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 extols 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 contends 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 upshot is unexpected: the marriage of neoclassicism (which gives precedence to individual autonomy) and value pluralism (which promotes multiple coexisting values) results in a system that incorporates only the faintest notion of autonomy while failing to advance other values, like fairness. This article conducts a functional analysis of prenuptial and cohabitation agreements to excavate these hidden implications. It finds that the neoclassical approach in family-related 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.*

The question remains, however: is it the adoption of neoclassicism that fails pluralist theory, or is pluralist theory problematic in and of itself? In evaluating that, the article critiques the plasticity of pluralistic theory and exposes the risk that pluralism will function as a fig leaf covering the embrace of free market policies.

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INTRODUCTION

In the wake of the struggle for marriage equality, legal scholars, myself included, have observed (and generally celebrated) that family law is moving toward offering a menu of options for legal recognition of relationships.[1] That is, as a positive side effect of the process leading to securing marriage rights for same-sex couples, a new and more pluralistic regulatory regime has emerged. Such regulatory regime includes several

[1] *See, e.g.*, WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121 (2002); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1891 (2012); Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 626 (2013).

registration schemes for recognition of relationships (such as marriage, civil unions, and domestic partnerships) as well as multiple contractual instruments available for couples to organize the financial obligations between them (such as prenuptials, postnuptial, cohabitation, and separation agreements).[2]

The formation of multiple options is the basis for the descriptive claim that family law has moved toward *structural pluralism.*[3] Structural pluralism refers to the *structure and organization* of the law.[4] It derives from the notion that the law should facilitate diverse social spheres, a menu of institutions.[5] A few normative justifications also support the development of structural pluralism. Scholars rely on different principles (utilitarianism, autonomy, and value pluralism), but the claim is quite similar under each: to accommodate people's autonomy, or to maximize their overall happiness, the state must facilitate a variety of regulatory options—tailored for diverse types of family structures—that will enable partners to arrange the legal consequences of their relationships.[6] Increased use of private ordering is also consistent with the role of the state as facilitating effective choice, because expanding the variety of substantive contractual arrangements that courts are willing to enforce will

[2] Eskridge, *supra* note 1, at 1884 ("The simultaneous contraction and expansion of family law have usually not been treated in public discourse as related phenomena.").

[3] *See id.* at 1889 ("To be specific, American family law in the last century. . . has moved toward a pluralist regime where each state offers a larger menu of options for romantic couples, including those with children").

[4] Structural pluralism is also a normative theory because the theory addresses (or should address) three matters: (1) the *object* of pluralism—what institutions should be on this menu, (2) the *type* of pluralism—what values should be encompassed in and distributed by the menu, and (3) the *justification* for pluralism—why pluralism. *See* Rutgers J.G. Claassen, *Institutional Pluralism and the Limits of the Market*, 8 Politics, Philosophy & Economics 420, 421 (2009) (arguing that "any particular theory of institutional pluralism has to take a stand on three main substantive issues: the object of the pluralism, the type of pluralism, and the justification for pluralism").

[5] Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 Colum. L. Rev. 1409, 1424 (2012) [hereinafter Dagan, *Pluralism and Perfectionism*].

[6] For a utilitarian-based argument for structural pluralism *see*, Eskridge supra note 1, at 1887 ("The utilitarian approach accommodates our social pluralism in family formation, such that the state recognizes a variety of family institutions, each tailored to different circumstances and preferences"); See JOSEPH RAZ, THE MORALITY OF FREEDOM 372 (1986), for an argument that autonomy requires an adequate range of choices. See Shahar Lifshitz, *Married Against Their Will? Toward A Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1589-1600 (2009), for autonomy-based arguments on family law pluralism, relying on Raz's work.

enhance and countenance a nearly limitless variety of substantive arrangements.[7]

However, is the development of multiple options for arrangements of relationships truly a cause for celebration? A few scholars have already scrutinized and criticized pluralistic theory's assumption that offering multiple registration schemes advances effective choice.[8] Moreover, as I argue elsewhere, these registration schemes are typically abolished after same-sex marriage is legalized, and, in any event, such registrations are often designed in a way that is not attractive to many couples and hence are hardly used.[9] Therefore, I argue, the primary result of the development of pluralism is mainly the increased use and enforcement of contractual instruments between couples. Put differently, the current structural pluralism in American family law is primarily reflected by expansion of contractual choice.

Thus, the important and unanswered question that emerges is whether the law of intrafamilial contracts promotes or detracts from family law pluralism. Although the debate about the pros and cons of private ordering in family law is an old and much discussed one, the relationship between private ordering and pluralism has received scant attention by family law scholars. Further, scholarship cheering the development of pluralistic family law has failed to adequately define the object of pluralism and the type of goods that should be bolstered by structural pluralism.[10] This Article aims to fill these gaps in legal scholarship by investigating whether the increased enforcement of intrafamilial contracts reflects pluralistic principles and whether pluralism—as a normative force—can serve as a core theory to guide the development of family law.

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[7] *See e.g.*, Jeffrey Evans Stake, *Paternalism in the Law of Marriage*, 74 IND. L.J. 801, 818 (1999) ("The menu of options should include all of the serious proposals. Since almost anything that can be written into law can be written into an agreement, one way to offer all of the good proposals is to allow private contracting."); *See infra* note 54 and accompanying text.

[8] *See infra* note 53 and accompanying text (surveying the main criticism on the additional registration schemes as enhancing pluralism).

[9] In the United States, typically, the legal institutions that were created initially as a compromise in the legal struggle for marriage equality—civil unions, domestic partnerships, and so on—were abolished after the legalization of same-sex marriage. *See* Aloni, *supra* note 1, at 626. Some states (e.g., Hawaii and Illinois) maintained their registration scheme—but not only is this the exception, it remains to be seen whether couples are actually going to use them.

[10] *See infra* Part I.

To answer these questions we must first define what "pluralistic values" are. This is because structural pluralism focuses on the *mechanism* to create options but does not indicate what values it should embed and distribute. Hence, in order to explore whether the growth of private ordering expands pluralism, we need first to fathom what pluralism means, beside multiple institutions.

While there are numerous definitions and variations of "pluralism," the Article, building on the work of scholars in other legal fields, uses the concept of "*value pluralism.*"[11] Value pluralism refers to "the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another."[12] That is, the world is composed of a plurality of ultimate goods, not just one, and these goods cannot be ranked.[13] The term "value," in this sense, can refer to abstract values (e.g., justice, equality, liberty) but more typically addresses the *bearers* of the values—the institutions that embed these values.[14]

Therefore, to examine whether private ordering in family law integrates the principles of value pluralism, we first need to investigate what the primary values are that contractual arrangements incorporate. Only after we uncover which values are promoted in each contractual instrument separately can we look at the system as a whole—to examine whether the system formalizes a balance of values or whether it is dominated by one, or a few, particular values, to the exclusion or diminution of other values.

Discovering the values that predominate in each institution is not an easy task given that we cannot arrange the values embedded in the choices between different regulatory schemes across a single metric. Thus, I use functional analysis, focusing—as a primary source of illustration—on two

[11] *See* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY 4-5 (2002); Ruth Chang, *Incommensurability (and Incomparability), in* THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS (Hugh LaFollette ed., 2013) (introducing five main ideas that philosophers discuss in relation to incommensurability of values and naming Berlin's work as "One of the first contemporary uses of "incommensurability.")

[12] Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 171 (1969).

[13] GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 2 (2002).

[14] That is, while scholarship uses the term "values," what is actually compared is concreate reason for preferring one option or good over the other. *See* Burton, *supra* note 24, at 551. Rather than comparing values in the abstract, modern literature examines the reasons we have for choosing one option over the other. When discussing values, I follow the tradition of using the term "values" both when discussing abstract values and when exploring the bearers of the values (i.e., the options that each legal institution offers).

types of intrafamilial contracts: prenuptial agreements and cohabitation contracts. This examination concerns the way that the contractual options function—what values these choices offer for couples. For example, how much maneuvering and flexibility is available to couples in selecting the options and how much does the structure of the law affect the content of these arrangements?

This functional analysis begins with a significant and novel analytical-descriptive claim: an emerging trend in contractual family law is toward adopting a *neoclassical approach*.[15] By "neoclassical," I mean a modern version of classic contracts theory—with some adaptations. That is, the doctrines that govern these arrangements adopt formalist, proceduralist enforcement of premarital contracts and cohabitation agreements along with inequitable default rules. The law aims to balance between competing values but does that by adherence to rules and formalities over standards: nullification when formalities are not met, and reduction of the court's discretion to evaluate the contract's fairness.[16] Similarly, the design of default rules in intrafamilial contracts favors the economically stronger partner and disadvantages the vulnerable party—often the partner who invested more in the household at the expense of career development[17]—just as classic contractual doctrine has often worked for the advancement

[15] The celebrated move toward pluralism in family law is often grounded in an inaccurate interpretation of the way contract law operates in the area of domestic relations. Namely, some literatures assume that contractual family law already encompasses a pluralistic approach. Accordingly, the doctrines that govern contractual family law already reflect a different balance of values than other sorts of contracts do (by providing expansive protections to vulnerable parties). *See* Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS. 1, 15 (2013) [hereinafter Dagan, *Autonomy, Pluralism, and Contract Law Theory*]. Most scholars thus still maintain that prenuptial agreements afford stronger protection than other commercial contracts but have not yet noticed the emerging trend that diminishes these protections or focuses more on procedural safeguards. *See, e.g.*, Robin Fretwll Wilson, The Perils of Privatized Marriage *in* MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT, *supra* note 25, at 253, 279-80 (asserting that generally in the United States prenuptial agreements are being evaluated more carefully than other conventional contracts). As I show in Part II.B., while it is still true that many states employ heightened standards for evaluating the fairness of prenuptials, the new trend is toward diminishing these stricter requirements, at least in terms of substantive fairness. Other academics treat the areas of cohabitation contracts and premarital contracts as two separate legal spheres and thus overlook the emergence of the neoclassicist trend. However, when examining, side by side, the contractual approach to unmarried partners and between spouses—the trend toward a neoclassical approach becomes apparent.

[16] Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1728-9 (1976).

[17] *See infra* Part II.B & C.

of the economically stronger party.[18] Consequently, building on another body of scholarship in contract law,[19] I call this trend "neoclassic."

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. Thus, in some jurisdictions, the doctrine takes a strong pro-enforcement stance, increasing the predictability of enforcement. Conversely, in the law of cohabitation contracts, the neoclassical approach functions to protect the freedom *from* contract of the economically empowered partner.[20] By imposing formalities to create binding obligations between unmarried partners, the doctrine ensures that the parties do not make commitments involuntarily.

Each regulatory regime, considered alone—whether governing informal relationships or marriage—does not tell the whole story about the embodiment of value pluralism or the lack thereof. I thus put these legal institutions in perspective by examining the whole regulatory regime together.[21] My conclusion, visualized in Table 1, is that the overall regulatory structure systematically provides significant freedom for the wealthier party to skirt the financial responsibility to support an ex-partner, while limiting protections for the less-well-off partner.[22] Put differently, while the rise of private ordering is touted by family law scholars as the advance of pluralism, this development is more correctly understood as reflecting a neoclassical approach. Based on this observation, I argue that value pluralism stands in contradiction to a neoclassical approach to private ordering. This is because the neoclassical regime gives precedence to individual autonomy and freedom of contract over other values.[23]

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[18] Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1135 (1995) ("[A] legal system that emphasizes freedom of contract, that encourages everyone to 'do his own thing,' at 'whatever cost to his neighbor,' works ultimately to the benefit of the already rich and powerful.").

[19] *See* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1285 (1990) ("The word 'neoclassical' suggests the partial nature of the accommodation, indicating that neoclassical contract has not so far departed from classical law that a wholly new name is appropriate.").

[20] *See infra* Parts II(B)&(C) (describing the development in doctrines governing prenuptial and cohabitation contracts).

[21] *See infra* Table I.

[22] *See infra* Part III.

[23] *See infra* Part III.

Finally, I inquire whether it is the adoption of neoclassicism that fails pluralist theory—or whether pluralist theory is problematic in and of itself. I offer initial thoughts about the suitability of value pluralism to serve as a normative foundation for family law, and submit that the plasticity of a pluralistic theory presents a weakness and a risk. Because the theory, as developed thus far, does not provide adequate guidance about the content of the menu of options, it is rendered illusory—and does not offer material guidance to the critical and controversial policy questions that occupy family law. Furthermore, the theory's plasticity and commitment to personal autonomy make it a comfortable ground for adoption of laissez-faire policies that advantage the economically superior partners, and create a false sense of security that there is, indeed, "effective choice" in the name of pluralism.

The Article is structured as follows. Part I frames the transition of family law from an era of privatization to an era of pluralism and introduces the basic assumptions of pluralistic theory as pertaining to family law. Part II lays out a functional analysis of the values embedded by cohabitation and prenuptial agreements—with an emphasis on the neoclassic nature their doctrines are starting to adopt. Section II.A commences with the introduction of the basic principles of classic contractual theory and its successor, neoclassical theory. Sections II.B. and II.C examine, respectively, the values incorporated in the use of premarital contracts and in cohabitation contracts. Part III.A takes a panoptic view on the various institutions that family law offers and asserts that it fails to accommodate the principles of value pluralism. It also clarifies that the neoclassic approach stands in contradiction to value pluralism. Part III.B then considers whether pluralism provides a sufficient theoretical ground for policymaking in family law. The Conclusion proposes the need to move toward a neopluralist theory of family law—one that is cognizant of and committed to distributive justice.

I. THE DEVELOPMENT OF PLURALISM IN FAMILY LAW

Pluralistic theory is on the rise in private law scholarship generally,[24] and now dominates the discussion in family law as well.[25] Pluralism takes

[24] *See, e.g.*, Bertram Lomfeld, *Contract as Deliberation*, 76 LAW & CONTEMP. PROBS. 1, 8 (2013) ("A newer camp of scholars offers genuine pluralistic multi-value theories of contract law"); Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 538 (2013) (arguing that "all normative legal theories should be pluralist"); Dagan, *supra* note 5, at 1435 (2012); Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915, 915 (2012).

a few different meanings and definitions in family law.[26] In this Article, I explore one meaning and application of pluralism in family law: the idea that the state ought to permit a menu of options for legal recognition of relationships (structural pluralism). In particular, I focus on one essential feature of the menu: the use of private ordering in the organization of financial obligations between the partners. I scrutinize the assumption that private ordering between couples advances pluralist family law.[27]

A. From Privatization to Pluralism?

To clarify, the embracing of private ordering by family law is not a new phenomenon. It is part of a larger process, commonly referred to as the "privatization of family law"—a development that started almost fifty years ago.[28] Legal scholarship is not entirely coherent on the link between the privatization process and the newer pluralistic development: what are the differences between privatization and pluralism? Was the privatization process replaced by pluralism?[29] This Part aims to provide an account that frames and delineates the connection between privatization and pluralism.

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[25] *See, e.g.*, Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 259 (2013) (advocating for pluralistic progression in family law); Melissa Murray, *After Lawrence*, BALKINIZATION BLOG (Jan. 15, 2013), http://balkin.blogspot.com/2013/01/after-lawrence.html ("If same-sex marriage was among the first generation of issues to emerge in Lawrence's wake, hopefully relationship recognition pluralism will be among its second-generation progeny"); *see also* Linda McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, *in* MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION, 309, 309-10 (JOEL NICHOLS ed., 2012) (arguing that "'legal pluralism' is hot" and examining what legal pluralism means in family law).

[26] McClain, *supra* note 25, at 309. One popular strain of scholarship in family law addresses the plurality of legal sources that direct society, including religious tribunals and custom, *id*. at 310. *See also* Joel A. Nichols, *Louisiana's Covenant Marriage Law: A First Step Toward A More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 932 (1998) (advocating for "robust pluralism," which entails "state openness to and respect for the internal norms and regulations of various faith traditions regarding marriage and divorce."). As explained below, I focus here on a different kind of legal pluralism and do not address the topic of religious diversity.

[27] Eskridge, *supra* note 6, at 1889.

[28] Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444.

[29] Brian Bix, for example, considers the expansion of private ordering as one of four different developments that contribute (or could contribute) to the development of pluralistic and more decentralized family law (the other three are: delegation to religious communities, establishment of menus of options, and allowing couples the choice of law to govern their relationships. *See* Brian H. Bix, *Pluralism and Decentralization in Marriage Regulation*, *in* MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT, *supra* note 25, at 64–66.

To do this, it is useful to briefly recount the privatization process that preceded and contributed to the development of pluralistic structure.

In the past half century, family law has gone through a growing process of privatization. The transformation of marriage—from an institution with strong status characteristics to a mix of status with contract—was most notable in the rise of no-fault divorce, which permits parties to exit the marital relationship without a showing that the other spouse breached the marital contract.[30] This progression was further characterized by the replacing of most mandatory rules that were part of the marriage contract with default rules.[31] In other words, partners now can define many aspects of their marriage contract, and only a few rules are prescribed by the state that cannot be altered by the parties.[32]

The privatization process is also characterized by the blurring of differences between marriage and other relationships. Before the privatization process, marriage was distinguished from other relationships by a set of rules: laws that criminalized sex outside marriage and laws that deemed children born out of marriage as illegitimate.[33] The distinction between marriage and other relationships started to blur with decriminalization of adultery and cohabitations laws, the overturning of laws that differentiate between children born of married parents and those of unmarried parents, and some recognition of rights of people in nonmarital unions.[34]

This process was accompanied by an age-old debate: what is the role of private ordering in allowing domestic partners to design their legal obligations disparately from the terms dictated by the state?[35] In one camp, communitarians and supporters of traditional marriage opposed the contractualization of family law primarily because they thought that allowing spouses to tailor their own obligations would increase opportunistic behavior and marriage instability.[36] For them, as a

[30] *See* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1235 (1998). This is not to say that the state released all control over this aspect, as spouses still seek the state's approval in order to dissolve the marriage.

[31] Eskridge, *supra* note 3, at 1902.

[32] Scott & Scott, *supra* note 30, at 1234.

[33] Singer, *supra* note 28 *at 1447*.

[34] *Id*. at 1448-52.

[35] *See, e.g.*, Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 476 (1983).

[36] *See, e.g.*, Scott & Scott, *supra* note 30, at 1245 (presenting the arguments of communitarians to contractualization of family relations); Jennifer Wriggins, *Marriage*

descriptive and normative matter, marriage was more akin to a status: "an institution, public not private, controlled by the will of the state, not that of the parties."[37] Put differently, it is the state—not the parties themselves—that has the control, and should maintain the control, to prescribe the obligations and privileges attendant to marriage.[38]

Some scholars view contract, on the other hand, as "variable, private, and controlled by the will of the parties not that of the state."[39] Commentators from different ideological perspectives have generally saluted the greater individual freedom and flexibility associated with private ordering.[40] "Contract," hence, is synonymous with individual autonomy.[41] Although several scholars have offered sophisticated critiques of private ordering as representative of the partners' will,[42] more commentators now salute the extended private contracting in family law and even call for its expansion.[43] As a result of this privatization process, today legal scholars commonly view marriage as a mix of status *with* elements of a relational contract.[44]

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*Law and Family Law: Autonomy, Interdependence and Couples of the Same Gende*r, 41 B.C. L. REV. 265, 265-66 (2000); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 780 (1994). Other commentators argue that contractual approach to family law is always problematic because parties do not tend to think in contractual terms. *See, e.g.*, Ira Mark Ellman, "*Contract Thinking" Was Marvin's Fatal Flaw*, 76 NOTRE DAME L REV. 1365, 1367 (2000-01) (discussing some of the arguments against using contractual principles in adjudicating disputes among unmarried partners).

[37] Janet Halley, *Behind the Law of Marriage (i): From Status/contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 4 (2010).

[38] Singer, *supra* note *28*, at 1446; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 111-18 (1998).

[39] Halley, *supra* note 53, at 4.

[40] *See, e.g.*, Weisbrod, *supra* note 36, at 814-15; Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 328-34 (1982); Scott & Scott, *supra* note 30 (suggesting that marriage as relational contract is compatible with long-term commitment).

[41] *See* Halley, *supra* note 53, at 15 ("the onset of contractual freedom between spouses is seen as necessary for marriage to be free and equal.").

[42] *See, e.g.*, 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, 384-85 (1985).

[43] *See, e.g.*, Martha M. Ertman, *Exchange as a Cornerstone in Families*, 34 W. NEW ENG. L. REV. 405, 443-44 (2012) (concluding that the law should extend more opportunities for private ordering).

[44] Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 225 (2011) ("the laws governing marriage in the United States have moved farther along the spectrum from status to contract"). However, in the turn of the 21st

Recently, some scholars argue, family law reached the era of pluralism, both descriptively and normatively.[45] Although scholarship does not address this issue directly, the privatization process described above could be characterized as a transition period that preceded the pluralistic progression.[46] Distinguishing between the process of privatization and the progression toward pluralism is not easy, among other reasons because scholars use the term "pluralism" in different ways, sometimes ambiguously; and because private ordering is itself an element of this pluralistic development (meaning, the pluralistic progression is expressed, among other ways, with the growth of options for private ordering). However, pluralism, at least normatively, means more than privatization. Accordingly, not only should the state allow couples to decide for themselves about the legal consequences of their relationships (privatization); but the state must also proactively promote choices that are as diverse as possible (as long as these options are useful). The pluralistic paradigm also assigns a different role for states' intervention in regulation of relationships: from establishing the norms that are attendant to marriage, to serving "primarily as supportive of individual and community ideas of marriage (within limits)."[47]

The *expansion* of options for legal recognition of relationships likewise contributes to this transformation from privatization to pluralism.[48] As a result of efforts to legalize same-sex marriage, a few states now offer more institutions for registration of relationships, sometimes even open to nonintimate partners.[49] The dual development of

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century, there seems to be a resurgence of the idea of marriage as status. *See* Halley, *supra* note 37, at 2.

[45] *See, e.g.*, Bix, *supra* note 29 at 61; David J. Herzig, *Marriage Pluralism: Taxing Marriage After Windsor*, 36 CARDOZO L. REV. 1, 3 (2014) ("Family law has accommodated the new social pluralism through the creation of various new institutions to formalize cohabitation among both same-sex and heterosexual couples.").

[46] *Cf.*, Singer, *supra* note 28, at 1565 (suggesting that the privatization process could serve as a "useful stepping stone to imagining and implementing a more just form of public ordering.").

[47] Bix, *supra* note 29 at 61.

[48] Eskridge, *supra* note 6, at 1884; Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1302-9 (2014).

[49] These registration schemes vary in their scope and the level of obligations and rights they confer. For instance, in some states (Illinois, Hawaii) they are open to same- and opposite-sex couples, while in others they are limited to same-sex couples only (New Jersey). Often these legal institutions are abolished when same-sex marriage is legalized, but some do survive. *See* Aloni, *supra* note 1, at 592-93.

Eskridge also includes within the expansion process the opportunities to live in nonregistered relationships and still incur some legal consequences; for example, the

an increased acceptance of private ordering and of multiple registration schemes, coupled with the diverse family structures that exist today in the U.S.,[50] is the primary reason for the rise of structural pluralism in family law: the idea that, in the past century, American family law "has moved toward a pluralist regime where each state offers a larger menu of options for romantic couples, including those with children."[51] Eskridge observes that "American family law has long been more pluralistic than most academics, virtually all policymakers, and all partisans have made it out to be."[52] As stated before, the view that multiple registration schemes enhance pluralistic values has been scrutinized by several scholars.[53] The critique of the shortcomings of registration schemes is familiar; I focus,

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option to cohabit (which was criminally prohibited in the past). Eskridge argues that "[i]n an increasing number of states, cohabitation has become a reasonably coherent legal regime that is not just a private alternative to marriage but is also a regulatory alternative to civil marriage." Eskridge, *supra* note 6, at 1934-5. While it is true that, in all but three states, contracts concerning the financial aspects of relationships are generally enforceable, it is doubtful that regulation of cohabitation really comprises "coherent legal regimes." *Cf.,* Hafen, *supra note 35*, at 564 ("It is not accurate to infer. . . [that] cohabitation has moved from a 'permitted' to a 'protected' status by the recognition of contractual rights."); Aloni, *supra* note 1, at 587 (discussing the shortcoming of establishing financial obligations between unmarried partners based on contractual terms). *See also infra* Part B.III (discussing contracts between unmarried partners).

[50] *Eskridge*, *supra* note 6, at 1892-94.

[51] *Id.* at 1889; Bix, *supra* note 6, at 60, 64. To be sure, Eskridge acknowledges that the current menu of options is incoherent and developed without systematic thought by the legislature. Eskridge thus acknowledges the shortcoming of this regime and advocates for its improvement (while insisting that a pluralistic regime already exists).

[52] Eskridge, *supra* note 6, at 1947.

[53] Elsewhere, I argued that these registration schemes—while have the potential to serve as useful options for regulation of relationships and for a variety of family structures—fail to provide meaningful choices. *See* Aloni, *supra note* 1, at 591-4. Mary Anne Case further observed, soon after these registration schemes appeared, that they actually decrease the choices open to couples by adopting requirements (such as proof of cohabitation or financial support obligations between the partners) that are not required in order to obtain a marriage license. *See* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772-74 (2005). More recently, Janet Halley suggested that the evolving menu of options for recognition of relationships is "less emphatic about choice, more regulatory, more *governmental* in the Foucaultian sense than a real menu of options." Halley contends that these legal institutions incrementally adopt marriage-like characteristics, and if a couple choose not to adopt one of them, the state can still ascribe financial obligations on them, thus leaving less room for choice. Halley, *supra* note 37 at 32. *See also* Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291 (2013) (arguing that once domestic partnership became marriage with a different name it lost its transformative value).

then, on the other element of the alleged pluralism: the contractual component.

Indeed, within this shift to structural pluralism, private ordering plays a significant role.[54] Consequently, contract is the main tool that makes these registration schemes more flexible and tailored to the specific needs of the parties—*not* one-size-fits-all.[55] For instance, marriage offers more plasticity once partners have the option to choose covenant marriage or to execute a prenuptial agreement.[56] Private ordering also extends choice without any registration, because parties can create their own obligations by contracting about it without registering their relationships.[57] Private ordering in family law, the argument goes, thus serves (and should serve) to extend people's choices in organizing their relationships, in a way that reflects that couples' preferences and patterns of structuring their partnerships come in different shapes and sizes.

B. Parsing Out Pluralism in Family Law

Even with a better understanding of what pluralism in family law means, many unanswered questions remain. Mainly, what type of goals should a menu of options achieve, what types of values should be embedded in such menu, and can a menu succeed in incorporating these values? To date, family scholarship has failed to provide coherent answers to these questions.[58] This is, in part, because the term "pluralism" is used

[54] *E.g.*, Michael J. Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533, 535 (1991) (arguing that private ordering in family law is justified by increasingly secular and pluralistic perception); Bix, *supra* note 29, at 64–66. *See also* Hafen, *supra* note 35, at 487 ("The claims arising from such an unlimited spectrum of relationships would necessarily be contractual in nature, with no overtones of Status as a source of obligation.").

[55] Aloni, *supra* note 1, at 607-09.

[56] *See, e.g.*, Lifshitz, *supra* note 6, at 1633-34 (arguing that covenant marriage fits that pluralistic approach to family law because it extends the marital options).

[57] Stake, *supra* note 7, at 818.

[58] A specific application of autonomy-based pluralism in family law is offered by Shahar Lifshitz, but while he intends it to provide general guidance to family law, at this stage, the particular work is focused on a pluralistic legal approach to regulation of laws pertaining to unmarried couples. He offers a normative theory that supports his claim that the legal regulation of cohabiting couples, and to a larger extent family law generally, should follow pluralist principles. According to Lifshitz, pluralist theory in family law stems from the principle that the state should support individual autonomy by creating different legal institutions that reflect the different types of relationships. Based on these principles, he offers a unique legal institution of cohabitation that results in a set of legal consequences that correlate with the type of cohabitation. *See* Lifshitz, *supra* note 6.

in different contexts, sometimes without clear definitions.[59] At times, the term refers to a descriptive (not normative) shorthand for legal tolerance, acceptance, recognition, and encouragement of a variety of family forms and variation within particular family forms.[60] Such definition is typically accompanied by the assumption that structural pluralism—including private ordering—reflects a positive development. However, this definition falls short of indicating what types of values should be embedded in and distributed by such menu.[61] That is, it does not articulate principles for establishing institutions or for allocating goods (values) relative to these different institutions. For example, "structural pluralism" could mean that the state has to provide as many options as possible (free market), or try to provide a choice that still has a channeling effect, or provide only limited choice.[62] In short, without our knowing the object and type of pluralism, the term "pluralism" per se is ambiguous. Finally, even if one agrees on the definition and goal of family law pluralism, we still have to examine whether the developing structure actually achieves its goals—or progresses in that direction. Thus, an additional gap in legal scholarship that this Article aims to fill is exploration of whether the expansion of choice—structural pluralism—truly reflects pluralistic values. And if the current emerging structural pluralism does not reflect pluralistic values, the question arises as to whether such menu is even achievable, or whether pluralism is a suitable scaffold for family law theory.

While family law scholarship has failed to explore the aims of structural pluralism, scholars from other legal fields have put forward

[59] *See, e.g.*, Bix, *supra* note 29 at 60 (arguing that pluralism as expressed by "growing diversity and decentralization of marriage options . . . could be a good idea." Bix, however, does not define the term "pluralism," but only provides "alternatives paths to pluralism" by focusing on different developments that lead to what I call "structural pluralism.").

[60] *See, e.g.*, Feinberg, *supra* note 25, at 258–60, 279–86 (defining "pluralistic relationship recognition" as "the needs of the diverse relationship and familial forms in existence today without regard to marriage eligibility.").

[61] Eskridge's pluralism is essentially a vehicle to achieve other utilitarian goals. Pluralism à la Eskridge entails "a regime where there is more individual choice, but that choice is channeled, or guided, by governmental nudges rather than by hard governmental shoves." Eskridge, *supra* note 6, at 1893. Eskridge submits that family law serves three main goals, which sometimes are at odds: encouraging committed relationships, creating an efficient and low-cost decision-making mechanism, and protecting vulnerable persons. Family law pluralism, he posits, supports achieving a balance between these goals. *Id.* at 1946–47.

[62] *See* Aloni, *supra* note 1, at 599-601 (contending that the menu-of-option plan is not coherent enough).

elaborated theories of the definition and role of pluralism in private law that can provide a productive basis for similar exploration in family law.[63] Hanoch Dagan, in a book and numerous articles,[64] advances the most developed such theory. Dagan's pluralistic theory relies on three paradigms of pluralism: structural, value, and autonomy-based.[65] Structural pluralism, as explained above, is the vehicle that serves to advance pluralistic values. Value pluralism argues that the world is composed of a plurality of universal goods, not just one; these goods cannot be ranked (incommensurable); and often there is conflict between them.[66] Additionally, Dagan's theory is strongly influenced by Joseph Raz's notion of autonomy. Accordingly, in order for people to self-govern, they must have adequate and meaningful choices.[67] Dagan thus endorses a view that the pluralist approach is grounded in respect for different values or different balances of values, and in a vindication of autonomy that can only be achieved by facilitating adequate and meaningful choices between options.

When it comes to private ordering, Dagan asserts that contract law requires adoption of—and to some extent already embodies—such structural, autonomy-based, and value pluralism. Contracts law is ideal as an embodiment of pluralistic theory because "contract law is an umbrella of a diverse set of contract institutions, where each institution responds to a different regulative principle, namely: vindicates a distinct balance of values in accordance to its characteristic subject-matter and the ideal type of the parties' relationships it anticipates."[68]

According to Dagan, a particular example in which contract law already encompasses such pluralism is family law contracts—such as premarital contracts and separation agreements. Accordingly, different rules govern the enforceability of such family-related contracts in a way that reflects the unique values underpinning them.[69] While Dagan does not

[63] Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1024-25 (2011) (describing four property theorists and uncovering their commitment to value pluralism).

[64] *E.g.*, HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011); Dagan, *Autonomy, Pluralism, and Contract Law Theory*, *supra* note 15, at 19, 20.

[65] Dagan, *Pluralism and Perfectionism*, *supra* note 24, at 1421-29.

[66] GALSTON, *supra* note 11, at 3-4 (2002); Crowder, *supra* note 13, at 44-56 (defining value pluralism based on four elements: (1) plurality (2) of universal (3) incommensurable (4) in conflict—values).

[67] RAZ, *supra* note 6, at 399.

[68] Dagan, *Autonomy, Pluralism, and Contract Law Theory*, *supra* note 15, at 1.

[69] *Id.* at 17.

purport to explore the role of pluralism in family law, he often makes reference to this area.[70] For instance, Dagan repeatedly refers to marriage and family contracts as prime examples for arenas that already show some degree of pluralism and will benefit from further embracing pluralist principles.[71]

Building on and extrapolating from Dagan's work—and evaluating its suitability to family law—in what follows I examine whether private ordering in family law advances the principles of value pluralism. That is, I explore whether the growing private ordering in family law provides effective choice and embodies a balance of values, and whether it is progressing in that direction. In particular, in the next Part I review which values are integrated into each type of family law contract.

II. THE NEOCLASSICIST EVOLUTION OF FAMILY CONTRACTS

This Part uses functional analysis to examine which values take precedence in contracts that regulate the financial obligations between intimate partners. A functional analysis focuses both on how the structure of law shapes the parties' use of such contracts and on distributional concerns resulting from this structure. It enquires into who employs the contracts, who has incentive to enter into such contracts, which promises are enforced, and what impact the bargaining process and default rules have on the contracts' content.

Particularly, I look at two types of family law contracts that are often treated as distinct but today reflect neoclassical contract principles: premarital and cohabitation agreements. I focus on these two because, in both, the doctrinal changes that govern their enforceability have been significant and rapid, and because both are symbolic of the emerging structural pluralism in family law. It is important to note, however, that although I explore these two types of agreement, similar principles are embedded in separation contracts[72]—and, to some extent, in postnuptial contracts.[73]

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[70] Dagan, *Pluralism and Perfectionism*, *supra* note 24, at 1435.

[71] *E.g.*, *id*.

[72] *See* Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1154-55 (1999) (arguing that in the context of separation contracts "under the pretense of respect for the autonomy and the equality of women, contract doctrine and its application provide no remedy and leave women mired in financial despair and resentment.").

[73] Traditionally, and still today, courts are reluctant to enforce postnuptial agreements, and scrutinize them more critically than prenuptial contracts. *See* Sean

Since I conclude that the doctrines governing family law contracts are adopting neoclassical characteristics, I begin by laying out the basic principles of the neoclassical approach in contracts law. Section A thus introduces basic principles of classic contractual theory and its progeny, the neoclassicist approach. Section B investigates the values that have unfolded in premarital agreements. Section C then studies the values that enfold contractual principles that regulate the obligations between unmarried partners.

A. The Foundational Assumptions of Neoclassical Contract Theory

Classic contractual theory posits a regulatory apparatus grounded on the clear intent of the parties to enter into the contract and, once a valid contractual obligation is created, to hold the parties strictly to their bargain.[74] In other words, the rules of classic contractual theory make "contractual liability hard to assume and hard to escape once it is assumed."[75] Classic theory relies on formal requirements—such as writing and consideration—as conditions to make a promise legally binding.[76] Once these requirements are met, the doctrines of excuse are construed narrowly in order to bind people by their promises.[77]

In effect, the principles of classic contract theory give individuals considerable power in regard to their commitments while taking that power from the courts.[78] By construing formal, acontextual, rigid rules of formation and excuse, the system principally curtails the discretion of the judge and the jury, diminishes their ability to exercise their personal views, and forces them to adhere to the rules.[79] Rather than use a case-by-case approach to inquire into the contract's fairness, classic theory is grounded in stability and predictability. The trade-off for this is that such a

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Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 829 (2007); *Hoffman v. Dobbins*, 2009 WL 3119635, at *2 (Ohio Ct. App. 2009) ("Postnuptial agreements, with specific limited exceptions, are not valid in Ohio."). Nevertheless, recently there is more tendency to uphold postnuptial agreements and equalize the tests for their enforceability with those of prenuptials. Moreover, the recently promulgated Uniform Premarital and Marital Agreements Act specifically applies to postnuptial agreements and subjects them to the same requirements as premarital agreements.

[74] Franklin G. Snyder & Ann M. Mirabito, *the Death of Contracts*, 52 DUQUESNE L. REV. 345, 362 (2014); GRANT GILMORE, THE DEATH OF CONTRACT 52-53 (Ronald K.L. Collins 2d ed., 1995).

[75] Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 372 (2004).

[76] *Id*. at 371.

[77] GILMORE, *supra* note 74, at 50-3.

[78] Snyder & Mirabito, *supra* note 74, at 362.

[79] Feinman, *supra* note 19, at 1286-7.

system binds individuals to their bargain with very little regard to the fairness of the deal, change of circumstances, relative bargaining power, or specific circumstances of the case.[80] Indeed, "[c]lassical contract doctrine generally makes little concession for the bargaining power inequalities that plague consumers."[81]

Neoclassic contractual theory emerged as a critique to the classic approach.[82] It rests on a balance between the classic contractual principles—freedom of contracts and efficiency—with other values, including fairness.[83] The neoclassic approach adopts doctrines that are more flexible and pragmatic. Like its predecessor, the approach is still grounded in concepts such as "assent," but it is more likely to address realities of the parties and their dealings.[84] This approach defines the mainstream theory in contract law these days.[85] But as implied by its name, neoclassical contract law has not departed far from classic contractual theory.[86] It is still founded on the assumption of "relatively autonomous individuals" who undertake commitments under state intervention that ensures fairness.[87] Such contract law still assumes,

[80] Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 16 (2004) [hereinafter Feinman, *The Classical Revival*] ("The solution to these problems is to revert to a simple model of contract based on an ideal market, strictly enforcing the bargains that parties make, not reading beyond the four corners of a document in enforcing a contract, and certainly not evaluating the bargains for fairness.").

[81] Melissa T. Lonegrass, *Finding Room for Fairness in Formalism-the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 50 (2012).

[82] John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 870 (2002).

[83] Feinman, *supra* note 19, at 1288.

[84] Jay M. Feinman, *Contract After the Fall the Law of Contract* 39 STAN. L. REV. 1537, 1538 (1987).

[85] *Feinman supra note 19 at* 1285; G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 496 (1993) ("Most scholars agree that, as a matter of descriptive fact, our era is dominated by this neoclassical realist model, which is characterized by a pragmatic mix of both firm rules and open-ended standards.").

[86] *Feinman supra note 19 at 1285.*

[87] *Id.* at 1309-11; Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 182 (2005) ("The cornerstone of the neoclassical conception of contract is the idea that contractual obligations are voluntarily undertaken by contracting parties."). *See also*, Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism* 4 MICH. J. RACE & L. 1 (1998) (criticizing neoclassic approach for lack of treatment of racial and gender bias in contractual relationships).

sometimes incorrectly, that contracting parties act rationally, and it is generally pro-enforcement of the bargain.[88]

As I show below, the characteristics of neoclassical contract law are gradually but steadily appearing in the area of family-focused contracts. While the general structure of the law embodies the main principles of classic contract theory—such as adherence to rules, formalism, curtailing judges' discretion, and limiting the award of alternative measures such as quasi-contractual remedies—the system is more akin to neoclassic than classic. This is because, as I describe below, the system displays attempts to balance between competing principles, and it is more flexible than classic contract theory. Yet, the neoclassic approach is still deeply grounded in the principles of voluntariness and autonomy and adherence to rules over standards, as analyzed in the following sections.

B. Prenuptial Agreements

In this Part, I use functional analysis in order to explore the values that are promoted by the use of premarital contracts. I outline the evaluation of enforceability of premarital contracts in Subsection 1. In Subsection 2 I survey and analyze the default rules of marriage dissolution. In the third Subsection, I give a functional analysis.

1. Enforceability

The evolution of doctrines governing the enforceability of premarital contracts can be roughly compartmentalized into three stages.[89] The first

[88] *See* Danielle Kie Hart, *Contract Law Now-Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 13 (2011) (arguing that neoclassic contracts law—which she calls "modern"—still retains the main characteristics of classical legal theory). Some scholars view the neoclassic theory of contracts as taking a drastic distance from classic contract theory and incorporating a strong nonformalistic approach to contract principles. According to this account, modern courts have rejected the neoclassic approach in favor of a pro-market approach to contract enforcement. *See* Shell, *supra* note 85, at 495–519.

[89] Because states vary widely in their approaches to enforcement of premarital contracts and because constant and significant doctrinal changes have occurred in such a short period of time, this is a very rough division. *See* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 83-84 (2011) [hereinafter Oldham, *Reevaluation*] (stating that there are substantial differences between state's approaches to enforcement of premarital agreements). Despite this shortcoming, this categorization is helpful in observing the emergence of a neoclassic approach, compared with the other approaches. Jeffrey G. Sherman offered a somewhat similar evolutionary categorization, by identifying "three significant events in the shift toward routine enforcement of all prenuptial agreements." His analysis, however, is slightly

stage in the evolutionary process, the common law stage, extends from the early 1970s until the drafting of the Uniform Premarital Agreement Act (UPAA) in 1983.[90] In this stage, courts moved from a policy of absolutely declining to enforce premarital contracts regarding the consequences of divorce to a regime of limited enforceability, characterized by strong caution in enforcement.[91] In the second stage, the UPAA stage—from the passage of the UPAA until recently—states have varied greatly in their approaches. Roughly divided, some states have treated premarital contracts similarly to conventional contracts, thus adopting pro-enforcement approaches. In other states, courts have required a heightened burden for their enforceability (strong procedural and substantive fairness). In the third stage, the neoclassical stage, which just started evolving, a third approach has started to emerge: legislators and courts began to desert the substantive review of prenuptial agreements and to adopt strong procedural safeguards, attempting to protect the weaker party, while increasing predictability of contracts and restraining judges' discretion. Recent representatives of these changes are current New Jersey legislation and the Uniform Premarital and Marital Agreements Act (UPMAA). Below, I discuss these three stages. The account of stages one and two will be familiar to most readers, so I offer only a succinct description of them.[92]

Until the seventies, courts declared premarital agreements concerning divorce planning unenforceable on the grounds that they violated public policy by encouraging divorce.[93] Thus, only premarital agreements affecting the distribution of property upon the future spouse's death were enforceable. However, at the beginning of the 1970s, courts started to uphold premarital contracts concerning the obligations of the spouses

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dated, as his article was published before a few recent significant events that I consider here as part of the third stage. *See* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 386-90 (2005-2006) (identifying the three significant events as: the Posner case (1970), the UPAA (1983), and the *Simeone* case (1990)).

[90] UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001 & Supp. 2012) [hereinafter UPAA].

[91] *See* Margaret Ryznar & Anna Stepien-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 35 (2009).

[92] For excellent reviews of the development of enforcement of prenuptial agreement *see* Silbaugh, *supra* note 38, 70-75; 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, 148-59 (1998) [hereinafter Bix, *Bargaining in the Shadow of Love*].

[93] Silbaugh, *supra* note 38, at 72-73.

upon divorce.[94] Still, most courts examined the fairness of prenuptial agreements more closely than they would have under general contractual principles.[95] That is, courts have employed both procedural and substantive tests to examine the fairness of prenuptials, including a close inquiry of fairness at the time of enforcement (as distinguished from the time of execution)—aka, "second-look" provisions.[96]

The second stage in the evolution of enforceability of premarital contracts began with the promulgation of the Uniform Premarital Agreement Act (UPAA) in 1983.[97] The Act, or some portions of it, was adopted by twenty-two states and the District of Columbia;[98] it embraced a strong pro-enforcement approach.[99] The Act "facilitates treatment of premarital agreement as essentially ordinary contracts . . . [and] reduces the high burden of disclosure and conscionability."[100] In fact, when it comes to review of unfairness, the UPAA required a higher burden from the challenger than conventional contracts require.[101] This is because the UPAA coupled the element of unconscionability with fair disclosure. Namely, under the UPAA, an antenuptial agreement would not be enforced if it was unreasonable at the time of execution *and* the affected party did not receive fair disclosure of the financial status of the other party.[102] Conversely, under traditional contractual doctrine, each element alone (fair disclosure *or* unconscionability) can serve as a cause for unenforceability.[103]

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[94] *E.g.*, *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Unander v. Unander*, 506 P.2d 719 (Or. 1973).

[95] Bix, *Bargaining in the Shadow of Love*, *supra* note 92, at 154.

[96] See, *e.g.*, *Button v. Button*, 131 Wis. 2d 84, 388 N.W.2d 546, 552 (1986) ("If, however, there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce"). *See also Mallen v. Mallen*, 280 Ga. 43, 44 622 S.E.2d 812 (2005) (explaining that in evaluating antenuptial contracts courts consider whether the facts and circumstances changed since the agreement was executed so as to make its enforcement unfair and unreasonable).

[97] *See* UPAA, *supra* note 90.

[98] DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 842 (3d ed. 2012) (Only thirteen states enacted the law without significant changes); Oldham, *Reevaluation*, *supra* note 89, at 84.

[99] Bix, *Bargaining in the Shadow of Love*, *supra* note 92, at 155.

[100] ABRAMS, *supra* note 98, at 840.

[101] Bix, *Bargaining in the Shadow of Love*, *supra* note 92, at 156.

[102] *See* UPAA, *supra* note 90, § 6(a).

[103] Bix, *Bargaining in the Shadow of Love*, *supra* note 92 , at 155–6.

The first to adopt what was recently described as an "extreme" approach to enforceability[104] was Pennsylvania's Supreme Court in *Simeone v. Simeone*.[105] There, the Court ruled that prenuptial agreements should be evaluated in the same way as other conventional contracts. Still, even under this approach, the rules require that the parties provide fair financial disclosure to one another before signing the agreement.[106] Yet, several states that adopted the UPAA have created some variations, and still many other states have added rules that provide stronger protections for policing premarital contracts—including second-look provisions.

The third stage in the evolution—manifested by the changes in doctrine in New Jersey and the promulgation of the UPMAA—generally demonstrates a trend toward a regime of difficult entrance and difficult exit, and preference for rules over standards, with an emphasis on procedural safeguards over substantive ones.

In 2013, New Jersey amended its version of the UPAA in an effort to strengthen the enforceability and predictability of prenuptial agreements and protect them from review and possible recession by judges.[107] Before the revision, New Jersey's law included a second-look provision, instructing courts to examine the fairness of the agreement at the time of enforcement.[108] In addition, the law listed unconscionability as a stand-alone cause for unenforceability.[109] The amendment, however, not only limits the examination of unconscionability to the time of execution (and thus eliminates the second-look provision) but also narrows the scope of unconscionability, defining four specific factors that determine whether or not an agreement is deemed unconscionable.[110] Under the provision of this amendment, the party seeking to set aside the prenup must prove that she

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[104] Chelsea Biemiller, *The Uncertain Enforceability of Prenuptial Agreements: Why the "Extreme" Approach in Pennsylvania Is the Right Approach for Review*, 6 DREXEL L. REV. 133, 156 (2013) ("Pennsylvania takes an extremely pro-contract approach to prenuptial agreement enforcement").

[105] *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

[106] *Stoner v. Stoner* 819 A.2d 529, 533 (Pa. 2003) ("reaffirm[ing] the principle in *Simeone* that full disclosure of the parties' financial resources is a mandatory requirement").

[107] New Jersey Senate Committee Statement, S.B. 2151, 7/26/2012 ("This bill would strengthen the enforceability of premarital and pre-civil union agreements").

[108] N.J. Stat. Ann. § 37:2-38(b) (West 2009) (Deleted by amendment, P.L.2013, c. 72).

[109] *See* N.J. Stat. Ann. § 37:2-32 (West 2011).

[110] N.J. Stat. Ann. § 37:2-38 (West) ("An agreement shall not be deemed unconscionable unless the circumstances set out in subsection c. of this section are applicable").

did not receive full disclosure of assets, *or* did not waive the disclosure, *or* did not have reasonable knowledge about the spouse's assets, *or* did not consult independent legal counsel (and did not waive, in writing, the opportunity to consult one). Put differently, there is not *substantive* unconscionability in New Jersey, only procedural. If the procedural requirements were met, and the spouse entered voluntarily into the contract, there is no way out. This amendment was motivated by clear animosity toward judges' discretion and by an attempt to strengthen the enforceability of antenuptial contracts.[111] The result is that, in New Jersey, challenging a prenuptial agreement is more difficult than attacking a conventional contract.

Finally, the most noteworthy legal development in the field is the 2012 promulgation of the UPMAA.[112] In drafting the UPMAA, three decades after the UPAA, the Uniform Law Commission responded to criticism of the UPAA as well as to the wide variation among states in its implementation.[113] Fortunately, it did not take the extreme approach adopted by New Jersey; rather, as described by two committee members, it aimed to strike a balance between "informed decision-making and procedural fairness without undermining interests in contractual autonomy, predictability, and reliance."[114] Indeed, as analyzed below, the UPMAA takes a more balanced approach than its predecessor. At the same time, as indicated in that very description, the act's focus is more on procedure and informed decision making and less on substantial unfairness.

Like its predecessor, the UPMAA specifies that the agreement be in writing and signed by both parties.[115] However, the proposed UPMAA changes, in quite significant ways,[116] the causes of unenforceability that the UPAA incorporated: One, the UPMAA strengthens the procedural requirements regarding entrance into the contract. Under the UPAA, there was no requirement of access to independent legal representation. This

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[111] Hearing of S2151 Before the S. Judiciary Comm., 2012 Leg., 215th Sess. July 26 (N.J. 2012) (statement of S. Nicholas Scutari, Speaker, S. Judiciary Comm.).

[112] Available at: http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf

[113] Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 314-5 (2012).

[114] *Id.* at 315.

[115] *Id.* at 338.

[116] *Id.* at 339 ("The standards for enforceability, however, diverge significantly from the UPAA").

presented a problem, as sometimes a prospective spouse would introduce the agreement a few days before the wedding, when the other party did not have enough time to consult a lawyer and was under the threat of having to cancel the wedding.[117] The UPMAA sets forth that when one party did not have a reasonable opportunity for representation, the contract will not be enforced.[118] To clarify, the UPMAA does not require independent legal representation in each agreement but only ensures that the challenger had *reasonable time and financial means* to obtain legal advice.[119] If a party was not represented by a lawyer, the UPMAA requires that the challenger sign a clear waiver of the rights that she is relinquishing under the agreement.[120]

Two, as previously stated, under the UPAA, a finding of unconscionability required both that the bargain was unreasonable *and* that the challenger did not receive a fair disclosure of the other party's financial condition.[121] The UPMAA uncouples financial disclosure from unconscionability, thus compelling adequate disclosure of the partners' financial situations as a stand-alone prerequisite for enforceability.[122] In addition, it contains a separate provision allowing the court to refuse enforcement of the whole agreement, or part of it, if it was unconscionable at the time of execution.[123]

Three, UPMAA, unlike its predecessor, leaves the door open for invalidation of an antenuptial agreement based on changed circumstances during the marriage that result in "substantial hardship."[124] Apparently, the drafting committee was divided about the need to have such provision.[125] The majority of the committee rejected the addition of a second-look provision for the reason that it contradicts freedom of contract

[117] Oldham, *Reevaluation*, *supra* note 89, at 90 (describing cases in which the wealthier party presents the prenuptial a short time before the wedding and conditions the marriage on signing the prenuptial).

[118] UPMAA 9(a)(2). In section 9(b) the section defines what counts as available independent legal counseling.

[119] *See* UPMAA, § 9(b)(1)(A), (B).

[120] Section 9(a)(3) requires that the agreement include a "notice of waiver of rights" or "an explanation in plain language" of the rights that the challenger waived.

[121] *See* UPAA, *supra* note 90, § 6(a)(2).

[122] UPMAA § 9(d) defines "adequate" disclosure as: (1) if the party receives description of the property income and liability that belong to the other party; or (2) waiving in writing such disclosure; (3) the party has or should have adequate knowledge of the property income and liabilities of the other party.

[123] Atwood & Bix, *supra* note 113, at 342.

[124] UPMAA § 9(f)(2).

[125] Atwood & Bix, *supra* note 113, at 333.

and increases unpredictability. However, since a minority of the members insisted, the committee decided to add such provision in brackets—meaning that the provision is an alternative for states that would like to adopt it, but it is not an integral part of the proposed law.[126]

So far, only two states have adopted the UPMAA and two others have introduced a bill but have not finalized the legislative process. Of the two adopting states, Colorado has done so without the bracketed section (the second-look provision).[127] Moreover, Colorado did not adopt the stand-alone unconscionability ground. Rather, as soon as prospective spouses follow the procedure set forth in the law, the part of the agreement that concerns the division of property is deemed enforceable and there is no way to invalidate it.[128] However, Colorado still allows for evaluation of unconscionability at the time of enforcement, but only as applied to spousal support and attorney's fees.[129] In other words, when it comes to distribution of property, substantive unconscionability is unavailable. Similarly, Mississippi, where the legislation has only been introduced, chose (in its bill) the same system as Colorado did.[130] Conversely, North Dakota has adopted the whole act, including the bracketed second-look provision;[131] and D.C., which has only introduced the bill, subscribes to unconscionability only at the time of signing, not at the time of enforcement (i.e., D.C. did not adopt the bracketed section).[132]

What we see here, therefore, is the emergence of a new attitude in enforcement of premarital agreements. Before the emergence of this trend, states could have been divided, very roughly, into two approaches: those that took a strong pro-enforcement stance (for example, the thirteen states

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[126] *Id.*; Section 9(f)(2) (allowing courts to refuse enforcement if it "result[s] in substantial hardship for a party because of a material change in circumstances arising since the agreement was signed").

[127] COLO. REV. STAT. ANN. § 14-2-309 (West).

[128] COLO. REV. STAT. ANN. § 14-2-309 (West) ("A marital agreement or amendment thereto or revocation thereof that is otherwise enforceable after applying the provisions of subsections (1) to (4) of this section. . . . ").

[129] COLO. REV. STAT. ANN. § 14-2-309 (West).

[130] House Bill 1042, An Act to Create The Uniform Premarital And Marital Agreements Act, available at: http://billstatus.ls.state.ms.us/documents/2014/html/HB/1000-1099/HB1042IN.htm

[131] Bill 20-217, Uniform Premarital and Marital Agreement Act of 2013, available at: http://lims.dccouncil.us/_layouts/15/uploader/Download.aspx?legislationid=29377&filename=B20-0221-HearingRecord1.pdf

[132] B20-0217, UNIFORM PREMARITAL AND MARITAL AGREEMENT ACT OF 2013 (reintroduced in 2015) available at: http://dcclims1.dccouncil.us/images/00001/20130410170845.pdf

that adopted the UPAA without significant changes[133]); and those that offered robust protection, both procedural and substantive (for example, states that adopted second-look provisions[134]). What we see in the UPMAA itself—and in some of the states that have considered or adopted it—is the movement toward both an emphasis on procedural safeguards and a reduction in substantive protection. To demonstrate this point further, it is useful to compare the UPMAA with the American Law Institute (ALI) proposals that were promulgated in 2002.[135] Under the ALI principles, a court can refuse enforcement of a prenuptial agreement if the enforcement would "work a substantial injustice"—a more flexible standard than the bracketed section of the UPMAA.[136]

In conclusion, states still show considerable variation in their enforcement of premarital agreements. However, it seems that the emerging trend—demonstrated by five states that recently amended or are about to amend their laws and the general spirit of the UPMAA—is progression toward informed decision making and the abolishment or limiting of substantive unconscionability. In Subsection 3, I analyze the consequences of this trend. For now, however, in order to better understand why the law that governs premarital agreements adopts neoclassic values, an examination of the default rules of marriage dissolution is required.

2. Default Rules

Default rules are modifiable contractual terms that govern the agreement in the absence of other agreement by the parties.[137] The default rules of the marriage contract are the state's rules regarding division of property and spousal support upon divorce.[138] That is, unless the prospective or married couple signs a marital contract (prenuptial, postnuptial, or divorce settlement) that modifies these default terms, upon

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[133] *See* Oldham, *Reevaluation*, *supra* note 89, at 84 (listing the states that adopted the UPAA with slight variations).

[134] *See id.*, at 103-11 (describing different approaches to substantive review of premarital agreements).

[135] *See* American Law Institute, Principles of The Law of Family Dissolution: Analysis and Recommendations (2002) § 7.04(3).

[136] *Id*. at § 7.05.

[137] Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 565-56 (2006).

[138] Scott & Scott, *supra* note 30, at 1306; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 n.10 (1989).

divorce the spouses will follow the financial obligations established by the state.

The study of marital default rules is sometimes separated from the exploration of rules pertaining to enforcement of premarital contracts.[139] But the two topics—the contractual doctrine and the design of default rules—cannot be separated because the default rules have a significant effect on people's incentive to contract and on the substance of the contract itself.[140] This is especially true in the area of premarital contracts, because the parties are opting out of the state's contract (unlike other contracts in which parties opt into a contract). This Subsection examines the default rules of marital breakdown.

This Subsection shows that the default rules have been changing in a way that favors the wealthier, nonprimary caregiver partner.[141] By using the term "homemaker" or "primary caregiver," I refer not only to spouses who do not work outside the home, but also, and primarily, to those who work the "second shift"—who have invested more in the household, including raising the children, and made sacrifices that are likely to result in lost career opportunities.[142] In the distribution of property arena, the rules tend to divide assets equitably, but some rules still disfavor the dependent spouse. In the spousal support arena, the developments are toward strong restrictions of spousal support.[143]

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[139] UMPAA, for example, did not discuss the rules of distribution of property and alimony and their effect at all. See Atwood & Bix, *supra* note 113, at 330 (reporting that the mandate given to the UPMAA committee was limited to premarital and postmarital contracts, despite expectation that it will include cohabitation contracts as well). Similarly, typically family law casebooks discuss the two topics separately.

[140] *See infra* note 197 and accompanying text for discussion of the effect of default rules on the content of the prenuptial agreement; *infra* notes 272–279 for a discussion about the effect of default rules on financial obligations between cohabitants.

[141] *See, e.g.*, Scott & Scott, *supra* note 30, at 1312-16 (suggesting that contemporary alimony laws disfavor the spouse who undertakes the main home assignments).

[142] *See* Oldham, *Reevaluation*, *supra* note 89, at 124 ("In relationships where the parties raise children, the primary caretaker customarily incurs lifetime career damage."). For a discussion and statistics about "homemakers" and gender roles see *infra* note 190 and accompanying text.

[143] J. Thomas Oldham, *Changes in the Economic Consequences of Divorces*, 42 FAM. L.Q. 419, 433 (2008) [hereinafter Oldham, *Changes in the Economic Consequences*] ("During the past fifty years, equitable distribution has become accepted in all common law states. Spousal support is less frequently awarded, and when awarded, it is increasingly common for it to be for a fixed term, rather than for an indefinite period.").

The complicated rules of the distribution of property upon breakup—in community property states and common law states—come down to whether the court divides the marital assets of spouses equally or equitably.[144] Each state has its own rules concerning what is included in marital property and what is not (separate property).[145] Assets deemed "separate property" are not included in the pool that is divided, thus reducing the share of one spouse. The rules governing division of property upon divorce are complicated, uncertain, and hardly known to lay people, and thus may prevent people from effectively protecting themselves in advance.[146]

The range of marital property available for distribution on divorce has expanded in the past generation or so, and the trend is toward equitable distribution.[147] At the same time, a few significant rules still deal inadequately with dependent spouses. For example, in 2009, Alabama enacted a law that precludes division of retirement benefits when the marriage lasted less than ten years.[148] In Indiana, unvested retirement benefits are not considered marital property,[149] and because "pension rights frequently are the most valuable part of the marital estate," this law creates a significant loss to the homemaker.[150] Except for New York,[151] no other states recognize a license or professional degree as marital property,[152] and while some states have some mechanisms for reimbursement of the other spouse's contribution to the relevant education, still others do not recognize the enhanced earning that the

[144] Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 100 (2004).

[145] J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220 (1989).

[146] John C. Sheldon, *Anticipating the American Law Institute's Principles of the Law of Family Dissolution*, 14 ME. B.J. 18, 22 (1999) ("marital property issues tend to be fact-intensive, and marital distribution statutes tend to be vague and to rely heavily on judicial discretion"); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51, 63 (1998-1999) (arguing that "virtually any outcome is legally possible").

[147] *See* Oldham, *Changes in the Economic Consequences*, *supra* note 143 at 429-32.

[148] ALA. CODE ANN. § 30-2-51.

[149] IND. CODE ANN. § 31-2-98 (Westlaw 2005).

[150] Oldham, *Changes in the Economic Consequences*, *supra* note 143, at 430. One study found that pensions accounted for 25 percent of the parties' total wealth, *id*. at 434.

[151] *O'Brien v. O'Brien*, 489 N.E.2d 712, 751 (N.Y. 1985).

[152] Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115, 126 (2010) ("New York is, therefore, in the minority in treating professional licenses as marital assets. . .").

license provides.[153] As a result, "the husband is permitted to keep most of the assets accumulated during marriage, while the wife, who has invested in her family and her husband's career, is deprived of a return on her marital investment."[154] In Georgia, the Supreme Court recently held that property acquired during the marriage is presumed separate property unless proven to be marital.[155] This is contrary to the rules in all other states and can result in unjust outcomes because it is difficult, between married couples, to prove who acquired the property, and when.[156]

In any event, in many cases distribution of property is less of an issue, as most couples do not accumulate significant assets;[157] the more important question involves interest in the spouse's future income.[158] This is especially true when the primary caregiver has lost career opportunities resulting from sacrifices that she or he took as a result of a bargain with her or his spouse; and a job found at this later stage will likely not promise satisfying financial security.[159] When it comes to spousal support, not only do courts currently grant fewer alimonies, but the alimonies are shorter term and of lesser amount.[160] Even before the recent trend of alimony reform, courts granted spousal support infrequently.[161]

The type of spousal support has also changed radically. From permanent spousal support as the prevailing rule (that is, the payor pays until his death or until the payee remarries), most states now prefer rehabilitative spousal support: a time-limited order meant to assist the

[153] *Id.* ("Other jurisdictions may grant the nonprofessional spouse certain relief in limited circumstances.").

[154] Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1115 (1989).

[155] *Newman v. Patton*, 286 Ga. 805 (2010); *See Dasher v. Dasher*, 283 Ga. 436, 658 (2008).

[156] Frantz & Dagan, *supra* note 144, at 102; Oldham, *supra* note 145, at 220 ("Problems relating to tracing are common in divorce since most spouses do not keep property in the same form throughout a marriage.").

[157] See ABRAMS, supra note 98 at 471.

[158] Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 403-04 (1992) [hereinafter, Stake, *Mandatory Planning*]. *But see*, Oldham, *Changes in the Economic Consequences*, *supra* note 143, at 434 ("[T]he adoption of equitable distribution may be becoming more significant over time, as more spouses have accumulated property of some value during marriage.").

[159] Stake, *Mandatory Planning*, *supra* note 158, at 403–04.

[160] Judith G. McMullen, *Spousal Support in the 21 Century*, 29 WIS. J.L. GENDER & SOC'Y 1, 6–7 (2014).

[161] *See id.* at 6.

nonworking spouse to become self-supporting.[162] Many states now restrict permanent alimony to long-term marriages[163] (e.g., twenty years in Massachusetts[164]). A few states are considering alimony reforms that piggyback on Massachusetts's reform.[165] A recent Texas statute allows courts to grant spousal support only in marriages longer than ten years and, even then, the duration of alimony for marriages of between ten and twenty years cannot exceed seven years.[166]

In conclusion, the default rules of marriage, and especially the rules governing spousal support, disfavor the person who gave up employment opportunities in order to invest more in the household and family.[167] Now that we have surveyed and analyzed the rules of enforceability and the default rules that govern premarital agreements, we can move to explore how these rules influence the contracting habits and usage of parties, and which values are primarily embedded within this contractual instrument.

3. Functional Analysis

In this Subsection, I first ask who the primary users and beneficiaries of prenuptial agreements are and to whom they may be detrimental. Then I examine whether the neoclassic approach provides sufficient protection to those who can be harmed as a result of prenuptials.

Based on the design of default rules (property distribution and spousal support), two main groups have incentives to execute premarital contracts—i.e., to move away from the property and support obligations suggested by the default rules.[168] One, the wealthier partners want to protect themselves from unpredicted changes in the default rules.[169]

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[162] Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1, 22 (1989).

[163] Frantz & Dagan, *supra* note 144, at 119 ("Those few awards of alimony are almost entirely time-limited").

[164] Mass. Ann. Laws ch. 208, § 49 (b), (f) (West 2013).

[165] McMullen, *supra* note 161, at 8.

[166] TEX. FAM. CODE ANN. § 8.051, 8.054 (West 2011).

[167] *See e.g.*, Scott & Scott, *supra* note 30, at 1316 ("Current alimony law distorts these incentives by imposing on the homemaker a disproportionate share of the financial costs of divorce"); Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 717-18 (2000).

[168] Ryznar & Stepien-Sporek, *supra* note 91, at 33 ("Premarital agreements may be drafted to either significantly favor or disfavor the more vulnerable spouse upon divorce.").

[169] *Id*. at 61 ("Premarital agreements may also be more common among prospective spouses with significant income or age disparities"); Heather Mahar, *Why Are There So Few Prenuptial Agreements*? (Harvard Law Sch. John M. Olin Center for Law, Econ. & Bus. Discussion Paper Series 2003), at *6, available at http://

Likewise, they want to guarantee that their properties—those they own pre-marriage and/or will receive by inheritance—will remain theirs and not be transmuted from separate to marital, or be subject to a court's discretion in equitable distribution (as in "kitchen sink" states[170]). This group can also include people who remarry and want to protect their family assets.[171] The second group is the primary caregivers.[172] Because, as shown earlier, the default rules of marriage dissolution are construed in a way that does not adequately protect the investment of the primary caregivers and compensate for lost career opportunities, scholars and practicing attorneys alike agree that primary caregivers have a strong incentive to execute a prenuptial agreement.[173]

However, the reality is that primary caregivers rarely use prenuptials to protect their interests. Indeed, "somewhat paradoxically, it is wives in traditional marriages that empirically are less likely to write a marital contract even though they apparently have the most to gain from doing so."[174] In accordance, ample evidence indicates that the majority of prenups are executed by the economically privileged partners in order to shield their assets.[175] Not only do the wealthy make premarital agreements, but business owners and people who expect to inherent family wealth also execute premarital agreements more frequently than ever

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lsr.nellco.org/cgi/viewcontent.cgi?article=1224&context=harvard_olin ("[E]ven if a couple finds the present divorce law desirable, there is no guarantee that the law at the time of their divorce will not have been modified.").

[170] Oldham, *supra* note 145, at 219 (defining 'kitchen sink' states as allowing "court to divide all property owned by either spouse at the time of divorce").

[171] Sherman, *supra* note 89, at 373 ("P]renuptial agreements are more common for second marriages than for first marriages.") (citation omitted); Ian Smith, *The Law and Economics of Marriage Contracts*, 17 J. ECON. SURV. 201, 208 (2003).

[172] Mahar, *supra note* 169, at *6.

[173] *See, e.g.*, Jeff Landers, *Deciding To Become A Stay-At-Home Mom? Consider This Cautionary Tale*, May 29, 2014, Forbes ("*[A] prenup or postnup is an absolute legal and financial necessity* for any woman choosing to give up paid work and all its associated benefits, tangible and otherwise, to stay home with the children."). *Cf.*, Stake, *Mandatory Planning*, *supra* note 158, at 404 (arguing that current spousal support rules pose a risk to the homemaker and proposing that prenuptial agreements could ease this problem).

[174] Smith, *supra* note 171, at 212.

[175] *See id*. at 208; MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW. AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 139 (1989) (noting that prenuptial agreements "are nearly always used to insulate the property of the more powerful spouse, who in most cases will have the better bargaining position.").

before.[176] Indeed, as J. Thomas Oldham notes, "Although in rare instances a premarital agreement provides additional rights to the spouse with fewer assets, the 'stereotypic' voluntary execution case involves this scenario: the wealthier party decides he or she wants a premarital agreement to limit the other party's financial claims if the parties divorce."[177] Concerning the substance of the agreement, Oldham explains that "[s]ome limit the rights of the less wealthy spouse but still provide significant financial recovery to that spouse if the marriage ends in divorce. But many severely restrict or attempt to completely eliminate all financial claims upon divorce."[178]

A few reasons explain why prenuptials are signed predominantly by wealthy partners and much less often by the primary caregivers—despite their strong interest.[179] First, some partners may not be aware of the benefit of executing a prenup.[180] Most people are ignorant of the complex rules surrounding the financial consequences of marriage dissolution;[181] they assume that the default rules will be more or less similar to their expectations.[182] Second, and relatedly, many parties are too optimistic regarding the likelihood of divorce, thus devaluate the potential benefit of prenups.[183] Even if partners execute one, their over-optimism about the longevity of their marriage may cause them to invest less in negotiating best terms.[184] Indeed, "Persons contemplating marriage are unlikely to view the prospective partner objectively and may not measure the potential costs and benefits of the marital state accurately."[185] Importantly,

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[176] Laura Petrecca, *Prenuptial agreements: Unromantic, but important*, USA TODAY, March 11, 2010, available at: http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08_cv_n.htm (quoting American Academy of Matrimonial Lawyers President, Marlene Eskind Moses, saying that "[i]t's not just something for the rich and famous any longer. It's for people that have assets and/or income that they want to protect.")

[177] Oldham, *supra* note 89, at 89 (citation omitted).

[178] *Id*. at 103 (citation omitted).

[179] *See also* Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Countermarriage*, 99 CALIF. L. REV. 235, 264 (2011) (suggesting five reasons for why the state could reasonably refuse to enforce contracts between romantic partners).

[180] Mahar, *supra* note 169, at *9.

[181] Smith, *supra* note 171, at 214.

[182] Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 441-43 (1993).

[183] *See, e.g.*, Mahar, *supra* note 169, at *9; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254 (1995).

[184] Smith, *supra* note 172, at 214.

[185] Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 63 (1990) [hereinafter Scott, *Rational Decisionmaking*].

due to these cognitive biases, couples may fail to insert provisions that will excuse them from performance in cases of changed circumstances (for example, not anticipating that they may lose employability).[186] Further, drafting can be costly.[187] Parties can use boilerplates, but then they risk signing a prenup that does not suit their needs.[188] And some parties think that suggesting a prenuptial signals that they are not trustworthy, or that they are opportunistic; others are uncomfortable raising these issues for other reasons.[189]

But not only are primary caregivers less likely to enter into a protective agreement, they are also more prone to be harmed by doing so. Despite the *potential* of prenuptial agreements to protect the economically vulnerable party, they could disadvantage that party in a few instances. This is true for few reasons. One stems from the gender of the typical primary caregiver: Primary homemakers, even if they also work outside the home, are still predominantly women.[190] The division of gender specialization also holds true for wealthier couples—those who are most likely to use prenuptial agreements.[191] Meta-analyses of studies of women as negotiators persistently show that women have different negotiating

[186] *Id.* at 82.

[187] Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 461 (1998).

[188] *See* Ryznar & Stepien-Sporek, *supra* note 91, at 41 (analyzing the advantages and disadvantages of using boilerplates in prenuptial agreements).

[189] Rasmusen & Stake, *supra* note 187, at 461.

[190] According to US Bureau of Labor Statistics, in 2011 64.2 percent of mothers with children under 6 years did not work outside the home, compared with 76.5 percent of mothers with children 6 to 17 years of age. Twenty-seven percent of employed women usually worked part time, while only 11 percent of men did. *See* Women in the Labor Force: A Databook (Feb. 2013) available at: http://www.bls.gov/cps/wlf-databook-2012.pdf; Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 20-26 (2000) ("sacrifices in earnings potential for the sake of the marriage will be common even among wives who work full-time during marriage, and also make it more likely that husbands will outearn their wives"); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 206-7 (2012) ("The primary family responsibilities that lead married mothers to limit paid employment go far in explaining the motherhood penalty. Minimized investments in the job market often mean less pay, less advancement, and, over time, reduced earning potential as opportunities disappear.").

[191] Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 25 (2010) (arguing that "the more wealth a married couple has, the more profound their gender specialization tends to be").

style than men, which may lead to detrimental results.[192] Women, generally, are "less likely than men to ask, less likely to initiate negotiations, less positively disposed toward negotiation, less confident, and more likely to set lower goals."[193] The differences in bargaining style are especially great when ambiguous terms such as "equitable distribution" are involved.[194] Furthermore, in general, women have more to lose from not getting married than men do because their marriage prospects decline with age, while men's age range for getting married is longer.[195] For this reason, some women may feel more willing to enter into a marriage that includes a bad bargain than to begin again searching for a partner.[196]

An additional important reason that prenuptials can pose greater harm to the primary caregiver is that the negotiations will likely yield limited results in her favor. This is because the default rules create an endowment that limits the effectiveness of the bargain. As Janet Halley points out, "'[B]argaining in the shadow of the law'—or at least, of what the spouses think the law to be—does not emerge suddenly in divorce negotiations but rather permeates marriage."[197] Because parties bargain in the shadow of the default rules even at the time of executing a prenuptial, it is unlikely that the homemaker will get much more than the default rules grant her[198] since those rules more or less set the framework for what each partner expects to get. Of course, the bargaining endowments do not exclude the option that the prenuptial will grant more than the default, but at the least the default rules stand as a general guideline for what the parties' reasonable expectations should be. Thus, there is only so much that a prenuptial agreement can achieve in favor of the homemaker, as evidenced by the reality that prenuptials are often written to leave the weaker party with less than the default rules would otherwise give her.

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[192] Deborah M. Kolb, *Negotiating in the Shadows of Organizations: Gender, Negotiation, and Change*, 28 OHIO ST. J. ON DISP. RESOL. 241, 243 (2013); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 579-80 (1998) (citing research that suggests that women are not equally effective negotiators as men).

[193] Kolb, *supra* note 192, at 243 (citation omitted).

[194] Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 111-12 (2008).

[195] Wax, supra note 192, at 545-56.

[196] *Id.* at 650-2.

[197] Halley, *supra* note 53, at 49.

[198] Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 27 (1981).

While the consensus among scholars is that primary caregivers are better off bargaining before marriage (compared with during marriage or upon divorce), this is not always the case.[199] Taking into consideration the trend toward strict enforcement of premarital agreements, the homemaker could, in some cases, be better off negotiating ex-post (at the time of divorce), when there are some uncertainties about the law that can be used as leverage in reaching a settlement agreement.[200] In addition, because the alimony award is based on need, in the case of changed circumstances or when the couple was married for a long time a homemaker will likely fare better under the default rules than under strict enforcement of a harsh prenuptial. With the decline of second-look provisions—which would invalidate prenups in cases of changed circumstances—people in long-term marriages with children, or people who suffered unforeseeable events that reduced their working capacity, may gain more under the default rules of support that take into consideration need, employability, and the marriage's longevity.[201] Executing a prenuptial has other advantages—like saving transactional costs of future litigation, which can be prohibitively

[199] Some scholars suggest that women's bargaining power to execute marital agreements is better before marriage compared with negotiating during marriage or upon divorce. *See* Smith, *supra* note 172, at 214-15; Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1229 (1993); *See also*, Stake, *supra* note 158, at 419 ("Some, but not all, of the benefits stemming from premarital contracts assume that negotiation is easier at the time of marriage than at the time of divorce. There is reason to believe that early planning is much less stressful."). During marriage, the argument goes, women have more to lose (for example, due to the decline in their earning capacity), which may incentivize them to stay in the marriage even in return for a bad bargain. Similarly, upon divorce, women generally face harsher financial consequences. *See* Scott & Scott, *supra* note 36, N214 ("In a traditional marriage, the homemaker wife, evaluating her reduced future earning capacity and declining prospects for remarriage, is disadvantaged in bargaining during the marriage."); Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 233 (2010) ("it is undisputed that women are worse off after divorce than men"); Matthew McKeever & Nicholas H. Wolfinger, *Reexamining the Costs of Marital Disruption for Women*, 82 SOC. SCI. Q. 202, 215 (2001). In addition, finding out before getting married that the prospective husband is opportunistic can be a warning signal to the future bride; and then, while she still has good prospects for getting married, she can choose a different partner. Wax, *supra* note 192, at 651. While this is a valid perspective, it still does not render the deficits of bargaining before marriage—which are suggested by this Article—less significant.

[200] *Cf*., Scott & Scott, *supra* note 30, at N191 ("Women who are less assertive negotiators than men will be more likely to hold onto the default baseline than to bargain aggressively in environments where legal claims are uncertain.").

[201] *Cf.* Scott, *Rational* Decisionmaking, *supra* note 185, at 73-74 ("Also troublesome is that events not anticipated at the time of marriage may result in unfairness if precommitments are enforced.").

expensive (assuming that the homemaker did not challenge the prenuptial, which would be costly) and reducing the accompanying acrimony[202]—but, even so, between the options of a difficult divorce or being divorced without financial means, the former seems better.

Taken together, all these factors—over-optimism about staying married, cognitive bias in predicting change of circumstances, cost of drafting, lack of familiarity with the complicated default rules, different perspectives on bargaining, more urgency to marry at a younger age, and limitation on the substance of the bargain as a result of the default—can lead some homemakers to enter into antenuptial agreements that disfavor them, even significantly.[203]

Against this backdrop, we can move now to examine the type of protection that the new doctrinal trend—and its focus on procedural safeguards—provides. What the UPMAA approach—and to a larger extent the approach of New Jersey and the few states that adopted or introduced the UPMAA—suggests is a trade-off: stronger procedural requirements that aim to inform the weaker party of her potential loss, in exchange for stronger predictability of enforceability of these agreements; i.e., less power to judges to set these agreements aside based on unfairness or changed circumstances. What the UPMAA and the aforementioned states do not take into consideration is the well-known deficiencies of mandated disclosure and procedural safeguards.

The rules governing prenuptial agreements assume that more information will direct people to reach better decisions.[204] But this proposition ignores the real problem: even if people get full information, they can still make bad choices. As stated recently by Omri Ben-Shahar and Carl E. Schneider, "A great and growing literature in social psychology and behavioral economics documents the ways people distort information and ignore and misuse it in making decisions. That literature

[202] Stake, *supra* note 158, at 418 ("Setting aside beneficial effects on behavioral incentives during the marriage and enhanced marital harmony, the reduced costs at breakup alone might justify mandating premarital agreements.").

[203] *See generally* Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J. L. & GENDER 171, 650-52 (2013) (arguing that the duress doctrine fails to incorporate the rich concept of power imbalance and showing how such a narrow approach disfavors the weaker party in prenuptial enforcement proceedings).

[204] *Cf.*, Atwood & Bix, *supra* note 113, at 332 (2012) ("requiring that one have a basic understanding of what he or she is waiving seemed appropriate as a matter of fundamental fairness.").

teaches that you do not solve the problem of bad decisions by giving people information."[205]

Without mandatory legal advice,[206] the procedural requirement of signing a waiver does not remedy the cognitive bias inherent in the situation: it does not assist with the parties' over-optimism vis-à-vis divorce that may cause them to bargain less effectively and it does not assist with cognitive bias related to the inability to predict unanticipated contingencies in their lives.[207] And even legal advice does not guarantee that the prospective spouse has bargained wisely. As explained by Jens M. Scherpe "even negotiating or renegotiating the terms of the agreement for many would seem a breach of trust and therefore might lead to the (future) spouse accepting terms that he or she otherwise would not have accepted."[208] Indeed, as stated by an appellate court in New Zealand, legal advice does "not protect one who ignores the advice."[209] Thus, "even the best legal advice cannot be more than *a* safeguard, but never *the* safeguard."[210]

Further, the procedural requirements of antenuptial formation do not address the limitations of bargaining in the shadow of the default rules. They also do not sufficiently mitigate the disadvantage in many women's negotiating style under the present adversarial system and do not give any

[205] Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 720 (2011).

[206] As a reminder, the UPMAA requires access to independent legal counsel if the other party was represented, but does not mandate representation—it only assures accessibility. Alternatively, if the party who forfeits rights was not represented, the agreement must include a "notice of waiver of rights" or "an explanation in plain language" of the rights being waived. In addition, there is a requirement for fair disclosure of assets and liabilities, unless the other party already has knowledge or a reasonable basis for knowledge of the information. No doubt these rules help in assuring more knowledge before signing a prenuptial. They will be effective in preventing the somewhat common practice of suggesting prenuptial agreement just a short time prior to the wedding.

[207] With regard to the contingency problem, Elizabeth Scott suggests that the problem may be mitigated by using standard forms and by background rules that define the conditions of modification and excuse. Scott, *Rational Decisionmaking, supra* note 185, at 89-90. The problem with Scott's suggestion is simply that these background rules are disappearing (the diminishing of second-look provisions). The only such background rule adopted by the UPMAA concerns disregarding a waiver of spousal support that causes a party to be eligible for public assistance. § 9(e).

[208] JENS M. SCHERPE, MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE 443, 495 (2012).

[209] Coxhead v. Coxhead [1993] 2 NZLR 379, 404 (CA).

[210] SCHERPE, *supra* note xx, at 495.

weight to the general disadvantage of women in bargaining in the shadow of the marriage market.

Not only do the procedural safeguards not offer sufficient protection to the primary caregiver, but the serious problem is that they are likely to result in a diminishing review of substantive unconscionability. Traditionally, in conventional contracts law, courts have found unconscionability only when both procedural and substantive unconscionability exist.[211] However, often, when full disclosure is made, "an empty but formally correct disclosure can keep the contract from being unconscionable, however problematic its terms."[212] This is already the case in New Jersey and in Colorado (with regard to division of property): when the parties meet the procedural criteria, they cannot raise any further arguments concerning the fairness of the deal. It is likely that even in states that would adopt a stand-alone unconscionability standard, as suggested by the UPMAA, courts will be less willing to invalidate the agreement once the parties have followed the procedural rules of executing a prenuptial.

The law and function of prenuptial agreements thus fit squarely within the neoclassic approach. The law focuses on posing requirements for formation of contracts that aim to assure the parties' consent to the agreement. But the neoclassic approach disregards the reality of the marriage market, the inequality of the bargainers, the design of default rules, and unfair results.[213] It also strengthens predictability while diminishing judges' discretion and making the excuse of obligation more difficult—all characteristics of neoclassical contractual theory.[214]

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[211] Lonegrass, *supra* note 81, at 12.

[212] Ben-Shahar & Schneider, *supra* note 205, at 739.

[213] Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 947-48 (2006) ("Conspicuously absent from the [unconscionability] doctrine's elements is consideration of subjective factors related to power, class, gender, or race. . . The doctrine does not account for the parties' pre-bargain attitudes and behavior that may influence the terms of their agreement.").

[214] *Cf.*, Feinman, *supra* note 19, at 1286-87 ("When courts mechanically applied these abstract, formal doctrines, they protected the individual's right to assume contractual obligation or to avoid it at the same time as they provided a predictable basis for commercial transactions"); Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 808 (2000) ("the rules of classical contract law were implicitly based on the assumptions that actors are fully knowledgeable. . . This model accounts in part for such rules as the duty to read, whose operational significance was that actors were conclusively assumed to have read and understood everything that they signed.").

In conclusion, the neoclassic trend adopted to alleviate bargaining imbalance in the premarital-agreements context reflect another example of the position, described by Duncan Kennedy as "center-left," that focuses on "eliminating inequality of bargaining power" but "has nothing to do with eliminating factual inequalities."[215] As long as the procedural requirements are met, those mechanisms' primary purpose is in assuring the enforceability of the contract and reducing the power of courts to invalidate unfair bargains.[216] Parties can end up with a severely unfair bargain and the court would not set aside the agreement—because the formal requirements were met. The spirit of the legal change is to make the weaker party aware of her losses and then make the agreement enforceable anyway.

C. Cohabitation Contracts

While cohabitation contracts and premarital agreements are treated as distinct topics—both in family law casebooks, as evidenced by their organization into different sections,[217] and in legislative work, as evidenced by the work of the UPMAA committee[218]—the two have clear connections. One main correlation is in the way that the rules that govern enforcement of both types of contracts potentially channel people's choices regarding their relationship status and financial arrangements. That is, if cohabitation does not warrant financial obligations between the partners without entering into express contract, then some people who would like to protect their wealth would be better off cohabiting than marrying.[219] If, on the other hand, cohabitation without express contract imposes financial obligations, some people may be better off being

[215] 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, 621 (1982) [hereinafter Kennedy, *Distributive and Paternalist Motives*].

[216] Lonegrass, *supra* note 81, at 54 ("The conventional approach to unconscionability is decidedly formalist. Requiring strong evidence of procedural unconscionability maintains the ideal of freedom of contract by permitting judges to interfere only in contracts that exhibit clear deficiencies in consent.").

[217] *See, e.g.*, PETER N. SWISHER, ANTHONY MILLR & HELENE S. SHAPO, FAMILY LAW: CASES, MATERIALS, AND PROBLEMS (3rd Ed. 2012) (dealing with "disputes between unmarried cohabitants" in chapter 2, and discussing marital contracts in chapter 11).

[218] Atwood & Bix, *supra* note 113, at 331 (reporting that the UPMAA committee wanted to draft a law that addresses cohabitation contracts but was ultimately limited to premarital and marital agreements).

[219] *E.g.*, Blumenthal v. Brewer, 2014 IL App (1st) 132250, ¶ 32 (arguing that refusing to enforce obligations between unmarried partners may "create[] an incentive for some to not marry.")

married with a prenuptial agreement.[220] Therefore, in order to form a more comprehensive understanding of the gamut of regulatory choices for arranging relationships, it is necessary to examine the rules governing informal relationships.

1. Enforceability

The rules guiding the enforcement of cohabitation contracts vary greatly between states.[221] State rules range from complete nonenforcement, to enforcement of written contracts only, to enforcement of implied-in-fact contracts and granting of equitable remedies. Since most readers will be familiar with this account, the Section will describe it only briefly, focusing more on the evolution of the law and its consequences.[222]

As with premarital agreements, until the 1970s courts generally denied enforcement of contracts governing the financial obligations between unmarried partners, based on public policy doctrine.[223] In 1976, the famous Californian case of *Marvin v. Marvin* opened the door widely to enforcement of such contracts and conceived the concept of palimony.[224] Not only did the *Marvin* court hold, for the first time, that agreements defining financial obligations between cohabiting couples are enforceable as a matter of public policy, but the court also stated that "courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties."[225] Put differently, the *Marvin* court made possible an expansive interpretation of contractual obligations between partners, including those that derive from alternative theories of liability as unjust enrichment.[226]

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[220] Of course, the decision of whether to structure one's intimate life in marriage is dependent on many other considerations. Strategically, the choice between marriage and cohabitation can be influenced by other factors, such as tax consequences of living in marriage, the variety of benefits that are attached to marriage, or cultural preferences.

[221] Halley, *supra* note 53, at 20.

[222] *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 108, 138-54 (2010), for an excellent and comprehensive analysis of the legal treatment of unmarried partners.

[223] *Id*. at 48.

[224] *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976).

[225] *Id.*

[226] Halley, *supra* note 53, at *19-20.

Today, all states, except for three,[227] enforce written contractual obligations between unmarried partners.[228] In so doing, many states have adopted a neoclassicist approach for enforceability of such agreements. Again, New Jersey provides the best example of such approach. Once known (alongside California) for its liberal policy toward enforcement of cohabitation contracts,[229] New Jersey recently passed an amendment to its statute of frauds requiring that cohabitation contracts be in writing and that both parties have independent legal advice prior to execution.[230] Other states, either by legislation or court decisions, require that cohabitation contracts be subject to the terms of the statute of frauds.[231] Still others—for example, New York—enforce only expressed agreements.[232] Furthermore, as Cynthia Bowman points out, in reality "cohabitants are only slightly more likely to obtain 'palimony' in California than in New York if the claim rests upon an implied contract, and at least the courts in New York are more candid about disallowing such claims."[233] While additional states enforce implied-in-fact promises and recognize equitable theories for liability, the general trend has been toward strengthening procedural requirements in entrance into a binding legal contract, such that they are more restrictive than those in other conventional contracts.

Not only are the formal requirements heightened for creating a legally binding cohabitation contract, the exit from such agreement can be difficult, too. The very few courts that have discussed express, written contracts between cohabitants have employed firm rules of enforceability and declined to invalidate these contracts based on unfairness.[234] For

[227] *See Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983); *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994). In the third state, Illinois, long-time resistant to enforcement of cohabitation contracts, *Hewitt v. Hewitt* is still a good law. However, recently an appellate court allowed unmarried partners to bring unjust enrichment claims. Blumenthal v. Brewer, 2014 IL App (1st) 132250, ¶ 32.

[228] *See* Aloni, *supra* note 53, at 587.

[229] William H. Danne, Jr., Annotation, "Palimony" Actions for Support Following Termination of Nonmarital Relationships, 21 A.L.R. 6th §10 at 351 (2007) ("In New Jersey, which, along with California, has taken the lead in recognizing the viability of palimony support actions").

[230] N.J. Stat. Ann. § 25:1-5 (West 2010).

[231] *E.g.*, Minn. Stat. Ann. §§ 513.075-.076 (West 1990); *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 5th Dist. 1997) (holding that cohabitation contract must be in writing); *Kohler v. Flynn*, 493 *N.W.*2d 647, 649 (N.D.1992) ("[i]f live-in companions intend to share property, they should express that intention in writing").

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

[233] BOWMAN, *supra* note 222, at 51.

[234] *Cf.*, Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 255 (2004) [hereinafter Scott, *Cohabitation and*

instance, the Supreme Judicial Court of Massachusetts stated clearly that it evaluates the fairness of cohabitation contracts by a different standard than that of prenuptial agreements.[235] Accordingly, the court ruled that a cohabitation contract that left a female partner destitute after twenty-five years of cohabitation "is enforceable so long as it conforms with the ordinary rules of contract law, and a court is no more entitled to inquire into its fairness and reasonableness than it is in respect to contracts generally."[236]

Finally, in several states the existence of the option to contract between unmarried partners can abrogate the availability of a remedy based on an implied-in-law contract.[237] This is another basic principle deriving from classic contractual theory: "The binary nature of liability (either a contract had been consented to or it had not) precluded the award of alternative measures such as reliance or restitution damages."[238] As a doctrinal matter, the option to contract about financial obligations can preclude the use of quasi-contract theory.[239] This is because unjust enrichment, as a doctrine, is generally not available as an alternative to contract but, rather, imposes liability when parties could not have contracted about the terms.[240]

Indeed, this rationale was recently invoked by New Jersey's Court of Appeals when rejecting a claim based on an implied-in-law contract.[241]

Collective Responsibility] ("If a couple has an express written agreement, enforcement is usually straightforward").

[235] *Wilcox v. Trautz*, 427 Mass. 326, 334 (1998) ("An agreement between two unmarried parties is not governed by the threshold requirements that apply to an antenuptial agreement.").

[236] *Id.* at 334.

[237] *See, e.g., In re Estate of Alexander*, 445 So. 2d 836, 840 (Miss. 1984) (recognizing express contracts between cohabitants but declining to grant any equitable remedies); *Slocum v. Hammond*, 346 N.W.2d 485 (Iowa 1984); *Contra, see, e.g., Tarry v. Stewart*, 98 Ohio App. 3d 533, 649 N.E.2d 1 (1994) (denying claims for unjust enrichment by cohabitants because the claimants have already benefited from the relationships).

[238] Feinman, *The Classical Revival, supra* note 80, at 5; Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form*," 100 Colum. L. Rev. 94, 108 (2000).

[239] Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 724 (2006) ("The second limiting principle holds that restitution is not available as an alternative to contract. If the claimant conferred a benefit on the defendant in the hope of payment, and could reasonably have negotiated for payment but failed to do so, the claimant has no right to restitution") (citation omitted).

[240] *Id*.

[241] *Maeker v. Ross*, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013).

Beverly Maeker and William Ross lived together from 1998 until 2011.[242] During this time, Beverly did not work outside of the home and, according to her complaint, William promised to support her financially for the rest of her life. After their breakup, William refused to support her, and she filed a complaint seeking relief based upon palimony and alternative theories, such as unjust enrichment.[243] William asserted that even if the parties did have an agreement, it did not comply with the procedural requirements of writing and independent legal counseling and therefore was unenforceable. The trial court rejected William's claim, awarded Beverly temporary support of $6,000 a month, and ruled that her complaint was not barred by the 2010 amendment. The appellate court reversed. Not only did the appellate court hold that the amendment is applicable to bar enforcement of palimony obligations between the parties but the court also rejected all of Beverly's equitable claims (unjust enrichment, *quantum meruit*, quasi-contract, and equitable estoppel). In doing so, the court opined that "plaintiff's equitable claims are merely different versions of her underlying palimony claim that is barred."[244] The court held that quasi-contract claims between cohabitants can be valid only when the claimant contributed something beyond homemaking.[245] The lack of a contractual claim, when there was an option to execute a contract, renders equitable claims meritless unless the other party made a substantial contribution to the household different from domestic services.

The account presented so far does not purport to indicate that all states have adopted such rigid approaches to enforcement of cohabitation contracts. Indeed, some states recognize, and in fact apply, a variety of theories of recovery to cohabitants upon dissolution. Yet in a recent opinion, after a survey of the rules of enforcement in all states, a New Jersey Supreme Court justice concluded that "because they are easy to allege yet inherently contrary to fundamental legal concepts that have governed our jurisprudence for centuries, palimony claims must be viewed with great skepticism and must be subjected to harsh and unremitting scrutiny."[246] Indeed, this determination supports the argument herein that cohabitant contracts also tend toward the neoclassic: the prevailing trend is to condition their enforcement in formalities and reduce the availability of

[242] *Id.* at 83.
[243] *Id.*
[244] *Id.* at 97.
[245] *Id.*
[246] *Devaney v. L'Esperance*, 195 N.J. 247, 273 (2008).

alternative theories of liability; and, once the procedural requirements are fulfilled, it is difficult to excuse the obligations.

2. Default Rules

When it comes to informal relationships, most states have adopted default rules that declare that partners do not have financial obligations vis-à-vis one another unless they contract otherwise.[247] Some states have also adopted implicit default rules that domestic services provided during the relationship are presumed gratuitous and do not merit compensation.[248] The reason, as articulated by a Connecticut appellate court, is that "the household family relationship is presumed to abound in reciprocal acts of kindness and good-will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed."[249]

In two states, however—Washington and Nevada—courts have adopted opposite default rules. In these states, if the couple lived in "committed relationships"—established by such flexible factors as duration of the relationship and the pooling of resources—they can apply community-property law by analogy.[250] In other words, in these states, if partners do not want to assume equitable division of property, they need to opt out in order to alter the default rule.[251]

However, those two states are an isolated minority. To see how the defaults operate in this area, consider the following case. In *Ericson v. Baron*, the partners lived together informally for thirteen years and had a child together.[252] During the time of the relationship, the male, a founder of a prominent advertising company in New York, increased the company's size from four to thirty-five employees, with a gross revenue of twenty million dollars.[253] The partners lived together in Soho, Manhattan, in a loft purchased in 1997 with the man's money and under his name. According to the women's complaint, she was raising their mutual daughter and supporting his two children from a previous marriage, maintained the household, and was active in providing ideas for his work (she had also worked in the field). Her partner, according to the complaint,

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[247] *See* Scott, *Cohabitation and Collective Responsibility*, *supra* note 234, at 229.
[248] *Id.* at 257.
[249] *Sullivan v. Delisa*, 101 Conn.App. 605, 923 A.2d 760, 769–70 (2007).
[250] *Olver v. Fowler*, 168 P.3d 348, 354 (Wash. 2007).
[251] Aloni, *supra* note 1, at 590.
[252] *M v. F*, 910 N.Y.S.2d 406 (Sup. Ct. 2010).
[253] *Id.* at *1.

kept promising her that "what's mine is yours" and made other promises to keep supporting her and sharing their properties.[254] Upon the couple's breakup, the man refused to give her any rights in his multiple properties, including their residence, and the woman sued for her share based on a theory of constructive trust. While the New York Supreme Court was "not entirely unsympathetic to the circumstances described by the Mother," it rejected her claim, stating that it is "long-standing law and policy in New York that unmarried partners are not entitled to the same property and financial rights upon termination of the relationship as married people."[255]

3. Functional Analysis

In the context of cohabitation contracts, the neoclassic approach to family contracts is doing the opposite work than it does in premarital contracts: in the former, it protects one's freedom *from* contract.[256] That is, the primary purpose of the rules stemming from this approach is to protect parties from obligations to the other party if they have not specifically delimited those obligations. This goal is achieved by the symbiosis of default rules and rules of formation, which place the burden to opt in on the party who wants to secure some financial obligations from the other partner (as opposed to burdening the other party, who may want to avoid any distribution). The design of these rules, I assert below, disfavor the weaker, less-informed partner.

The rules of formation and default rules in this area are grounded in solid rationales: mainly, that proving oral and implied promises between intimate partners is costly and invasive, and courts encounter unique difficulty in discerning the partners' intentions.[257] The doctrine also protects partners from liability that they may purposely choose to avoid by not getting married.[258] Thus, to protect parties from the ascription of

[254] *Id*. at *2.

[255] *Id*. at *4.

[256] *See* Kennedy, *Distributive and Paternalist Motives*, *supra* note 215, at 568-70 (deconstructing the principle of freedom of contracts for rules that permit freedom to bind oneself to contract from rules that support the freedom not to bind oneself without will).

[257] *See* Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 273 (2010); Scott, *Cohabitation and Collective Responsibility, supra* note 234, at 256-57 ("the extent and nature of understandings about financial sharing and support vary in informal unions, and the ability of third parties (for example, courts) to discern accurately the parties' expectations on the basis of their conduct in this context is limited"); BOWMAN, *supra* note 223, at 51.

[258] *See* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 857 (2005) ("Under conscriptive rules, individuals are no longer free to choose when, how, and whether to marry; instead, the

obligations that they have not voluntarily assumed, and to channel parties to express their commitments clearly, the rules warrant that unless otherwise contracted, the parties do not have financial obligations vis-à-vis one another.

But despite the fact that these rules are grounded in solid justifications, the doctrine in effect strongly favors the more sophisticated party, whose decision not to get married may be motivated by the wish to protect his wealth.[259] The set of rules concerning obligations among unmarried couples leaves it to the weaker party to protect herself by contracting to create commitment.[260] The problem is, however, that unmarried partners often do not think in contractual terms and generally do not have sufficient understanding of the rules surrounding legal obligations between unmarried partners.[261] Sometimes, as well, the partners do not know how their relationship will develop and thus fail to protect themselves.[262] Additionally, signing a cohabitation contract can be costly and thus unavailable to the economically weaker party.[263] The weaker party can attempt to use boilerplates that are readily available, but without knowledge of the rules may be hesitant to sign one, or to sign what they fear may be an unfair bargain. Further, some people are unaware of the required formalities[264] or think that common law marriage—despite its significant diminishing—will protect them.[265]

Reliance on contractual principles, and in particular on opt-in requirements to create obligations, threatens to adversely affect the

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state—after the fact—decides for them."); Lifshitz, *supra* note 6, at 1576 (arguing that the choice not to marry may reflect an opposition to bear financial obligations and, "precisely from the liberal approach, which stresses individuals' intentions, it is appropriate to respect their decision not to marry, and not impose upon them quasi-marital obligations.").

[259] ALI Principles, *supra* note 135, §6.02 cmt. a ("[f]ailure to marry may . . . reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage.").

[260] BOWMAN, *supra* note 222, at 228.

[261] Ellman, *supra note 36*, at 1369; Lifshitz, *supra* note 6, at 1577-78 ("Typical couples, however, are rarely consciously thinking of the legal aspects of their relationship.").

[262] BOWMAN, *supra* note 223, at 52.

[263] *Cf*. Eskridge, *supra* note 6, at 1976-77 ("Americans have the foresight or the resources to contract for all the possibilities that can arise in family relationships.").

[264] *Id*. at 1979; Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 135 (1976).

[265] BOWMAN, *supra* note 222, at 231-32.

primary caregiver once again.[266] The system ignores gender realities: women's reluctance to bargain, their less attractive options in the employment market, and their bigger loss from leaving the relationship.[267] It does not treat the still-common situation in which female cohabitants devote time to caregiving, contribute to household expenses, and so forth.[268] Indeed, "the cohabitants' unequal bargaining power leads to unjust results under contract theory."[269]

The design of default rules—no automatic obligations without contractual agreement—favors the party who would like to avoid commitment. As explained by Elizabeth Scott, under current default rules, the economically stronger party can hide his intentions regarding the financial commitment between the partners.[270] At the same time, the financially stronger party, though promising that he will support his partner at the end of the relationship, can make financial arrangements that advance his position upon breakup (such as putting titles solely under his name). "In this way, he reaps substantial benefits from the relationship, and then is protected by the implicit default rule against financial sharing between cohabiting partners."[271]

Setting the default rules this way also ratifies possible informational asymmetry between the more sophisticated party and the less informed one.[272] Ian Ayres and Robert Gertner argue that in the context of informed and less informed parties, the efficient way to design default rules is

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[266] *Cf.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1107 (1985) ("One consequence of this conception is that courts can justify the failure to enforce cohabitation arrangements as mere nonintervention, overlooking the fact that the superior position in which nonaction tends to leave the male partner is at least in part a product of the legal system.").

[267] Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1163 (1981) ("[T]he essence of a cohabitation or marriage contract between heterosexual cohabitants is that the man gives up wealth that would otherwise accrue to him in order to insure the woman some semblance of economic dignity. Self-interest would lead the man to give up as little as possible. The woman has scant leverage with which to persuade him otherwise. She lacks economic power. She needs a stable relationship more than he does. . . .").

[268] BOWMAN, *supra* note 222, at 227.

[269] Blumberg, *supra* note 267, at 1163.

[270] Scott, *Cohabitation and Collective Responsibility*, *supra* note 234, at 260.

[271] *Id.* (citation omitted).

[272] *Cf.*, Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, *in* RECONCEIVING THE FAMILY 331, 345 (Robin F. Wilson ed., 2006) [hereinafter Scott, *Domestic Partnerships*] (discussing unequal information or expectation between unmarried partners).

against the informed party. In this way, they argue, a "penalty default" incentivizes the informed party, who is interested in altering the default, to reveal information about his intentions and the legal situation surrounding the topic.[273] If, however, the default rules are designed in a way that is favorable to the informed party (does not give him incentive to modify them), he will not have a reason to alter the default and to reveal his intentions. The likely result is that the less informed party will not know about the rule and the disadvantage it creates. Such design, they argue, encourages opportunistic behavior by the more informed party.[274] In the case of cohabitation, the informed partner does not have a legal incentive to reveal any information about his intentions regarding financial obligations. He can use the ignorance of the weaker party (in terms of not knowing about the penalty) in order to avoid obligations.[275] If the rule were the opposite, the informed party would be encouraged either to stay with the default (and thus be committed to undertake financial obligations) or to reveal his intention not to share commitments—and let the less informed party decide whether to remain in such relationship or not.[276] However, because most states have adopted rules that put the burden to contract on the less informed partner, the stronger partner has no incentive to reveal the information and to negotiate about the terms.

The defaults play another role in disadvantaging the weaker party, by creating a shadow of endowments that limit that party's possible achievement. As explained by Russell Korobkin, "[C]ontracting parties may view the default term . . . as a status quo endowment" and not alter the defaults because "their preference for maintaining the status quo relative to alternative states swamps their preference for the alternative contract term relative to the default term."[277] In particular, in the case of cohabitation contracts, defaults reflect the assumption that care work and housework are less valuable commodities than other, outside-of-the-home work. This is because the defaults presume that housework is given gratuitously and because some women tend to undermine their own

[273] Ayres & Gertner, *supra* note 138, at 91 ("Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule.").

[274] *Id*. at 96-100.

[275] *Id*. at 99.

[276] Scott, *Domestic Partnerships*, *supra* note 272, at 345.

[277] Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 675 (1998).

contribution.[278] Thus, the default rules also confer a bargaining disadvantage on the homemaker. [279]

Based on the function of the rules, it is safe to conclude that contractual obligations between unmarried partners also adopt a neoclassic approach. Construed with rigid rules of formation, diminishing availability of other bases of liability, and defaults that disadvantage the less informed partner, these rules mainly support the autonomy of the couples to avoid ascription of obligations. The neoclassic approach is helpful to the stronger party and fails to protect the economically weaker party.

The bottom line, per this Article, is that the contractual choice embedded in each of these instruments taken separately (prenuptial and cohabitation contracts) provides choice that is more helpful to the economically stronger partner. The contractual instruments seem to better reflect the values of freedom of contract and predictability of enforcement over fairness and distributive justice.

III. DEBUNKING THE MYTHOLOGY OF PLURALISM IN FAMILY LAW

Finding that principles integrated by premarital and cohabitation agreement strongly favor contractual autonomy over other values—and thus do not reflect the principles of value pluralism—still does not determine that the structure is antipluralistic. This is because a plausible view of structural pluralism is that each institution on the menu reflects primarily *one* value while other institutions integrate different values. In this way, arguably, the system itself, with its various options, reflects a more diverse set of values. In Section A, I thus examine whether the plurality of private ordering options that exist in family law reflect—or progress toward reflecting—the principles of value pluralism by offering

[278] Scott, *Cohabitation and Collective Responsibility*, *supra* note 234, at 257; Wax, *supra* note 192, at 583 ("That women's contributions to the family are often denigrated in the minds of family members can be attributed not just to the devaluation of women's efforts generally, but also to the nature of what women contribute.").

[279] A modest change in the default rules could create a significant improvement. For example, Elizabeth Scott has suggested that the default rules be construed such that living together for five years would raise a rebuttable presumption that the parties intended to undertake obligations to one another. This proposed change in default rules would capture only a small number of the current unmarried partners: those whose relationships are more committed—because most cohabitants either get married or break up in less than five years. *See id*. at 258-65. Most important, this rule would encourage the parties either to opt out if they reject the commitment, or to accept the law's assumption that the parties undertook support obligations. Without entering into the details of the pros and cons of such a proposal, the main idea is simply that a humble change in contractual rules can affect the reality of cohabitants without imposing over inclusive obligations.

effective choice and incorporating balance of values. I attribute, in Section A, the system's failure in promoting pluralistic values to the adoption of a neoclassic approach. In Section B, I explore whether the policies driven by neoclassicism are not commensurate with pluralism, or whether pluralists' premises do not fit family law specifically.

A. The Illusion of Structural Pluralism

To see if the emerging pluralistic structure incorporates the principles of value pluralism, we have to examine the system from a panoptic perspective: looking at all the contractual instruments and legal institutions together. This is necessary to evaluate the effectiveness of choices that the system extends, because those choices determine partners' behaviors in selecting the institution that fits them.[280] Put differently, we also need to learn how the different institutions interact with one another such that they channel the parties' choice.[281]

Isolating and evaluating the values that comprise the whole system is an intricate task. Because the system embodies multiple incommensurable values, we cannot put them on a single metric—so there is no quantitative measure to segregate and weigh them.[282] Thus, my methodology is to examine the functions that the system serves in the regulation of relationships. In particular, I analyze whether the system tends to promote or detract from principles of value pluralism—in short, whether the system as a whole reflects a balance of values.

Table 1 indicates the four main institutions and instruments that are available for couples to administer their financial obligations vis-à-vis one another, and the values they bear.[283] For each institution or instrument, the table identifies how the default rules and the rules that determine

[280] Eskridge, *supra* note 6, at 1977 ("[S]tate menus and default rules will inevitably affect people's decisions about interpersonal commitment and family").

[281] Aloni, *supra* note 1, at 606 (arguing that proponents of menu of options failed to explore the way that the different institutions on the menu affect couples' choice in selecting the right framework).

[282] *See* Cass R. Sunstein, *Incommensurability and Kinds of Valuation: Some Applications in Law* 234, 238 *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997) (defining incommensurability as occurring "when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgment about how these goods are best characterized).

[283] But, as previously stated, it does not examine postnuptial and settlements agreements—and their effect on the choice presented to parties to design their relationships. As stated before, inclusion of these institutions will only strengthen the argument proffered by this Article. *See infra* notes 72-73 and accompanying text.

formation and enforceability of the contract influence the bargain. Importantly, while the table's rubrics reflect the general law in a majority of the states, when it comes to enforcement of prenuptial agreements, the rules described in the table and the following analysis are those of neoclassic jurisdiction, and not of many states that still maintain a more balanced approach or those that take a strong pro-enforcement stance.

TABLE 1

	Default Rules	**Rules of Formation and Enforcement**
Informal cohabitation	• No automatic financial obligations between the partners (opt-in requirement) • Entrenches possible informational asymmetry • Protects freedom from contracts • Helps the stronger partner to avoid obligations	• Writing requirement or express contract • Could result in reducing availability of other theories of liability (unjust enrichment) • Protects freedom from contracts • Favors party with knowledge of the law and the means to execute contract
Cohabitation with written or express contract	• Bargaining in the shadow of default rules directing that no obligations at all can serve as a limit to achievement and entrenching devaluation of housework and care work	• Strict enforcement, even if unfair • Likely to exclude the option of other theories (such as unjust enrichment)
Marriage	• Default rules that generally disadvantage the primary caregiver (short-term alimony, no division of enhanced income from professional degree)	• Public policy doctrine warrants that bargains about nonmonetary terms during the marriage will likely not be enforced[284]—disadvantaging the primary caregiver
Marriage with prenuptial	• Bargaining in the shadow of defaults that disfavor the primary caregiver can result in limited success for the bargain	• A trend toward strict enforcement, without second-look provisions • Emphasis on procedure and informed decision-making over substantive review

[284] Courts have traditionally refused to enforce agreements concerning obligations of the spouses in an ongoing marriage, invoking the public policy doctrine. *See* Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 192 (2013) ("More recent cases demonstrate that courts continue to resist enforcing contracts that adjust traditional spousal duties."); Case, *supra* note 44, at 225 ("Courts in this country have generally been closed to those who seek judicial enforcement of bargains or judicial resolution of disputes in an ongoing marriage.").

Arguably, the menu of options—particularly in its contractual alternatives—reflects the principles of value pluralism. Facilitating these multiple, flexible options allows couples to exercise their autonomy by designing obligations that suit their relationships, the division of work between them, and the particular weight that the specific individuals put on these values. Structural pluralism, the argument goes, is compatible with the principles of value pluralism because it is grounded by the notion that people appreciate divergent kinds of valuations.

While this view is not completely without merit, it invokes a thin notion of autonomy and misreading of value pluralism. Value pluralism has never been an invitation to celebrate individual freedom over all other competing values.[285] As noted by Dagan, "[F]acilitation is rarely exhausted by a hands-off policy and a corresponding hospitable attitude to freedom of contract. Rather, facilitation requires the law's active empowerment in providing institutional arrangements, including reliable guarantees against opportunistic behavior."[286]

The current family law system fails to provide such facilitation. Instead, it is grounded predominantly in notions of negative autonomy: allowing the parties (rather than the state) to determine the content of their obligations.[287] The system does not reflect a richer perception of autonomy, one that takes into consideration the adaptive preferences of the parties, access to economic opportunities and resources, and concerns about the end results of the agreement.[288] Indeed, choice and autonomy are not the same.[289] Table 1 demonstrates that the system is mainly devoted to preservation of choice, but autonomy—self-governing—is disproportionately granted to the economically stronger partner. The type of autonomy that is most emphasized in the system is freedom of contract (including freedom from contract).

The menu also fails to provide effective protection from strategic behavior of the kind suggested by Dagan. The multiplicity of options allows many opportunities for strategic behavior by the more

[285] William A. Galston, *Value Pluralism and Liberal Political Theory*, 93 THE AMERICAN POL. SCI. REV.769, 777 (1999).

[286] Dagan, *Pluralism and Perfectionism*, *supra* note 24, at 1429.

[287] MICHAEL J. TREBILOCK, THE LIMITS OF FREEDOM OF CONTRACTS 9 (1997) (analyzing the differences between "classical liberal theories of individual rights and autonomy" and theories that "emphasize a more expansive conception of individual liberty that has both negative and positive dimensions.")

[288] *Id*. at 243.

[289] Singer, *supra* note 28, at 1538-9.

economically privileged partner, while failing to provide significant protection to the weaker partner. For instance, the partners can live informally and, despite promises to the contrary (in the absence of a written contract), the economically empowered party can leave the dependent party without any property or financial support. However, if living without express contract does not protect the stronger party's wealth, perhaps because the other party demands some commitment or he is concerned about a *Marvin*-type remedy, the couple can execute a cohabitation agreement that will provide only minimal benefits to the weaker party (and the default rules support the result of such bargain). This arrangement is likely to be upheld. If the parties are getting married, the weaker partner is in a better position in terms of financial obligations than under all other arrangements. However, this protection is gradually eroding as the defaults benefit the financially stronger partner, thus leaving the economically weaker party with insufficient spousal support at the end of the relationship. Alternatively, the wealthier party could insist on a prenuptial agreement that forfeits the rights of the weaker party and still be enforced, provided that procedures are met. The weaker party bargains in the shadow of a less favorable endowment.

While the menu also embodies notion of gender equality, this is imbalanced and eroding. Commitment to gender equality is reflected mainly through rules of equitable division of property in marriage. In addition, a common argument is that private ordering allows couples to structure their relationships in a way that diverges from traditional gender roles[290]—thus, arguably, the menu supports gender equality by encouraging formation of family structures that transform entrenched notions of rigid gender roles and of parenthood. However, in one instance where autonomy to contract may be useful to the partner who contributes more to the household—i.e., contracting about nonmonetary contributions during marriage—autonomy ends. The unenforceability of such arrangements devalues the worth of such care work and allow less freedom in structuring the relationships in the way that partners want.[291] In addition, as argued before, while contracting potentially allows the primary caregiver to improve her position (vis-à-vis the default rules), problems associated with bargaining power, differing effect of the

[290] Matsumura, *supra* note 284, at 192.

[291] Karen Engle et. al., *Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 220 (2003) ("Borelli re-entrenches the public/private split, denying women economic rights based on the fact that much of the work we do is on the so-called "private" side of this putative split.").

marriage market on men and women, and devaluation of housework have the potential to disproportionately affect women.

To be sure, the menu represents an attempt to balance between competing values. For example, as mentioned before, the trend governing enforcement of prenuptials aims to balance between freedom of contract, predictability, and fairness.[292] However, these efforts are reduced in the end to a checklist of formal requirements that, ultimately, give precedence to freedom of contract and predictability over fairness. Even when the system mandates that the contracting party has full information but, due to cognitive bias, lacks the capacity to evaluate the information, "it may be reasonable to conclude that choices made under such circumstances are not autonomous."[293] A system that is focused more on rules and procedures, and disproportionately relies on autonomy, is closer to a monist system.[294] Indeed, an adjudication system in which, "[o]nce that checklist is satisfied, it declares that the contract is legally binding and enforceable" does not reflect the principles of value pluralism.[295] Such monist approach excludes the weighing of external factors—such as gaps in bargaining power, gender, marriage market, educational background, cultural differences, need, and so forth—that seem to be outside of the scope of the courts' examination.[296] Conversely, a pluralist court "can also invoke value pluralism to identify, weigh, and rank checklist requirements, such as the intention to enter into a marriage agreement against the fairness value of not enforcing onerous terms in those agreements to the disadvantage of a dependent spouse."[297]

One explanation for the limited success in providing effective choices and protections for the vulnerable party is the adoption of the neoclassicist approach. Such an approach is antipluralistic, at least to the extent that structural pluralism is a means to promote value pluralism. In essence, the neoclassicist approach stands in contradiction to pluralism because the former prefers one set of values and the latter is committed to plurality of values.

The neoclassic approach, by favoring form over substance—for example, preference for rules governing formation in family-related

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[292] *See, e.g.*, Atwood & Bix, *supra* note 113, at 315.

[293] *Id*.

[294] *See* Dagan, *Pluralism and Perfectionism*, *supra* note 24, at 1410.

[295] Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1046-47 (2010).

[296] *Id.* at 1046-48.

[297] *Id.* at 1048.

contracts over standards like fairness—expresses preference for freedom of contract over other competing values, primarily fairness and distributive justice.[298] As noted by Duncan Kennedy, "Formalities are premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter."[299] Put differently, the parties are free to make their own choices—as long as they signal that these choices were made voluntarily. Formalities, thus, from their own essence, stand in contradiction to pluralists' main claim: that the law should facilitate meaningful choice rather than just assuring the parties' will to enter into the bargain. If the aim of pluralism is to facilitate a meaningful choice between different institutions, preference for form over substance could not achieve that. Hence, neoclassicist contract law and value pluralism stand in a contradiction that cannot be resolved.

In conclusion, the emerging menu of options 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: could a structural pluralism achieve these goals with a different setting, or is the problem that pluralism based predominantly on contractual principles will always fail to accomplish its objectives? The next Section examines this question.

B. The Weaknesses and Risks of Pluralistic Approach in Family Law

Can pluralist theory—one that is not a fig leaf for neoclassicism—serve as a normative foundation to family law? In other words, is it only the adoption of neoclassicism that fails pluralist theory, or is pluralist theory problematic in and of itself? I propose that pluralistic theory, as so far developed, while showing a theoretical promise also presents a few weaknesses and risks. Ironically, the main shortcoming of the theory stems from its strength: it is too elastic. This plasticity also poses a risk: the adoption of free-market policies under the rhetoric of pluralism—a problem that is exacerbated by the theory's commitment to autonomy as a prominent value.

Pluralism generally—and value pluralism in particular—may be too elastic to serve as a productive guideline for the construction of family law. This obstacle stems from essential characteristics of pluralistic principles. A basic principle of value pluralism is incommensurability (or

[298] Kennedy, *Form and Substance, supra note 16*, at 1691.
[299] *Id.*

incomparability):[300] the notion that "the ultimate values recognized by our community and by our law are irreducibly plural; there is no single value that the legal system aims, or should aim, to satisfy or maximize, nor can the variety of ultimate values be compared to one another along a single scale or metric."[301] Put differently, often a plurality of good values—at times, conflicting values—exist, and can generate multiple and contradictory answers to a particular question.[302] Incommensurability, thus, some argue, presents a dilemma of rational choice when the lawmaker must decide between two options that are not commensurable. The question of whether incommensurability (or incomparability) of values precludes rational choice has been the subject of debate among philosophers for years and is far from being resolved.[303]

For the purpose of this Article, it is unnecessary to examine the various accounts. Rather, suffice it to note that even if incommensurability does not present a problem of rational choice, value pluralism, as so far developed, still does not tell much about how to balance and accommodate these competing values. Meaning, even if we agree that the lawmaker—despite problems in ranking incomparable values—is able to make rational choices about the options that compose structural pluralism, the theory (or theories) still does not provide any satisfying tools to evaluate which values will get precedence and in what way. Pluralistic theory merely suggests that rational lawmakers can have multiple ways to balance between conflicting values. While pluralistic theory does not entail that all choices are permissible, it does endorse the creation of a wide diversity of

[300] *See* Ruth Chang, *Introduction to Incommensurability, Incomparability, and Practical Reason* 14–16, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 282. While the terms "incommensurability" and "incomparability" are often used interchangeably, Ruth Chang asserts that the latter is the more accurate term to recognize the problem, as some items can be incommensurable (in terms of not having a common scale for measurement) but still comparable.

[301] *See* David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 Buff. L. Rev. 529, 531 (2014). Indeed, as argued by Michael Stocker, "'plural values' . . . mean pretty much the same as 'incommensurable values'"). Michael Stocker, *Abstract and Concrete Value: Plurality, Conflict, and Maximization*, 196, 203 *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 282.

[302] Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1372 (2001) ("The problems of incommensurability arise when we try to compare plural, irreducible, and conflicting values, or choose between options that exhibit or will result in the realization of plural, irreducible, and conflicting values.").

[303] *See, e.g.*, *id.* ("Incommensurability has been the focus of a sophisticated and technical debate in academic philosophy, where several books have been devoted to the subject."); Chang, *supra* note 300, at 13-34 (surveying seven types of leading incomparability arguments and asserting that none is compelling).

ways of life. "It condemns any law that totally precludes citizens from pursuing one of the necessary basic goods. It also condemns any law that prohibits citizens from instantiating a basic good in the only mode of which they are capable."[304] Thus, "*It does not tell lawmakers which rationally permissible resolution they should prefer*."[305] Because the theory is amenable to so many compositions, pluralistic theory does not provide sufficient guidance to construction and evaluation of family law.

In particular, the main and most fiercely debated question that has occupied family law in the past decade—in the field of regulation of relationships—has been which types of families will get the recognition and protection of the law and what type of regulation will be appropriate.[306] Value pluralism helps to explain that different couples hold different valuations for their relationships, and the state should facilitate choices that affirm diverse kinds of valuations. Structural pluralism is the mechanism to accommodate this idea of providing a "diversity of spousal institutions."[307] No doubt, the notion that the law ought to recognize a variety of family structures—and in order to do that needs to offer a plurality of suitable options—is of great significant.[308]

However, beyond the important theoretical justification for why the state ought to recognize diverse families with different institutions, pluralist theory does not add much to an ongoing debate about private ordering and choice of regulatory framework in family law.[309] While the question of whether the state should offer a plurality of institutions is still somewhat controversial, questions of how to fill in this menu, which

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[304] Henry S. Mather, *Law-Making and Incommensurability*, 47 MCGILL L.J. 345, 378 (2002).

[305] *Id.* at 388 (emphasis added).

[306] *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, COLU. L. REV. (forthcoming 2015) (evaluating which types of non-married families will be likely to secure recognition by the state).

[307] Lifshitz, *supra* note 6, at 1569.

[308] *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 126 (2008) ("[a] legal system in a pluralistic society that values all families should meld as closely as possible the purposes of a law with the relationships that that law covers.").

[309] The idea that family law ought to recognize a menu of options for legal recognition of relationships is not a new one. *See, e.g.*, Weisbrod, *supra* note 36, at 810 ("One way to think about a diversity of marital arrangements is to focus on individual contracts. Another is to think about structured menus, state-offered options, to which individuals give their consent."). Further, the idea of a menu of options has already been adopted by several countries. *See, e.g*., BOWMAN, *supra* note 222, at 201-6 (describing the Netherlands's approach as "a cafeteria approach to cohabitants' rights").

values and goals should be embedded in it, which types of families deserve this recognition, and whether it is politically achievable are the more difficult ones. Pluralistic theory offers insignificant guidance for these last questions.[310] Eskridge is right in noting that his pluralistic analysis "do[es] not tell us which values family law ought to serve, how to prioritize competing values. . . . These are enduring issues for public discourse, and their resolution will depend on the force of social practice and evolution of public norms."[311]

Not only does the elasticity of the theory not offer comprehensive guidance, but it also presents a tangible risk. As a result of its plasticity, the menu can be filled in by a few different structures, thus accommodating a neoclassic approach while creating a false security of pluralism. This is a genuine risk because pluralistic theory is uniquely susceptible to free-market interpretation. Fundamentally, the theory proffers that adequate choice allows people to self-govern and thus, with some limitations, the state should provide people these options. As stated by Cass Sunstein, "An understanding of diverse kinds of valuation helps explain why liberal regimes generally respect voluntary agreements. If people value things in different ways, the state should allow them to sort things out as they choose."[312]

Once again, the claim is not that pluralistic theory advocates unrestrained freedom of contract. As stated before, in cases of market failure, harm to third parties, and opportunistic behavior pluralistic theory endorses a system that contains some restrictions.[313] But the basic presumption toward validity of contracts makes it especially amenable to adoption of principles that vindicate freedom of contract over other values. Under this view, the adoption of the neoclassic approach and the focus on contractual instruments as the principle manifestation of family law pluralism (while the trend is toward diminishing registration schemes) are

[310] Merely saying that a pluralist approach is not one that is characterized by a hands-off policy does not solve the problem. Even under Hanoch's formulation, it seems like family law is moving toward facilitation of various regulatory regimes that are not necessarily characterized as "hands-off." And yet, even active engagement—when focused mainly on procedural safeguards—can prove to provide too little protection and to favor the wealthier party.

[311] Eskridge, *supra* note 6, at 1947.

[312] Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 849 (1994).

[313] *Id.* at 849 ("even a system that generally respects freedom of contract may block exchanges on several grounds. Typically such grounds involve some form of market failure…").

not merely a coincidence. They are a manifestation of the autonomy-based approach that underlines pluralistic theory.

Indeed, while Dagan's theory is grounded in the principles of value pluralism, it seems that his pluralistic interpretation is one that is committed mainly to further individual autonomy rather than to using these various institutions to promote variety of values.[314] This strong commitment to autonomy over other values explains the preference for autonomous contractual notions over other values. While Dagan's pluralism is not merely freedom of contracts, it is still a theory that focuses on the options created, but not on the outcomes of these choices. Compare, for example, Dagan's autonomy—that requires the state to provide options—with Maxine Eichner's view of autonomy, below. Accordingly,

> [S]upport for familial autonomy requires more than the state's forbearing from dictating family decisions. The state must also seek to ensure that families have the wherewithal to exercise this autonomy. Not only does this mean helping ensure that families have the capacity to make important decisions about their family, it also means that families have some reasonable means to effectuate their decisions. While the primary threat to such autonomy has long been seen to come from the state, much of today's threats of encroachment on decision making come from the market.[315]

Eichner and Dagan use similar principles: requiring the state to make the conditions necessary for people to exercise their autonomy. Yet, Dagan's theory stems from autonomy and its main purpose is to advance individual autonomy. Eichner, on the other hand, upholds a positive notion of autonomy—one that demands from the state a more active role in supporting the family, with specific emphasis on preventing the harm that the market may cause.

Relatedly, the other risk presented by pluralistic principles is that a pluralistic system is committed to entrenchment of existing values and balances, rather than to innovation. As stated by Jedediah Purdy, "[B]eing constituted by well-established social practices, [Dagan's pluralistic theory] tend[s] toward familiar values and balances of value, not radical

[314] *Cf.* Alexander, *supra* note 63, at 1027 ("It is important to emphasize that Dagan's primary concern is with a certain form of pluralism--"structural pluralism"--in private law.").

[315] Maxine Eichner, *Beyond Private Ordering: Families and the Supportive State*, 23 J. AM. ACAD. MATRIM. L. 305, 342 (2010).

innovations."[316] It seems evident in family law that pluralism tends to entrench existing attitudes rather than to create new ones. Thus—surely based on many political and cultural reasons—the majority of the new registrations that were established as a result of the same-sex marriage debate (civil unions and the like) have been abolished, while the new pluralism is composed of familiar contractual principles.

In conclusion, while pluralism offers an intriguing and valuable perspective for regulation of relationships, the theory, in its current stage, is insufficient to serve as a primary normative source for guidance of the field. Because the approach is too flexible it does not, in fact, provide tools to help lawmakers decide which institutions should be included and which values they should embody. In the end, those questions will be decided by the forces of politics and ideology. Moreover, the plasticity of the theory risks its adoption of laissez-faire policies under the disguise of autonomy and diversity.

CONCLUSION: TOWARD A NEOPLURALIST THEORY

Pluralistic theory is "hot" in legal academia, and family law—which has already started its progression toward offering multiple options—can serve as a laboratory to examine the potential and the pitfalls of pluralism. One prominent lesson starting to emerge is that structural pluralism is built mainly around private ordering. Unlike some European countries that created structural pluralism composed both of registration schemes (civil unions and the like) and contracts (or, as in the case of the French PACS, a combination of both[317]), the emerging U.S. pluralistic structure relies mainly on contractual elements. Not only is this pluralism manifested by the expansion of options for private ordering, but the values underpinning this system are primarily those of the free market. The system does not, moreover, follow the basic principles of value pluralism—of balance and variety of balances.

In political science referencing the United States, pluralist theory—concisely, the idea that political power is distributed among interest groups—has been the dominant theory for years.[318] The critique of the

[316] Jedediah Purdy, *Some Pluralism About Pluralism: A Comment on Hanoch Dagan's "Pluralism and Perfectionism in Private Law"* 113 COLUM. L. REV. SIDEBAR 9, 18 (2013).

[317] The French Pacte Civil de Solidarité is an institution that is semi-contractual semi-registration. For a description of the French PACS, see Aloni, *supra* note 53, at 632-8.

[318] John F. Manley, *Neo—Pluralism: A Class Analysis of Pluralism I and Pluralism II*, 77 AMERICAN POLITICAL SCIENCE REV. 368, 369-71 (1983).

theory—primarily, that it fails to account for economic inequality in the U.S.—has been so prominent that some scholars suggest that only a new theory, one that considers questions of economic structure, can serve as a foundation of political theory.[319] Political theorists thus developed a new and relatively accepted theory titled "neopluralism."[320] Neopluralism "is a more pessimistic perspective" than classical pluralism, and provides a normative framework that recognizes power differences between groups in society.[321]

Current scholarly accounts in family law have not addressed the connection between distributive justice and pluralism. This Article shows that, without particular commitment to distributive justice, pluralism will likely revolve around freedom of contract and autonomy. To theorize the connection between pluralism and distributive justice, family law (and likely private law generally) needs to formulate a theory similar to neopluralism: one that will maintain and develop choice and accommodate diverse structures of relationships, but will also be committed to distributive justice in the broader sense. Such theory likely involves more than expansion of the safeguards of fairness by judges; it would entail changes in the default rules as well, to influence the content of the bargain. How to promulgate a system that lies at the foundation of pluralistic principles and is committed to distributive justice, and whether such a system can exist, is an open question at the moment. But what is clear is that pluralism, and especially one that stems from commitment to autonomy, cannot serve as the basis for policymaking in family law.

[319] *Id*. at 382.

[320] Alexander M. Hicks & Frank J. Lechner, Neopluralism and neofunctionalism in political sociology *in* THE HANDBOOK OF POLITICAL SOCIOLOGY: STATES, CIVIL SOCIETIES, AND GLOBALIZATION (eds. T. Janoski, R. Alford, A. Hicks, & M. Schwartz. 2005).

[321] ROB BAGGOTT, PRESSURE GROUPS TODAY 37-40 (1995).