

## MISTAKING NEOCLASSICISM FOR PLURALISM IN FAMILY LAW

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Scholarship has generally celebrated the emerging pluralistic structure in family law, including the increased growth of private ordering. The proposition appears self-evident: diverse types of families should be allowed to shape the legal implications of their relationships as they choose. So, family and contract law scholarship celebrate private ordering as expressing diverse valuations and potentially tolerating a nearly limitless range of partnerships. But a perilous implication of this “pluralism” has gone unnoticed.

This article conducts a functional analysis of prenuptial and cohabitation agreements to excavate these hidden implications. It finds that the legal regimes in family law that appear to express pluralistic values are, in fact, ushering in a neoclassic approach to intrafamilial contracts—a theory that adopts formalist, binary, and proceduralistic principles for the creation of valid legal obligations, and is premised primarily on vindicating autonomy over other values. The neoclassical approach in intrafamilial contracts plays a double role: in the doctrines governing prenuptial contracts, it serves to protect the freedom *of* contract of the economically stronger party, while, in the law of cohabitation contracts, it functions to protect the freedom *from* contract of the economically empowered partner.

Viewing the system as a whole—at least in the context of selected jurisdictions—it becomes apparent that the overall regulatory structure systematically provides significant freedom for the wealthier party to skirt his financial responsibility to support an ex-partner, while limiting protections for the less-well-off partner. These implications are graphed in the following chart. The emerging menu of options thus does not adequately reflect the variety of values that are extrinsic to family law and cannot be considered as embodying the principles of value pluralism.

The question remains, however: can pluralist theory—one that is not based on neoclassicism—serve as a normative foundation to family law? In evaluating that, the

article critiques the plasticity of pluralistic theory and exposes the risk that it will function as a fig leaf covering the embrace of free market policies.

	<b>Default Rules</b>	<b>Rules of Formation and Enforcement</b>
<b>Informal cohabitation</b>	<ul style="list-style-type: none"> <li>• No automatic financial obligations between the partners (opt-in requirement)</li> <li>• Entrenches possible informational asymmetry</li> <li>• Protects freedom from contracts</li> <li>• Helps the economically stronger partner to avoid obligations</li> </ul>	<ul style="list-style-type: none"> <li>• Writing requirement or express contract</li> <li>• Could result in reducing availability of other theories of liability (unjust enrichment)</li> <li>• Protects freedom from contracts</li> <li>• Favors party with knowledge of the law and the means to execute contract</li> </ul>
<b>Cohabitation with written or express contract</b>	<ul style="list-style-type: none"> <li>• Bargaining in the shadow of default rules that assume no financial obligations between the parties can serve as a limit to achievement and entrenching devaluation of housework and care work</li> </ul>	<ul style="list-style-type: none"> <li>• Strict enforcement, even if unfair</li> <li>• Likely to exclude the option of other theories (such as unjust enrichment)</li> </ul>
<b>Marriage</b>	<ul style="list-style-type: none"> <li>• Default rules that generally disadvantage the primary caregiver (short-term alimony, no division of enhanced income from professional degree)</li> </ul>	<ul style="list-style-type: none"> <li>• Public-policy doctrine warrants that bargains about nonmonetary terms during the marriage will likely not be enforced—disadvantaging the primary caregiver</li> </ul>
<b>Marriage with prenuptial</b>	<ul style="list-style-type: none"> <li>• Bargaining in the shadow of default rules that disfavor the primary caregiver can result in limited success for the bargain</li> </ul>	<ul style="list-style-type: none"> <li>• A trend toward strict enforcement, without second-look provisions</li> <li>• Emphasis on procedure and informed decision-making over substantive review</li> </ul>