See UPMAA § 9(e) cmt. (2012) (noting the Act's "attempt[]" to "maintain[] an appropriate balance between . . . protection and freedom of contract"); *id.* § 9(a)(1), (2), (4); UPMAA Prefatory Note (2012) ("The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other.").

208. UPMAA § 9(f) & cmt. (2012).

They argue that private ordering increases spouses' autonomy by allowing them to arrange their financial affairs as they see fit.²⁰⁹ Under this view, consent to contract augments spouses' wellbeing by permitting needed individuation in a world in which families differ greatly one from another.²¹⁰ Premarital contracts also offer an alternative commitment device to marriage, one not as necessarily steeped in gender, class, and racial hierarchy.²¹¹

In responding to these claims, contract skeptics struggle to escape the consent paradigm. Some scholars question whether would-be spouses can meaningfully consent to waive important rights under conditions of socioeconomic inequality, which can create imbalances of bargaining power both before and during marriage.²¹² Other critics point out that permitting spouses to define their own obligations risks leaving economically vulnerable spouses unprotected: Marital norms encouraging cooperation can combine with background conditions of gender inequality to yield significant differences in spouses' respective financial positions over the course of a marriage.²¹³ Still other contract skeptics insist that accepting the benefits of marriage should also require accepting its burdens.²¹⁴ Just as the status of marriage confers myriad state benefits, it also carries state-imposed responsibilities, including foremost the duty to support one's family members.²¹⁵ Under this view, consent to enter the institution of marriage includes consent to the marital property and spousal support

209. Singer, *supra* note 58, at 1538 ("Proponents of private ordering have generally assumed . . . that private ordering enhances choice and that enhancing choice promotes autonomy.").

210. Bix, *supra* note 98; Singer, *supra* note 58, at 1533, 1534-35.

211. Bix, *supra* note 98; Singer, *supra* note 58, at 1532-33.

212. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Singer, *supra* note 58, at 1538 (noting "social and economic constraints on choice").

213. See Stolzenberg, *supra* note 95, at 677; cf. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992) (analyzing impact of norms); Silbaugh, *supra* note 97, at 69-70 (arguing that courts' unwillingness to enforce contract provisions about custody or domestic services disadvantages wives).

214. See, e.g., Richard H. Chused, *Family (Proper)ty*, 1 GREEN BAG 2D 121, 129 (1998).

215. Cf. *United States v. Windsor*, 570 U.S. 744, 771 (2013) (noting "over 1,000 statutes and numerous federal regulations" relating to marriage, including "laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits"); *id.* at 773 (singling out the "expect[ation] that spouses will support each other" among the "duties and responsibilities that are an essential part of married life"); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955-56 (Mass. 2003) (listing "some of the . . . benefits conferred by the Legislature on those who enter into civil marriage").

regime, thereby precluding contracting out of financial responsibilities to one's spouse. Each of these arguments reflects an attempt to voice and defend the community's interest in spousal relations. But because the consent paradigm restricts how such arguments can be made, scholars are limited to attacking consent to contract and elevating consent to marriage in its place.²¹⁶

A consent-based approach to marital obligations casts these as the product of individual choice, in the process obscuring broader issues of social policy and justice. For to the extent that we allow spouses freedom to define their own marital obligations, we may not achieve important goals of family law, including providing for dependents' needs and protecting vulnerable parties in relations of trust. If states and scholars were able to look beyond consent, they could more freely debate the costs and benefits of enforcing premarital contracts – as well as the nature of twenty-first century marriage and the collective's ongoing interest in the institution.

2. Cohabitant Obligations

Family law's decades-long inability to develop a workable approach to cohabitants' property disputes further demonstrates the costs of consent-based legitimation. The normative question presented is what, if anything, unmarried cohabitants owe one another when their relationships end. In this context, scholarly debates focus again on the appropriate *manifestations* of consent – what kinds of conduct should give rise to cohabitant liability – and whether consent's *consequences* should reflect its particular manifestations. In these debates, family law's focus on consent not only yields proposals for underinclusive, overinclusive, or extremely complex doctrinal reform, but also gives preference to individual autonomy over other normative concerns.

Scholars debating the appropriate scope of cohabitants' financial responsibilities toward one another take one of three general positions. The first group of scholars favors applying general private law doctrines to cohabitant disputes. This approach approximates the status quo in most states and is reflected in the Uniform Law Commission's newly approved Cohabitants'

216. Cf. David E. Pozen & Adam Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 732 n.7 (2021) (describing how “excluded modes of argument” nevertheless exert their own pressure).

Economic Remedies Act, which aims “to remove bars to claims which arise within the framework of a cohabiting relationship.”²¹⁷ These scholars, who include Naomi Cahn and June Carbone, adopt a relatively stringent definition of what manifestations of consent may trigger cohabitant obligations, a position that they defend in terms of promoting unmarried partners’ autonomy.²¹⁸ Under this view, which I refer to as the private-law approach, contract—usually attended by strict formalities like a writing—and restitution should continue to provide the main forms of recovery.

A second group of scholars advocates for greater redistribution between cohabitants, a position that they, too, ground in autonomy and defend in terms of consent. Courtney Joslin, for example, has argued that the law should look to cohabitants’ decision to live together as a family, rather than crediting only formal markers of assent to family responsibility.²¹⁹ In Joslin’s view, forming a family indicates consent to be a family, and this consent is sufficient to ground family-based financial obligations. Albertina Antognini has also criticized contract law for failing to recognize informal bargains between cohabitants, “thus supplant[ing], rather than support[ing], the decisionmaking and autonomy of the parties.”²²⁰ I call this set of views the consent-to-family approach.

Whereas the first and second approaches to cohabitant obligations focus solely on how consent should be manifested, the third approach is more dynamic, adjusting the consequences of consent according to its manifestations. The proponent of this approach, Kaiponanea Matsumura, argues that family law should

217. See *supra* Section I.B.2; UNIF. COHABITANTS ECON. REMEDIES ACT § 3 cmt (UNIF. LAW COMM’N 2021) [hereinafter UCERA].

218. June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 102 (2016) (arguing that courts should “treat [cohabitants] as two independent units who have not assumed responsibility for each other after a break-up”); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 884–97 (2005) (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”).

219. Joslin, *supra* note 120, at 915 (arguing that the law should recognize family formation choices beyond the “very limited set of formal decision points” represented by ceremonial marriage and formal contracting).

220. Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 144–45 (2021).

reconsider both how it “identif[ies] the act of consent” and “define[s] the object of consent.”²²¹ Matsumura proposes that the content of partners’ obligations should depend (at least in part) on what a court learns from examining the manifestations through which those obligations were incurred.

Although these scholars advocate very different approaches for regulating informal families, each approach relies on consent to justify cohabitant obligations—and falls short as a result. Advocates of the first two approaches assume the consequences of consent to be marriage-like obligation, which means that consent’s manifestations must function as an on/off switch to potentially extensive liability.²²² Because such obligations are too broad in scope for many, if not most, unmarried partners,²²³ the private-law approach errs on the side of under-inclusion, leaving intimate partners who neither married nor executed formal contracts with restitution as their only recourse. The consent-to-family approach captures more couples, but risks exposing them to excessive obligation. Matsumura’s dynamic approach could allow family law to impose obligations more tailored in scope, but it has other drawbacks. First, Matsumura’s approach is complex; not only would adjudication under it entail increased administrative and privacy costs, at least as compared to the private-law approach, but outcomes would be less certain, potentially decreasing the likelihood that parties will settle their disputes instead of litigating them.²²⁴ It is also unclear whether the dynamic approach succeeds in preserving consent’s normative power to legitimate obligations. Matsumura defines consent as a “context-dependent” “conclusion about the nexus between subjective will, conduct,

221. Matsumura, *supra* note 44, at 1058.

222. See *supra* note 215–220; see also Stolzenberg, *supra* note 27, at 2026 (noting that cohabitants tend to request marriage-like recovery).

223. Because nonmarital relationships are generally more varied, and tend to be less committed and interdependent, than marital ones, marriage-like recovery seems a poor fit for at least some—if not most—cohabitant relationships. Brian J. Willoughby, Jason S. Carroll & Dean M. Busby, *The Different Effects of “Living Together”: Determining and Comparing Types of Cohabiting Couples*, 29 J. SOC. & PERS. RELATIONSHIPS 397, 400–01 (2011) (describing five different types of cohabiting couples); Stolzenberg, *supra* note 95, at 683–84 (arguing that family law should “develop legal rules and sharing norms more appropriate to the levels of intimacy that inhere in a range of cohabitant relationships”).

224. Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412 (2022); Mnookin & Kornhauser, *supra* note 212, at 979.

and consequence.”²²⁵ Admitting that consent is objective, a creature of the state and subject to its definition, risks creating legitimacy gaps if the law imposes obligations based on conduct far divergent from what laypeople think would indicate consent.²²⁶

Because these approaches are consent-based, they are also importantly constrained in their normative reasoning. Advocates of the private-law and consent-to-family approaches call for different manifestations of consent because they disagree about whether something like marital property distribution should be imposed between unmarried partners. These positions depend in turn on what scholars take to be the correct balance between family law’s many competing and incommensurable values, which include (among others) providing for economically vulnerable family members, preventing exploitation and subordination, encouraging cooperation and trust, desert, contribution, and egalitarianism, in addition to autonomy. Focusing on consent, however, prioritizes autonomy over consideration of other principles; scholars ask to what cohabitants agreed, rather than what they should owe one another all things considered. Matsumura’s approach does manage to ask “whether a party’s conduct justifies the state’s exercise of authority,” but it does so on the way to drawing conclusions about consent.²²⁷ As a result, Matsumura, too, precludes full consideration of the tension between individual liberty and family law’s other purposes. If scholars stepped out of the consent frame, they could more directly debate which family-law concerns ought to take precedence when cohabitant relationships end.

3. Support for Children and Caregivers

The costs of consent-based legitimation are most apparent in family law’s approach to providing for dependents’ needs. Many scholars have described and criticized how American family law advances the state’s efforts to privatize dependency,²²⁸ that is, to place responsibility for meeting “inevitabl[y]” vulnerable

225. Matsumura, *supra* note 44, at 1021.

226. Cf. Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2235 (2020) (“Despite the prominent role consent plays in our moral and legal lives, little is known about what ordinary people . . . think consent actually is.”).

227. Matsumura, *supra* note 44, at 1022.

228. See *supra* note 27.

children's and "derivative[ly]" vulnerable caretakers' "basic needs for nurture, care, food, shelter, and other material goods" on their family members, rather than the public.²²⁹ This policy choice instantiates one answer to the underlying normative question how society should allocate the costs of social reproduction. Despite the fact that "society depends upon families to engage in social reproduction and has a stake in families successfully doing so,"²³⁰ the consensus in the United States is that families should absorb the lion's share of the costs.²³¹

To buttress this distributional choice, family law employs consent-based reasoning to minimize the broader community's responsibility for supporting children and their caregivers. But in its efforts to "insulat[e] the state from . . . bearing the financial burden for . . . child[ren],"²³² family law stretches the concept of consent to questionable extents. In imposing strict liability for sex,²³³ the child-support system accepts as manifestations of consent conduct that is only tenuously linked to the desire to parent; the birth of a child is a foreseeable, but not always a willed, consequence of procreative sexual activity. It is especially hard to justify as consensual the child support obligations imposed on male victims of statutory rape and sexual assault.²³⁴ Yet it is in these paternity cases that family law employs the strongest voluntaristic rhetoric to justify its regulation.²³⁵

The results of this overextension are seeming doctrinal incoherence and decreased legal legitimacy. When family courts require strict formalities to redistribute property between intimate partners but define consent's manifestations leniently in paternity suits,²³⁶ family law doctrine appears at least superficially

229. FINEMAN, *supra* note 27, at 34–37 (describing the phenomena of "inevitable" and "derivative dependency"); MCCLAIN, *supra* note 27, at 21 (describing "basic needs" that "[a] just society must ensure that its members are able to meet").

230. MCCLAIN, *supra* note 27, at 5.

231. See *supra* notes 2–5 and accompanying text.

232. Wallis v. Smith, 22 P.3d 682, 684 (N.M. Ct. App. 2001).

233. Cf. *supra* notes 147–155 and accompanying text.

234. See *supra* notes 152–155 and accompanying text (describing cases).

235. See, e.g., *In re Paternity of J.L.H.*, 441 N.W.2d 273, 276–77 (Wis. App. 1989) (declaring in a statutory rape case 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").

236. See *supra* notes 107, 125–126 and accompanying text; cf. Stolzenberg, *supra* note 27, at 2019–22.

contradictory and confusing. Although the normative and practical concerns driving this divergence can be uncovered upon inspection, relying on consent-based legitimation makes it unnecessary for family law to voice them explicitly.²³⁷ The failure to offer principled explanations for consent's context-dependency risks undermining the concept's power to legitimate family regulation—the very reason for which it is invoked in the first place.

Family law's approach to providing for dependents has other, more subtle costs. Consent-based legitimation naturalizes the view that conceiving, bearing, and raising a child is an individual choice, a situation to which parents assented and for which they therefore rightly bear responsibility. "With . . . caregiving . . . widely viewed as" "a freely willed result of a consensual transaction . . . the [person] who engages in it is participating in a form of individualised [sic] self-actualization," one that a liberal society has no duty to subsidize.²³⁸ This "internalize your own costs" attitude has become so widespread that it permeates our social, as well as our legal, culture.²³⁹

Family law's deployment of consent-based justification insulates from debate foundational questions of distributive justice. Casting pregnancy and parenthood as the product of individual

237. See generally *infra* Section II.B.

238. West, *supra* note 15, at 16; see also *id.* at 17 ("[T]he choice to mother entails an acceptance of the risks and benefits that flow" from that choice, "both facilitat[ing] and justif[y]ing the withdrawal of communal support . . . for the burdens that choice imposes."); cf. *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 445 (7th Cir. 1991) (holding that "leave policies that may influence the decision to remain at home" longer with a newborn "after the period of pregnancy-related disability has ended" do not violate the Pregnancy Discrimination Act).

239. Consider, for example, the treatment of pregnant women on public transportation. A reader recently wrote to *Washington Post* advice columnist Carolyn Hax, asking whether etiquette requires offering a pregnant woman one's seat on a crowded train or bus: "Last time I checked, women choose to have babies, therefore they aren't disabled. My friend says they should be afforded the courtesy. I think I'm already paying for them and their kids (*i.e.*, school costs, time away from work). If you can't stand, don't get pregnant." Carolyn Hax, *Turning 30 Has Been Tough*, PHILA. INQUIRER, Jan. 1, 2021, at C3. After classifying pregnancy as a chosen condition, the advice-seeker concludes both that pregnant women are not due any social accommodations and that they therefore should not become pregnant unless they are able to bear the condition's costs without inconveniencing others. The writer also appeals to the costs they already bear due to others' children—taxation to support schools, the inconveniences of co-workers' parental leaves. This cost-benefit analysis is tellingly incomplete, failing to consider either the benefits of social reproduction that accrue to the writer or the enormous individual burdens that pregnant women already internalize (literally) to produce the next generation.

choice renders unintelligible children's and caregivers' claims for material assistance against society, thereby "legitimat[ing] the paucity of" legal "rights that attach to . . . caregiving."²⁴⁰ Instead, our society requires parents to meet their children's and their own needs, with only minimal state support available for those without access to their families', their employers', or their own resources.²⁴¹ Viewed in this way, family caps on welfare grants represent the clearest demonstration of the simmering hostility toward those who "choose" to parent without adequate material resources.²⁴² This consent-based orientation legitimates the political decision to eschew broader social supports that would make stable family life accessible across income brackets.

* * *

In each of the examples above, fundamental normative questions are funneled into questions about consent, when they are not stifled entirely. Yet these questions—about balancing competing and incommensurable values; about tradeoffs between individual liberty and community responsibility; about distributive justice—resurface again and again. Turning to consent does not allow family law to avoid these questions. Instead, it just muddies any attempt to answer them. Rather than grappling with these questions obliquely, as stepping-stones to conclusions about consent, family law should tackle them directly and openly. Doing so, however, requires supplementing consent's role in justifying family obligations with other normative principles.

III. TOWARD A PLURALIST THEORY OF FAMILY OBLIGATIONS

Consent's prominence in justifying family obligations is unsurprising in light of both its historical pedigree and its centrality to liberal political theory.²⁴³ And yet relying solely on consent to

240. West, *supra* note 15, at 12.

241. "[U]nlike nearly all other industrialized nations, the U.S. does not have national standards on *paid* family or sick leave," and only ten states "have enacted paid family and medical leave laws." *Paid Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 17, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/>. Even when employers provide parental leave, it is often cast as a perk to attract and retain employees.

242. See *supra* notes 158–161 and accompanying text.

243. See *supra* notes 11, 33–37 and accompanying text.

justify family financial obligations has costs, some of which have gone unrecognized and can be weighty indeed.²⁴⁴ As a first step toward both a more just family law and a more just society, I argue for adopting a pluralist theory of family obligations. Legislators, judges, and scholars should narrow the realm of consent in family law, allowing the possibility that at least some family obligations may be justified by principles other than consent. I first explain why alternative principles are necessary in family law, then suggest some ways in which family law could go about incorporating them.

A. Why Supplement Consent?

Consent is so normatively appealing because it promises to render the dictates of legal authority consistent with individual autonomy.²⁴⁵ And consent-based justification has much to offer in appropriately delineated circumstances. But family law cannot rely on consent grounds alone when evaluating the permissibility of family support obligations. For while scholars have subjected consent to widespread and varied critique in domains ranging from criminal law²⁴⁶ to employment law²⁴⁷ to contract law²⁴⁸ and tort law²⁴⁹ to sexual and reproductive rights,²⁵⁰ the concept is especially

244. See *supra* Sections I.B, II.B.

245. See *supra* notes 11, 33–37 and accompanying text.

246. See, e.g., Vera Bergelson, *The Meaning of Consent*, 12 OHIO ST. J. CRIM. L. 171 (2014); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431 (2016) (criticizing consent-based definitions of rape); Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT*, *supra* note 36, at 221.

247. See generally MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

248. See generally OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW* (2012); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Schuck, *supra* note 178, at 956–59; Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

249. See, e.g., Tom L. Beauchamp, *Autonomy and Consent*, in *THE ETHICS OF CONSENT*, *supra* note 36, at 55; Schuck, *supra* note 178, at 956–59.

250. JOSEPH J. FISCHER, *SCREW CONSENT: A BETTER POLITICS OF SEXUAL JUSTICE* (2019); John Gardner, *The Opposite of Rape*, 38 OXFORD J. LEGAL STUD. 48 (2018); West, *supra* note 27.

problematic in the field of family law. Consent is not only a poor fit for conceptualizing the responsibilities that arise from family relationships; consent-based legitimation also suggests—erroneously—that families (and societies) can be successfully constituted through voluntarily assumed obligations only.²⁵¹

In fields beyond family law, skeptics have criticized consent on a number of grounds. One line of critique illuminates the gap between normative and legal notions of consent, pointing out that the law often finds consent in less-than-ideal circumstances.²⁵² Behavioral economists have further shown the consent paradigm to rely on unrealistic assumptions about human beings' ability to acquire, process, and take rational action based on knowledge.²⁵³ And critical legal theorists condemn consent-based legitimation's tendency to insulate from scrutiny a wide range of underlying social arrangements.²⁵⁴ Each of these critiques holds with special force in the field of family law.

First, the gap between normative and legal consent can run especially wide in family law. Family law's tendency to use consent as a proxy for other debates, described above, means that unvoiced yet inexorable policy considerations can require findings of consent where, to the eyes of lay observers, there may be none. (Recall again the example of male victims of statutory rape and alleged sexual assault tasked with child support obligations.)²⁵⁵ When this occurs, the legitimating power of consent is weakened. Family law's willingness to relax its standards for consent in some circumstances—straining to imply consent to child support

251. Tony Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 VA. L. REV. 39, 54–55 (1981) (arguing that “individual or social needs . . . can lead to the imposition of duties on persons against their will”).

252. See, e.g., KIM, *supra* note 34, at 10 (“The legal account of consent . . . does not always correspond to the normative one . . . because perfect conditions rarely exist.”); RADIN, *supra* note 248, at 118 (noting the “large grey area” between “full consent” and “nonconsent”).

253. See, e.g., Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 503 (1979); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974); see also KIM, *supra* note 34, at 10–15 (discussing “[l]imits of [h]uman [c]ognition and [s]elf-[c]ontrol”).

254. West, *supra* note 15, at 11–12 (stating critique that consent “cordon[s] off from criticism” “[t]he background conditions that motivated the consent, the goodness of the world the consensual transaction brings into being, and the value of that for which a consent is tendered”).

255. See *supra* notes 152–155 and accompanying text.

obligations while requiring extensive formalities for obligations to adult intimate partners—also makes the field seem doctrinally incoherent. This apparent confusion would resolve, however, if family law doctrines were explained according to their underlying normative principles—privatizing dependency in the case of children, vindicating autonomy in the case of adults²⁵⁶—rather than framed in terms of consent.

Second, family members' conduct routinely deviates from the behavioral models on which consent theories rely. Family law is tasked with regulating the closest human relationships, in which most people do not comport themselves as self-interested rational actors. Ideally, adult intimate relationships would not be associations of two individual utility maximizers, but rather a community in which each partner's welfare is intertwined with the other's.²⁵⁷ And it's hard to describe parent-child relationships—the staggering, self-effacing work that parents do for their children both on a daily basis and over the course of their lifetimes—in terms of rationality.²⁵⁸ Consent-based reasoning fails to capture both the reality and the central normative characteristics of intimate relationships. As a result, basing family obligations on consent alone risks leaving dependent and interdependent family members vulnerable when intimate relationships dissolve.

Finally, and most dangerously, consent-based legitimation can sanction unjust family relations while shielding those outcomes from questioning. As a historical matter, the concept has served to naturalize a range of subordinating social relations.²⁵⁹ Even today, consent-based inquiries frequently disregard the background social conditions against which family members offer their consent.²⁶⁰ Consider, for example, the court in *Simeone v. Simeone* declaring that parties to prenuptial agreements “must be regarded as having

256. Stolzenberg, *supra* note 27, at 2017.

257. Cf. Steven Schaus, *Wrongs to Us 5* (unpublished manuscript) (on file with author) (arguing that “partners in marriage-like relationships . . . can constitute [a] genuine ‘we’ . . . in a position to have joint aims and interests”).

258. See, e.g., Adam Gopnik, *Bread and Women*, THE NEW YORKER (Nov. 4, 2013), <https://www.newyorker.com/magazine/2013/11/04/bread-and-women> (“In order to supply the unique amount of care that children demand, we have to enter into a contract in amnesia where neither [parents nor children are] entirely honest about the costs. If we ever totted up the debt, we would be unable to bear it.”).

259. See *supra* Section I.A.

260. See *supra* notes 212–213 and accompanying text.

contracted to bear the risk of events” such as the “birth of children” or “reliance upon a spouse” merely because “[s]ociety” and “the law [have] advanced to recognize the equal status of men and women.”²⁶¹ And because consent-based theories focus on the fact of an agreement rather than its substance, they do not adequately account for the community’s many important interests in family life.²⁶² Indeed, the *Simeone* court went so far as to describe such considerations as “paternalistic” and “insupportable.”²⁶³

Basing financial obligations on consent alone not only artificially narrows family law’s moral imagination and practical reach, but also undermines broader efforts to construct a more just society. If we think that support obligations between family members can be incurred only with the obligor’s consent, it becomes impossible to imagine that individuals could owe duties to help support families other than their own; the requisite consent would always be lacking. Thus consent-based legitimation undergirds our current system of privatized dependency, in which family members’ support obligations toward one another are designed to relieve society at large of financial obligations toward vulnerable members of the polity.²⁶⁴

Despite these critiques, some might argue that consent-based legitimation serves a crucial function in family law. Regulating families through consent furthers core liberal values like liberty, individual autonomy, and choice – values that have only increased in importance since the family was first declared a realm in which the state should tread lightly.²⁶⁵ In a diverse society whose citizens hold different normative commitments, consent-based obligation allows the state to defer to privately ordered intimate arrangements. Rather than governing based on collective principles whose enunciation would involve taking a stance on the good life,

261. *Simeone v. Simeone*, 581 A.2d 162, 162–65 (1990).

262. See, e.g., *supra* notes 228–230 and accompanying text; cf. West, *supra* note 15, at 9 (describing consent-based legitimation’s failure to consider the “overall goodness or utility of the post-consent world” a consensual transaction “brings into being”).

263. *Simeone*, 581 A.2d at 165.

264. Stolzenberg, *supra* note 27, at 1992 (describing the U.S. choice to assign to the institution of the family the responsibility to meet the needs of those who can’t care for themselves).

265. Cf. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (describing “the private realm of family life which the state cannot enter”).

the state can avoid the tricky task of legislating family values.²⁶⁶ In this way, the argument goes, consent permits the liberal, pluralist polity to dodge normative questions that it may find difficult to settle.

The problem with this argument is that it assumes, erroneously, that private arrangements will produce outcomes acceptable to a liberal polity.²⁶⁷ Consent's troubled history within family law gives us good reason to doubt this proposition, as does today's inequality within and between families. As this Article has shown, consent is a morally plastic, substantively thin concept. By itself, consent is not inherently autonomy-enhancing; rather, its potential to further autonomy depends upon the structure of the legal regime in which it is deployed, as well as the social and economic backdrop against which that regime operates.

And just as we cannot be sure that consent-based regulation will enhance autonomy, neither can we assume that it will serve other values that we may wish or need to promote.²⁶⁸ Such concerns are especially important in family law, which cannot avoid grappling with fundamental normative questions.²⁶⁹ Family law regulates thick, identity-defining relationships of dependence, interdependence, and vulnerability—relationships that fit only uneasily within the ambit of a liberalism premised solely on individual liberty and formal equality.²⁷⁰ Yet a just society must ensure that these relations, too, are ones of justice.²⁷¹ Nor can a

266. This does not mean that all states have availed themselves equally of the opportunity. See, e.g., Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 576 (2016) (describing “an alternative system of sexual regulation” that “condemn[s] and punish[es] sex outside of marriage or sex that is deemed threatening or inimical to marriage”).

267. See, e.g., *Spires v. Spires*, 743 A.2d 186, 192–95 (D.C. 1999) (Schwelb, J., concurring) (appending to opinion copy of parties’ “deprav[ed]” “Marital Agreement” “requiring total subordination by the wife to the husband’s caprice”).

268. Cf. Bix, *supra* note 98, at 182 (“One need not denigrate the centrality of autonomy for living a good life to question whether enhancing individual autonomy is or should be the central objective for the state in all areas of law.”).

269. See *supra* Section II.B.

270. See, e.g., Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 51 (2003) (describing how social contract theories “imagine the contracting parties as rough equals, none able to dominate the others, and none asymmetrically dependent upon the others,” whereas “any real society is a caregiving and care-receiving society”).

271. See OKIN, *supra* note 24, at 135 (arguing that “justice is a virtue of fundamental importance for families, as for other basic social institutions”); cf. *id.* (“Without just families, how can we expect to have a just society?”).

polity achieve this end by remaining neutral between family members, for as scholars have long observed, such neutrality is illusory.²⁷² A state's refusal to intervene merely leaves intact a status quo that is marked by, at best, deeply knit connections whose severance will harm family members differentially, and at worst, power imbalances severe enough to constitute subordination. When push comes to shove, family law cannot avoid having at least a minimal vision of good family life.²⁷³ It can seek to define and defend only a spare definition of just family relations, but it cannot be totally agnostic as to the predictable effects of dependence and vulnerability. Indeed, the doctrinal area's reason for being is containing those very effects.²⁷⁴ Now that the United States has formally rejected hierarchical family structures and recognized the interests of women and children against patriarchal power, the state must take a stand to protect individual family members. And to promote values beyond thin notions of individual liberty and formal equality, the state also needs to provide material support to help family units function.²⁷⁵ A family law that is truly committed to helping family members flourish needs to address both relationship-based and systemic inequalities.

So long as we base family obligations on consent alone, we diminish our ability to re-envision how they are structured, morally depleting a field of law that is especially reliant on normative reasoning.²⁷⁶ For how we conceptualize our obligations matters. In focusing too narrowly on consent-based justifications, we foreclose consideration of other grounds for obligation—grounds that may better capture the nature of obligations not only between family members, but also between fellow citizens.

272. See, e.g., Olsen, *supra* note 25.

273. Cf. Bix, *supra* note 98, at 182 ("In family law, what often seems most important about the offering of and support for options is the way particular alternatives help certain individuals to live worthwhile lives, where living a worthwhile life means something above and beyond having chosen a particular path.").

274. See *supra* notes 27, 228–229 and accompanying text (on privatizing dependency).

275. See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEAS* 58–62 (2010) (arguing that the liberal polity must take an active role in supporting families).

276. Cf. Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. 453 (2020) (describing property and contract as forms of private law that have no inherent moral content).

B. Nonconsensual Family Obligations

Although family law's focus on consent currently precludes other grounds of legal obligation,²⁷⁷ it need not continue to do so. Entertaining the possibility that some regulation of families may be nonconsensual could help family law to avoid many of the doctrinal and normative problems described in this Article. To that end, I propose that family law adopt a pluralist theory of family obligations. That is, family law should accept that the obligations it imposes may be justified in light of a number of different principles, only one of which is consent. I offer here a brief overview of how such a pluralist theory might function.²⁷⁸

Under a pluralist theory of family obligations, consent would continue to play an important role in family law, for some obligations are so personal and extensive that only an individual's voluntary undertaking can render them legitimate. For example, the obligation to share equitably or equally the fruits of one's labor—the crux of marital property regimes—would be difficult to justify absent the obligor's voluntary assent.²⁷⁹ Because consent is likely to continue to justify many family obligations, the law might assume, until proven otherwise, that it is operating in the realm of consent.

As a practical matter, this might mean that the first step in determining whether a family member owes financial duties is to look for appropriate manifestations of consent to obligation. Under a pluralist theory, the law should define the required manifestations robustly in order to preserve consent's legitimating power. Thus, actions such as ceremonially marrying, executing a written contract, and planning for or taking on responsibilities toward a child would continue to give rise to consensual obligations.

Armed with the taxonomy of consent set forth above, family law could also declare that the content of even consensual obligations may flow from society's interest in the relationship, rather than from the parties' consent to the content specifically. As a theoretical matter, this position recognizes the conceptual

277. West, *supra* note 15, at 2 (“Today, it is often the act of an individual proffering his or her consent, rather than the enactment of a law by a representative governmental body, which garners our respect and deference.”).

278. I intend to develop this account more fully in future work.

279. See, e.g., Stolzenberg, *supra* note 95, at 645.

distinction between the second and third dimensions of consent and clarifies that consent “all the way down” is unnecessary and even undesirable. As a practical matter, this position would provide stronger normative support for greater limits on the substance of premarital contracts, as well as better justify parents’ extensive financial duties toward their children.

If an individual’s actions fail to meet the robustly defined threshold for manifesting consent, the law should not automatically conclude that no obligations follow. Rather, lack of appropriate consent should trigger further inquiry into whether some other source of family obligation is implicated. Because these kinds of principles and resulting duties unavoidably reflect the values and needs of the collective, their precise content and concomitant remedies would be up for democratic debate in a way that consent-based obligations often are not. For this reason, I offer only some preliminary ideas about supplements to consent here.

Under a pluralist theory of family obligations, family law would be freed to incorporate additional bases of obligation that reflect the many and varied purposes of family regulation. These alternative grounds might include principles like the need to avoid or remedy harm, to protect those in relationships of trust, or to fairly spread the costs of caring for the vulnerable. These principles must, of course, be agreed upon, defined, and refined collectively, but their being subject to democratic debate does not automatically render them contingent. Although insufficient to fully populate family law’s normative universe, liberal commitments to human freedom and equality do provide significant substantive guidance to would-be regulators. A diverse society may never be able to define the precise contours of the good life, but it can nonetheless hope to reach some basic agreement about what conditions individuals and families require to flourish.²⁸⁰ These conditions are likely to reflect the social facts and material arrangements of a given society, and thus general principles of obligation may yield different sets of specific obligations in different polities. In turn, these specific obligations could be actualized through analogies to

280. See, e.g., Nussbaum, *supra* note 270, at 54–55 (Since “a conception of the person, which builds growth and decline into the trajectory of human life . . . corresponds to human experience, there is good reason to think that it can command a political consensus in a pluralistic society[.]”).

existing legal frameworks, including tort law, restitution, fiduciary duties of care, and tax law and policy.

The need to avoid or remedy harm, for example, might justify state regulation requiring both parental support of children and some property transfers between former intimate partners. Because children are born vulnerable and unable to care for themselves, they are at increased risk of harm vis-à-vis the world. Adults who had a causal role in their birth might thus incur a prima facie obligation of support, with the extent of that support related in part to the child's need.²⁸¹ Although the practical results might be similar to those under the current system, explaining child support responsibilities in terms of children's needs is both more honest and more convincing a justification than parental consent to obligation.²⁸² Remedying harm can also support responsibilities between nonmarital partners if one has incurred economic dependency to aid the other or further the relationship (for example, by making career sacrifices, agreeing to relocate to a different area, or caring for a minor child of the other or both partners).²⁸³ The principle might even justify a short period of transitional payments at a relationship's end to reflect both the lesser earner's reliance on the other's greater resources and the harm that may result when those resources become suddenly unavailable. Here, the practical results could be quite different from under current law, which tends to foreclose recovery between unmarried adults.²⁸⁴

The need to protect those in relationships of trust might support an expanded equitable remedy for cohabitants whose relationships end, one that lies somewhere between the current laws of restitution and equitable division regimes in marital property.²⁸⁵ In addition, or in the alternative, family law could adopt an approach

281. Cf. Honoré, *supra* note 251, at 54–55 (arguing that “individual or social needs . . . can lead to the imposition of duties on persons against their will”).

282. Cf. *supra* notes 163, 232–235 and accompanying text.

283. Cf. UCERA § 2(3) (defining “[c]ontributions to the relationship” as “contributions of a cohabitant that benefit the other cohabitant, both cohabitants, or the cohabitants’ relationship, in the form of efforts, activities, services, or property”).

284. See *supra* Section I.B.2; see also *Marvin v. Marvin*, 176 Cal. Rptr. 555, 559 (Ct. App. 1981) (vacating rehabilitative award as lacking legal basis).

285. See, e.g., E. Gary Spitko, *Integrated Nonmarital Property Rights*, 75 SMU L. REV. 151 (2022); Stolzenberg, *supra* note 95, at 683–91 (describing “an equitable, asset-restricted cause of action” for cohabitants).

closer to the processes of partitions and accountings between co-tenants. While cohabitants may not marry because they do not want to be subject to marriage-level property sharing, they do often behave in economically cooperative ways as a result of their close relationships—behavior that the current law usually fails to recognize and incentivize. The principle of protecting trust and preventing exploitation could also justify imposing fiduciary-like duties of good faith and fair dealing between cohabitants (at least in jurisdictions that imply such duties between spouses).²⁸⁶

Fairly spreading the costs of dependency could be read narrowly, as an additional justification for parents' duties to support children, or more broadly, as involving a collective responsibility of all members of a society to provide for its vulnerable members' needs. This second reading of the principle is potentially quite radical—and yet after the events of the past few years, there is some hope for more openness to expanding social supports for family life.²⁸⁷ Such objectives could be achieved through redistributive taxation, combined with an increased role for the state in providing monies and propping up institutional structures that families need to survive and thrive. In this way, both family law and family obligations would be much broader and more widely spread than we currently imagine them to be.²⁸⁸

Not only would adopting a pluralist theory of family obligations potentially help to transform society; a pluralist theory would also provide enough regulatory flexibility to guide family law doctrine through such a transformation. Because nonconsensual family obligations are grounded in principles that take account of background social conditions, especially of social and economic inequality, they are more amenable to evolution as

286. See, e.g., Stolzenberg, *supra* note 95, at 680–81.

287. Although the Inflation Reduction Act of 2022, Pub. L. No. 117-169, was enacted without any family provisions, several senators have indicated that they will continue to work toward further family supports. See, e.g., 168 CONG. REC. S4060-61 (daily ed. Aug. 6, 2022) (statement of Sen. Ben Cardin) (“There is much to celebrate in this bill, but there are many priorities that we were not able to add. This ‘to-do’ list includes reinstating the expanded child tax credit and making childcare accessible and affordable.”); *id.* at S4152 (statement of Sen. Bob Casey) (“[A]fter we pass this bill, . . . we have more work to do. We have to . . . pass legislation to invest in home- and community-based services for seniors and people with disabilities. We have to invest in childcare and . . . enhanc[e] th[e] Child Tax Credit. We have to invest in prekindergarten education and paid family leave. We have to invest and protect the Medicaid program and extend it. We have so much more to do.”).

288. See *supra* note 32.

society evolves. For example, the degree of financial harm caused by a nonmarital partnership's dissolution might be much less in a society with robust provision for citizens' social and economic needs than it would be in a society that privatizes dependency. As a result, the partners' duties might be less extensive in the former society and more extensive in the latter. This feature of nonconsensual obligations makes them a particularly useful tool for bridging the gap between non-ideal and ideal family law, helping us to envision just family obligations not only in our society, but also in a society that spreads more broadly the costs of supporting social reproduction.

CONCLUSION

Consent has long been used to naturalize inequalities between family members, allowing the law to avoid close scrutiny of any arrangements deemed consensual. For this reason, reformers seeking to combat inequality within and between families should take care how strongly they invoke the concept to justify state regulation. To break free from our present reality, we need to be able to critique it. But as this Article has shown, consent cannot provide that analytical purchase. It's time to employ additional normative principles to supplement voluntaristic obligations with those that necessarily accompany community membership.