

Need, Dependency, and Choice

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Emily J. Stolzenberg, *The New Family Freedom*, 59 **B.C. L. Rev.** 1983 (2018), available at [SSRN](#).

Emily Stolzenberg's excellent article, *The New Family Freedom*, outlines the tension within American society in general, and American family law in particular, between protecting individual choice (autonomy), on one hand, and having private (rather than collective) responsibility for dependency, on the other.

Choice and privatized dependency can conflict: if individuals are responsible for others only when, and to the extent that, they so choose, many dependent persons will not be adequately cared for. As Stolzenberg points out, the conflict between the two principles may be strongest when considering parental obligation, cohabitation, and alimony.

In what the author describes as "strict liability for sex" (P. 2007), fathers have been held subject to child support duties even where conception arose from statutory rape or significant fraud. Even putting aside those extreme cases, the dependency principle would support imposing parental obligations arising from a sort of tort analysis in which men "assume of the risk" (P. 2008) for any children resulting from having sex. Choice - whether through voluntary intercourse, the decision to use IVF or surrogacy (Pp. 2013-14), or voluntary paternity affidavits (P. 2014) - is characterized and offered as the grounds for imposing parental obligations, not as a justification for opting out. It is, as Stolzenberg characterizes it (P. 2013), a "one-way ratchet." In this area of family law, the imperative to support dependent children overrides in part the autonomy interests of adults.

The legal view of cohabitation tends towards the other pole of protecting choice. Vulnerable adults in romantic relationships are protected only if they chose to marry, or if consent for protection was shown through an express contract. As Stolzenberg's article shows, courts sometimes allow former cohabitants to recover under a theory of implied contract, but that approach looks bad viewed either from the perspective of autonomy or dependency: the recovery given to vulnerable ex-partners tends to be inadequate, and when it is given, the evidence of choice justifying the outcome tends to be flimsy.

As Stolzenberg reports: "Strict-choice states, which deny recovery when intimate partners fail to formalize their family intentions, end up elevating the richer cohabitant's property rights over the poorer cohabitant's claims for economic justice." (P. 2023.) However, the question might be pressed, what are the grounds of "the poorer cohabitant's claim[] for economic justice"? With marriage, there is an argument (clearest in community property states) that getting married is entering a partnership with equal sharing; that is just the nature of the institution. Outside of marriage, the arguments tend to be in terms of need, sacrifice, unjust enrichment, and reasonable expectations. The moral claim of need is significant, but some might respond that it is society in general that owes support to its neediest, and that intimate partners should carry the primary duty only if they have voluntarily shouldered responsibility or are in some significant way at fault (a tort-like analysis, like Stolzenberg's "assumption of risk" argument discussed above). Of course, there are clear cases of unjust enrichment, in cohabitation as in marriage: *e.g.*, when one partner supports the other through professional school, and immediately thereafter the couple splits up. Many states recognize short-term alimony, at least for formerly married couples, in such circumstances. However, mostly the claims from long-term

cohabitation involve partners who give up their careers to take care of the home and children, while their partners further their careers and earning capacity. While such relationships are ongoing, the couple generally shares the benefits. What is the basis for a claim for support, or for the equitable redistribution of property, after the couple splits up? Perhaps much comes down to (reasonable) expectations. Katherine Franke has argued that, at least with many same-sex couples, there is no expectation of sharing beyond the end-point of the relationship.¹ In any event, once we are speaking about the parties' expectations, we seem to be back in the arena of choice.

Given the sharp dichotomy between married and non-married couples in American family law, some readers may be surprised by the trends in alimony law that Stolzenberg chronicles. Like the law of cohabitation, alimony law seems to be moving towards an official view that former partners are expected to support themselves. As the article describes (Pp. 2033-2034), there are economic and partnership theories that can justify indefinite alimony (at least for long-term marriages where one partner has made significant career sacrifices), but these seem to have become insufficient to persuade payors – and their representatives in state government. (Pp. 2034-2037.) Many states legislatures (and state courts) now favor short-term alimony or no alimony at all.

As with cohabitation, so with alimony, we need to consider the underlying justifications. At the beginning of the article (P. 1986), Stolzenberg refers to *In re Marriage of Wilson*.² In that case, a woman became permanently disabled during a marriage of less than six years. The disability occurred due to an injury and subsequent infection, and was not related to the marriage, the length of the marriage, or her husband's behavior. At divorce, the court imposed alimony, but then terminated it just short of five years later. The former wife was in great need, but arguably, her claim for assistance should be against society generally, rather than against her former husband.

Stolzenberg ends the article with proposed reforms which she admits are “incremental” and “partial” (P. 2038): e.g., “eliminating or reducing paternal child-support liability in cases of less-than-voluntary sexual conduct” (P. 2045), offering different rules for cohabitation based on duration (P. 2048), and favoring property redistribution over alimony as a way of responding to long-term need. (P. 2049.)

The article forcefully displays the tension between choice-based law and privatized dependency. Allowing family obligations to depend on a clear showing of consent is likely defensible only (if ever) in a society that offers greater collective responsibility for responding to dependency. And as Stolzenberg observes, “[r]eforming family law begins with rethinking our broader political economy, but it does not end there.” (P. 2052.)

1. See Katherine Franke, [Wedlocked](#) 209-26 (2015).
2. 201 Cal. App.3d 913, 247 Cal. Rptr. 522 (1988).

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