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### The Puzzle of Family Law Pluralism

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## THE PUZZLE OF FAMILY LAW PLURALISM

EREZ ALONI\*

Family law is succumbing to pluralism. Scholars have celebrated this trend as a desirable outcome of the struggle for marriage equality. And a pluralistic family law seems to offer distinct benefits: more regimes than just marriage, and greater room for choice within each regime (manifest by more types of legally enforceable intrafamilial contracts). This Article exposes counterintuitive facts that lead to a surprising conclusion: the legal changes that scholars tout as increasing pluralism eviscerate the substance of the choices families are permitted to make.

The policies that appear to extend choice within each regime, in fact, mask what I call a “neoclassical” approach to intrafamilial contracts—that is, an approach that adopts formalist, binary, and proceduralist principles for the creation of legal obligations. As this Article’s scrutiny of prenuptial and cohabitation agreements reveals, neoclassical contract theory is slowly taking over family law. The neoclassical approach vindicates a thin notion of autonomy over other values and favors the status quo. The Article further contends that the roots of family law pluralism in market logic render it fundamentally flawed: as long as the menu of relationship options is predicated on basic contract law, then, regardless of how many options the menu includes, the system will necessarily privilege the more economically powerful partner.

Is it possible to avoid this perverse result while preserving freedom of choice? The Article develops a more robust vision of pluralism by identifying the goals and methods of pluralism in family law as they have developed over time. In doing so, the Article offers foundations of a new theory of pluralism that advances true substantive equality and autonomy.

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#### INTRODUCTION

In the wake of the struggle for marriage equality, legal scholars have observed (and generally celebrated) that family law is moving toward developing a menu of options for legal recognition of relationships.<sup>1</sup> That is, as an unintended consequence of the process leading to securing marriage rights for same-sex couples, a new and more pluralistic regulatory regime has emerged. This menu of options is two-dimensional. One, it consists of more regulatory regimes than just marriage, including several registration schemes for recognition of relationships (such as marriage, civil unions, and domestic partnerships) and the option to establish financial obligations between unmarried partners without registration. Two, there is greater room for variety and choice *within* each regime. This flexibility is established by multiple contractual instruments available for couples to organize the financial obligations between them (such as prenuptial, postnuptial, cohabitation, and separation agreements).<sup>2</sup>

Some scholarship has touted the movement of family law from an era of privatization to an era of pluralism. As a descriptive matter, some scholars argue that family law has already started incorporating the basic form of

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<sup>1</sup>See, e.g., WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 121 (2002); Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 626 (2013); 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).

<sup>2</sup>See 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 . . .”).

*structural pluralism*.<sup>3</sup> Structural pluralism refers to the structure and organization of the law.<sup>4</sup> In the case of family law, it refers to the formation of multiple options for legal recognition of relationships and to the wider scope for innovation and choice within each regulatory regime. On the normative side, 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 well-being, 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.<sup>5</sup> Extending contractual choice and enabling more flexibility within each regulatory regime are also consistent with the role of the state as facilitating couples' (or individuals') autonomy because expanding the variety of substantive contractual arrangements that courts are willing to enforce will enhance and countenance a nearly limitless variety of substantive arrangements.<sup>6</sup>

However, is the development of multiple options for arrangements of relationships truly a cause for celebration? Registration schemes have either disappeared or played an insignificant role in the menu of options. This is because several states, after they legalized same-sex marriage, decided to abolish their registration schemes.<sup>7</sup> For example, Connecticut, New Hampshire, and Vermont eliminated such registrations after they legalized same-sex marriage, and Washington and California have restricted these schemes

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<sup>3</sup>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.”). [emphasis on original]

<sup>4</sup>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. Rutger J.G. Claassen, *Institutional Pluralism and the Limits of the Market*, 8 POL. PHIL. & ECON. 420, 421 (2009).

<sup>5</sup>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, 1589–1601 (2009), for autonomy-based arguments on family law pluralism relying on Raz’s work.

<sup>6</sup>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 also *infra* note 45 R and accompanying text.

<sup>7</sup>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 the like—were abolished after the legalization of same-sex marriage. See Aloni, *supra* note 1, at 626. Some states (for example, Hawaii and Illinois) maintained their registration schemes—but not only is this the exception, it remains to be seen whether couples are actually going to use them. See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1519 (2016).

to elderly couples only.<sup>8</sup> And, in any event, such registrations are often designed in a way that is not attractive to many couples—because the registrations take the form of marriage with a different name—and hence are hardly used by partners. Additionally, a few scholars have already criticized the assumption that the multiple registration schemes advanced autonomy.<sup>9</sup>

Therefore, the reality is that what looks like structural pluralism is predominantly manifested by the movement toward flexibility and choice *within* each regulatory regime. Namely, the menu of options is developing primarily in its second dimension by the increasing acceptance of a narrow subset of possible agreements between intimate partners (options to contract about financial obligations between married and unmarried partners).<sup>10</sup> In other words, so-called structural pluralism is reduced to the intensification of ex-ante private rulemaking options.

If, then, private ordering and individual autonomy are the new articulations of pluralistic structure, the question becomes what is pluralism anyway—and how is it different from privatization? Scholarship cheering the development of pluralistic family law has given the term “pluralism” different meanings. Further, literature in the field of family law has failed to adequately define the object of pluralism and the type of goods that should be bolstered by structural pluralism.<sup>11</sup> Therefore, I explore the various definitions of pluralism and the way it has emerged, in some quarters, as a synonym for individual autonomy.

For this reason, 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, private ordering is now dressed up in a new costume: pluralism. I assert that the relationship between private ordering and pluralism has received scant attention by family law scholars and is inadequately theorized.

To better understand the relationships between structural pluralism and private ordering I examine what types of values are promoted by private rulemaking in the family. I use functional analysis, focusing on two types of intrafamilial contracts: prenuptial agreements and cohabitation contracts.<sup>12</sup>

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<sup>8</sup> Same Sex Marriage, 2012 Wash. Sess. Laws 199.

<sup>9</sup> See *infra* note 44 and accompanying text (surveying the main criticism on the additional registration schemes as enhancing pluralism).

<sup>10</sup> By “narrow subset,” I mean to indicate that despite the intensification of private ordering in the family law system, courts still enforce only a particular set of promises (such as those that define the financial obligations between the partners upon divorce) to the exclusion of other possible agreements (such as agreements about the duties of the spouses during the relationship). See *infra* Part III.

<sup>11</sup> See *infra* Part I.

<sup>12</sup> While I use the term “cohabitation agreement,” I acknowledge that, for the most part, cohabiting couples do not execute such agreements and that courts use a variety of legal theories to find financial obligations between unmarried partners. Yet, as I explain in Part II.C, this is precisely the reduction and entrenchment of contractual elements in

This examination analyzes the way that the contractual options function and what values these options offer for couples.

This study makes a novel claim: the doctrines that govern prenuptial and cohabitation arrangements enforce these agreements in a formalist, proceduralist manner.<sup>13</sup> The law purports to balance competing values but, in fact, adheres to rules and formalities over standards and substance. For instance, the doctrine nullifies agreements when formalities are not met and reduces the court's discretion to evaluate a contract's fairness.<sup>14</sup> Similarly, default rules often favor the economically stronger partner and disadvantage the vulnerable party—often the partner who invested more in the household at the expense of career development.<sup>15</sup> This system resembles the way that classical contract theory has often worked for the advancement of the economically stronger party.<sup>16</sup> Consequently, building on another body of scholarship in contract law,<sup>17</sup> I call this trend “neoclassical.”

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. Therefore, 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.<sup>18</sup> By imposing formalities to create binding obligations between unmarried partners and instituting default rules that bar financial obligations without contracts, the doctrine ensures that the parties do not make commitments involuntarily.

The choice within informal relationships and marriage, considered alone, does not tell the whole story about the values embedded in the system

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family law that I critique: courts insisting on the use of ex-ante bargaining notions to find obligations between cohabiting couples.

<sup>13</sup> Some scholars still maintain that prenuptial agreements afford stronger protection than other commercial contracts. They have not yet noticed the emerging neoclassical trend that diminishes these protections by focusing more on procedural safeguards. Thus, some literatures assume that contractual family law already encompasses a pluralistic approach because the doctrines that govern intrafamilial contracts 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.* 19, 33 (2013). 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.

<sup>14</sup> See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1729 (1976).

<sup>15</sup> See *infra* Parts II.B–C.

<sup>16</sup> Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 *OR. L. REV.* 1131, 1135 (1995) (“[A] legal system that emphasizes freedom of contract . . . works ultimately to the benefit of the already rich and powerful.” (footnote omitted)).

<sup>17</sup> See Jay M. Feinman, *The Significance of Contract Theory*, 58 *U. CIN. L. REV.* 1283, 1285 (1990) (“The word ‘neoclassical’ . . . indicat[es] that neoclassical contract has not so far departed from classical law that a wholly new name is appropriate.”).

<sup>18</sup> See *infra* Parts II.B–C (describing the development in doctrines governing prenuptial and cohabitation contracts).

as a whole. I thus put these legal institutions in perspective by examining the whole regulatory regime together. My conclusion, visualized in Table 1,<sup>19</sup> 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.<sup>20</sup>

Thus, I contend that structural pluralism, in its current form, is a cover for market logic and inequality, or, at the least, that it lends itself to a free-market approach. Further, the reincarnation of privatization under the guise of pluralism is not a coincidence. Rather, pluralism is construed in a way that invites the incorporation of neoclassical principles. That is, 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.

Finally, I explore whether it is possible for family law to advance a truly pluralistic vision of family regulation. I assert that as long as the menu of options is predicated on notions of private ordering and ex-ante bargaining, then, regardless of how many options we have, the powerful party is going to triumph over the less-empowered one. That is, the shortcomings of the pluralistic system are to some extent unavoidable in any regime that uses private rulemaking to "supplement" marriage. I suggest that a truly pluralistic law needs to be bounded by other core values such as substantive notions of autonomy and equality.<sup>21</sup>

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 neoclassical nature their doctrines are starting to adopt. Part III takes a panoptic view of the interaction between the various institutions that family law offers and asserts that the system fails to promote a balance of values. Part IV provides a critique of family law pluralism and proposes a few baselines for the development of a truly pluralistic vision of family law. The Conclusion suggests the need to move toward a neopluralist theory of family law—one that is cognizant of and committed to distributive justice.

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<sup>19</sup> See *infra* Table 1.

<sup>20</sup> See *infra* Part III.

<sup>21</sup> See *infra* Part IV (arguing that such structure is likely to include registration schemes that are substantially different from marriage, change of default rules, and adequate protections from strategic behavior).

I. FROM PRIVATIZATION TO PLURALISM?

Pluralistic theory is on the rise in private law scholarship generally,<sup>22</sup> and now dominates the discussion in family law as well.<sup>23</sup> “Pluralism” takes a few different meanings and definitions in family law.<sup>24</sup> During the 1990s, pluralism, in the family law context, was used mainly to describe different groups and their diverse community norms concerning marriage and family life.<sup>25</sup> This Part examines how pluralism evolved into a term that is used in connection with choice and individual autonomy. It provides a modest genealogy of the shift from status to contract that preceded the supposed era of pluralism.

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.<sup>26</sup> 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?<sup>27</sup> This Part aims to provide an account that frames and delineates

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<sup>22</sup> See, e.g., Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 538 (2013) (“[A]ll normative legal theories should be pluralist.”); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1435 (2012); Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915, 915 (2012); 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.” (footnote omitted)).

<sup>23</sup> See, e.g., Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 259–60 (2013) (advocating for pluralistic progression in family law); Melissa Murray, *After Lawrence*, BALKINIZATION (Jan. 15, 2013), <http://balkin.blogspot.com/2013/01/after-lawrence.html> [https://perma.cc/7YR4-RDB3] (“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 C. 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: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 309, 309–10 (Joel A. Nichols ed., 2012) [hereinafter MARRIAGE IN A MULTI-CULTURAL CONTEXT] (arguing that “legal pluralism” is hot” and examining what legal pluralism means in family law).

<sup>24</sup> McClain, *supra* note 23, at 309.

<sup>25</sup> One popular strain of scholarship in family law addresses the plurality of legal sources that direct society, including religious tribunals and custom. *Id.* at 309–10; see also Joel A. Nichols, Comment, *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.

<sup>26</sup> Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444 (1992).

<sup>27</sup> 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



the connection between privatization and pluralism. To do this, it is useful to briefly recount the privatization process that preceded and contributed to the development of the supposed pluralistic shift.

In the past half century, family law has undergone a growing process of privatization. The transformation of marriage—from an institution with strong status characteristics to an institution with increasingly more contractual components—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 committed some type of marital fault.<sup>28</sup> This progression was further characterized by the replacing of most mandatory rules that were part of the marriage contract with default rules, which allows partners to define many aspects of their marriage contract.<sup>29</sup>

This process was accompanied by an age-old debate between supporters of traditional marriage and scholars who viewed contracts as “variable, private, and controlled by the will of the parties not that of the state.”<sup>30</sup> The former group argued that allowing spouses to tailor their obligations would increase opportunistic behavior and lead to marriage instability.<sup>31</sup> For them, 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.<sup>32</sup> The latter group viewed contracts as synonymous with individual autonomy.<sup>33</sup> Although several scholars have offered sophisticated critiques of private ordering as representative of the partners’ will,<sup>34</sup> more commentators now salute the extended private contracting in family law and even call for its expansion.<sup>35</sup>

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govern their relationships). Brian H. Bix, *Pluralism and Decentralization in Marriage Regulation*, in MARRIAGE IN A MULTI-CULTURAL CONTEXT, *supra* note 23, 60, 64–66.

<sup>28</sup> 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.

<sup>29</sup> Eskridge, *supra* note 1, at 1902.

<sup>30</sup> Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 4 (2010).

<sup>31</sup> See, e.g., Scott & Scott, *supra* note 28, at 1245 (presenting the arguments of communitarians regarding contractualization of family relations); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 779; Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 265–66 (2000). 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 (2001).

<sup>32</sup> See Singer, *supra* note 26, at 1446; Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 111–18 (1998).

<sup>33</sup> See Halley, *supra* note 30, at 15 (“[T]he onset of contractual freedom between spouses is seen as necessary for marriage to be free and equal.” (footnote omitted)).

<sup>34</sup> 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).

<sup>35</sup> 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).

Recently, some scholars maintain, family law reached the era of pluralism, both descriptively and normatively.<sup>36</sup> 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.<sup>37</sup> 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 without clear definitions.<sup>38</sup> 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).

Nevertheless, trying to account for this transition descriptively, the *expansion* of options for legal recognition of relationships constitutes the main development that demonstrates the assumed transformation from privatization to pluralism.<sup>39</sup> As a result of efforts to legalize same-sex marriage, a few states now offer (or offered) more institutions for registration of relationships, sometimes even open to nonintimate partners.<sup>40</sup> The dual development of an increased enforcement of private ordering and of multiple registration schemes, coupled with the diverse family structures that exist today in the U.S.,<sup>41</sup> is the primary demonstration of 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

<sup>36</sup> See, e.g., Bix, *supra* note 27, 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.” (footnote omitted)).

<sup>37</sup> Cf. Singer, *supra* note 26, 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”).

<sup>38</sup> See, e.g., Bix, *supra* note 27, 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 alternative paths to pluralism by focusing on different developments that lead to what I call structural pluralism. See *id.*

<sup>39</sup> Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1302–09 (2014); see also Eskridge, *supra* note 1, at 1884.

<sup>40</sup> 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). See Aloni, *supra* note 1, at 591–93.

Eskridge also includes within the expansion process the opportunities to live in nonregistered relationships and still incur some legal consequences; for example, the 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 1, at 1934–35. While it is true that in all but three states contracts concerning the financial aspects of relationships are generally enforceable, these regimes still present significant legal problems. I analyze the shortcoming of cohabitation agreements in Part II. C. See also Aloni, *supra* note 1, at 587 (discussing the shortcoming of establishing financial obligations between unmarried partners based on contractual elements).

<sup>41</sup> Eskridge, *supra* note 1, at 1892–94.

of options for romantic couples, including those with children.”<sup>42</sup> Bill 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.”<sup>43</sup> As stated before, several scholars have scrutinized the view that multiple registration schemes—as construed in the U.S.—enhance meaningful choice.<sup>44</sup> The critique of the shortcomings of registration schemes is familiar; in any event, it is safe to say that, at this point, the supposed pluralism is presented primarily by ex-ante contractual elements. I focus, then, on the other element of the alleged pluralism: the greater room for variety and choice within each regime; i.e., the contractual component.

Indeed, within this shift to structural pluralism, private ordering plays a significant role.<sup>45</sup> Consequently, contract is the main tool that makes these regulatory regimes more flexible and tailored to the specific needs of the parties—not one-size-fits-all.<sup>46</sup> For instance, marriage offers more plasticity once partners have the option to choose covenant marriage or to execute a prenuptial agreement.<sup>47</sup> Private ordering also extends choice without any registration, because parties can create their own obligations by contracting

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<sup>42</sup> Bix, *supra* note 27, at 60, 64; Eskridge, *supra* note 1, at 1889. To be sure, Eskridge acknowledges that the current menu of options is incoherent and developed without systematic thought by the legislature. He thus advocates for its improvement and further development. Eskridge, *supra* note 1, at 1891.

<sup>43</sup> Eskridge, *supra* note 1, at 1947.

<sup>44</sup> Elsewhere, I argued that these registration schemes—while they have the potential to serve as useful options for regulation of relationships and for a variety of family structures—fail to provide meaningful choices because they do not address the concerns of people who live in nonmarital unions. See Aloni, *supra* note 1, at 591–94. Mary Anne Case further observed, soon after these registration schemes appeared, that the registration schemes that existed then actually decreased the choices open to couples by adopting requirements (such as proof of cohabitation or financial support obligations between the partners) that were not required in order to obtain a marriage license. 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, *supra* note 30, at 22, 33 (footnote omitted). Halley contends that these legal institutions incrementally adopt marriage-like characteristics, and if a couple chooses not to adopt one of them, the state can still ascribe financial obligations to them, thus leaving less room for choice. *Id.* at 22; see also Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 296–300 (2013) (arguing that once domestic partnership became marriage with a different name it lost its transformative value).

<sup>45</sup> 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 27, at 64–66; see also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 487 (1983) (“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.”).

<sup>46</sup> Aloni, *supra* note 1, at 607–09.

<sup>47</sup> See, e.g., Lifshitz, *supra* note 5, at 1633–34 (arguing that covenant marriage fits that pluralistic approach to family law because it extends the marital options).

about it without registering their relationships.<sup>48</sup> 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 structure their relationships in different shapes and sizes.

Normatively, family law pluralism means more than privatization. Accordingly, the state must 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' 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)."<sup>49</sup>

But these descriptive and normative accounts of pluralism are unsatisfying. I argue that, to date, family scholarship has failed to provide coherent definition to family law pluralism.<sup>50</sup> Some scholars use the term to describe a movement away from marriage as the only regulatory regime (and one hard to modify) and toward a variety of regulatory regimes characterized by default and override rules.<sup>51</sup> But if this is the definition of pluralism, then how is it substantially different from privatization?<sup>52</sup> Additionally, this definition falls short of indicating what types of values should be embedded in and distributed by such menu.<sup>53</sup> For example, "structural pluralism" could mean

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<sup>48</sup> See Stake, *supra* note 6, at 818.

<sup>49</sup> Bix, *supra* note 27, at 61.

<sup>50</sup> 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. Lifshitz, *supra* note 5, at 1567 ("This Article addresses the regulation of economic relationships between unmarried cohabitants . . ."). 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 pluralistic principles. *Id.* According to Lifshitz, pluralistic 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. *Id.* at 1568–70. 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. *Id.* at 1601–25.

<sup>51</sup> Eskridge, *supra* note 1, at 1889–91. Other times, the term refers to a descriptive (not normative) shorthand for legal tolerance, acceptance, recognition, and encouragement of a variety of family forms and variations within particular family forms. See Feinberg, *supra* note 23, at 259 (defining "pluralistic relationship recognition" as "the needs of the diverse relationship and familial forms in existence today without regard to marriage eligibility"); *id.* at 258–60, 279–85. Such definition is typically accompanied by the assumption that structural pluralism—including private ordering—reflects a positive development.

<sup>52</sup> See generally Singer, *supra* note 26, at 1446–47 (characterizing privatization as recognizing relationships other than marriage and allowing the partners themselves to determine the consequences of their marital status).

<sup>53</sup> Eskridge's pluralism is essentially a vehicle to achieve other utilitarian goals. For Eskridge, pluralism 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 1, at 1893 (footnote omitted). 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. *Id.* at 1946–47. Family law pluralism, he posits, supports achieving a balance between these goals. *Id.* at 1950.

that the state has to provide as many options as possible (free market), or to try to provide a choice that still has a channeling effect, or to provide only limited choice for the type of partnership that the state wants to encourage.<sup>54</sup> 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 an exploration of whether the expansion of choice—structural pluralism—truly reflects pluralistic values. And if the currently emerging structural pluralism does not reflect pluralistic values, the question arises as to whether such an agenda is even achievable, or whether pluralism is a suitable framework for family law theory.

While family law scholarship has failed to probe the aims of structural pluralism, scholars from other legal fields have put forward elaborate theories of the definition and role of pluralism in private law that can provide a productive basis for similar exploration in family law.<sup>55</sup> Hanoch Dagan, in a book and numerous articles,<sup>56</sup> advances the most developed of such theories. Dagan's pluralistic theory relies on three paradigms of pluralism: structural, value, and autonomy-based.<sup>57</sup> Structural pluralism, as explained above, is the vehicle that serves to advance pluralistic values. Value pluralism argues that as the world is composed of a plurality of universal goods, these goods cannot be ranked (incommensurable), and that often there is conflict between them.<sup>58</sup> Dagan's autonomy-based theory is strongly influenced by Joseph Raz's notion of autonomy. According to Raz, in order for people to selfgovern, they must have adequate and meaningful choices.<sup>59</sup> Dagan then endorses a view that the pluralistic approach is grounded in respect for diverse values or different balances of values, and in promoting autonomy that can only be achieved by facilitating adequate and meaningful choices between options.

When it comes to contracts, Dagan asserts that contract law already embodies such structural, autonomy-based pluralism and should further develop in this direction. Contract law is ideal as an embodiment of pluralistic theory because it "is an umbrella of a diverse set of institutions, and each institution responds to a different regulative principle—that is, each vindi-

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<sup>54</sup> See Aloni, *supra* note 1, at 599–601 (contending that the menu-of-option plan is not coherent enough).

<sup>55</sup> Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017, 1024–35 (2011) (describing four property theorists and uncovering their commitment to value pluralism).

<sup>56</sup> *E.g.*, HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011) (suggesting a pluralistic theory of property in service of liberal values); Dagan, *supra* note 13, at 19–20.

<sup>57</sup> Dagan, *supra* note 22, at 1421–29.

<sup>58</sup> GEORGE CROWDER, *LIBERALISM AND VALUE PLURALISM* 44–56 (2002) (defining "value pluralism" based on four elements: (1) universal values (2) plurality (3) incommensurability (4) in conflict); WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 5–6 (2002).

<sup>59</sup> RAZ, *supra* note 5, at 398–99.

cates a distinct balance of values in accordance with its characteristic subject matter and the ideal type of relationships it anticipates.”<sup>60</sup>

Dagan further states that a particular example in which contract law already encompasses such pluralism is family law contracts—such as premarital contracts and separation agreements. Family law contracts are emblematic of a pluralistic approach because different rules govern the enforceability of such family-related contracts in a way that reflects the unique values underpinning them.<sup>61</sup> While Dagan does not purport to explore the role of pluralism in family law, he often makes reference to this area.<sup>62</sup> For instance, he repeatedly refers to marriage and family contracts as prime examples of areas that already show some degree of pluralism and will benefit from further embracing pluralistic principles.<sup>63</sup>

In what follows, I build on and extrapolate from Dagan’s work and evaluate its suitability to family law to 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. NEOCLASSICAL REALITY

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 the 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 agreements, similar principles are embedded in separation contracts<sup>64</sup>— and, to some extent, in postnuptial contracts.<sup>65</sup>

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<sup>60</sup> Dagan, *supra* note 13, at 20.

<sup>61</sup> *Id.* at 35.

<sup>62</sup> Dagan, *supra* note 22, at 1435.

<sup>63</sup> *E.g., id.*

<sup>64</sup> See Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1270 (1999) (arguing that in the context of separation contracts “[u]nder the pretense of respect for the autonomy and the equality

Since I conclude that the doctrines governing family law contracts adopt neoclassical characteristics, I begin by laying out the basic principles of the neoclassical approach in contract law. Section A thus introduces basic principles of classical contract 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*

Classical contract 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, holding the parties strictly to their bargain.<sup>66</sup> In other words, the rules of classical contract theory make “contractual liability hard to assume and hard to escape once it is assumed.”<sup>67</sup> Classical theory relies on formal requirements—such as writing and consideration—as conditions to make the promise legally binding.<sup>68</sup> Once these requirements are met, the doctrines of excuse are construed narrowly to bind people by their promises.<sup>69</sup>

In effect, the principles of classical contract theory give individuals considerable power regarding their commitments while taking that power from the courts.<sup>70</sup> By instituting formal, acontextual, and 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.<sup>71</sup> Rather than use a case-by-case approach to inquire into the contract’s fairness, classical theory is grounded in stability and predictability. The trade-off for this is that such a system binds

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of women, contract doctrine and its application provide no remedy and leave women mired in financial despair and resentment”).

<sup>65</sup> Traditionally, and still today, courts are reluctant to enforce postnuptial agreements, and scrutinize them more critically than prenuptial contracts. See *Hoffman v. Dobbins*, No. 24633 2009 WL 3119635, at \*2 (Ohio Ct. App. Sept. 30, 2009) (“Postnuptial agreements, with specific limited exceptions, are not valid in Ohio.” (citation omitted)); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 829 (2007). Nevertheless, recently there is more of a 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. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 2(2) (UNIF. LAW COMM’N 2013) (defining marital agreement as “an agreement between spouses intending to remain married”).

<sup>66</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 52–53 (Ronald K.L. Collins ed., 2d ed. 1995); Franklin G. Snyder & Ann M. Mirabito, *The Death of Contracts*, 52 DUQ. L. REV. 345, 362 (2014).

<sup>67</sup> Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 372 (2004).

<sup>68</sup> *Id.* at 371.

<sup>69</sup> GILMORE, *supra* note 66, at 50–53.

<sup>70</sup> Snyder & Mirabito, *supra* note 66, at 362.

<sup>71</sup> See Feinman, *supra* note 17, at 1286–87.

individuals to their bargain with very limited regard to the fairness of the deal, changed circumstances, relative bargaining power, or specific circumstances of the case.<sup>72</sup> Indeed, “[c]lassical contract doctrine generally makes little concession for the bargaining power inequalities that plague consumers.”<sup>73</sup>

Neoclassical contract theory emerged as a critique of the classical approach.<sup>74</sup> It rests on a balance between the classical contractual principles—freedom of contracts and efficiency—with other values, including fairness.<sup>75</sup> The neoclassical 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 the realities of the parties and their dealings.<sup>76</sup> This approach defines the current mainstream theory in contract law.<sup>77</sup> However, as implied by its name, neoclassical contract law has not significantly departed from classical contract theory.<sup>78</sup> It is still founded on the assumption that individuals are relatively autonomous and undertake commitments under state intervention that ensures fairness.<sup>79</sup> Such contract law still assumes, sometimes incorrectly, that contracting parties act rationally, and it is generally pro-enforcement of the bargain.<sup>80</sup>

As I show below, the characteristics of neoclassical contract law are gradually appearing in the area of family-focused contracts. While the general structure of the law embodies the main principles of classical contract theory—such as adherence to rules, formalism, curtailing judges’ discretion, and limiting alternative theories of recovery such as quasi-contractual remedies—the system is more akin to neoclassical than classical

<sup>72</sup> Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 16 (2004) (“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 . . . and certainly not evaluating the bargains for fairness.”).

<sup>73</sup> Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 50 (2012).

<sup>74</sup> John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 870 (2002).

<sup>75</sup> Feinman, *supra* note 17, at 1288.

<sup>76</sup> Jay M. Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1538 (1987).

<sup>77</sup> Feinman, *supra* note 17, at 1285; G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 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.” (footnote omitted)).

<sup>78</sup> Feinman, *supra* note 17, at 1285.

<sup>79</sup> *Id.* at 1309–10; Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 182 (2005) (“The cornerstone of the neoclassic 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, 12–17 (1998) (criticizing the neoclassical approach for lack of treatment of racial and gender bias in contractual relationships).

<sup>80</sup> See Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 13 (2011) (arguing that neoclassical contract law—which she calls “modern”—still retains the main characteristics of classical legal theory). Some scholars view the neoclassical theory of contracts as taking a drastic distance from classical contract theory and incorporating a strong nonformalistic approach to contract principles. According to this account, modern courts have rejected the neoclassical approach in favor of a pro-market approach to contract enforcement. See Shell, *supra* note 77, at 495–519.



theory. This is because, as I describe below, the system displays attempts to balance between competing principles, and it is more flexible than classical contract theory. Yet, the neoclassical 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 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.<sup>81</sup> The first stage, the common law phase, extends from the early 1970s until the drafting of the Uniform Premarital Agreement Act ("UPAA") in 1983.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> In other states, courts have required

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<sup>81</sup> Because states vary widely in their approaches to enforcement of premarital contracts, 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) (stating that there are substantial differences between states' approaches to enforcement of premarital agreements). Despite this shortcoming, this categorization is helpful in observing the emergence of a neoclassical 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 . . . ." Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 394 (2006) (identifying the three significant events as: the Posner case (1970), the Uniform Premarital Agreement Act (1983), and the *Simeone* case (1990)). His analysis, however, is slightly dated, as his article was published before a few recent significant events that I consider here as part of the third stage.

<sup>82</sup> UNIF. PREMARITAL AGREEMENT ACT (UNIF. LAW COMM'N 1983).

<sup>83</sup> See Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 35 (2009).

<sup>84</sup> See 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, 154–156 (1998).

a heightened burden for their enforceability (strong procedural and substantive fairness).<sup>85</sup> In the third stage, the neoclassical stage, which has just started unfolding, a new approach has started to emerge: legislators and courts have begun to desert the substantive review of prenuptial agreements and to adopt strong procedural safeguards, attempting to protect the economically weaker party while increasing predictability of enforcement and restraining judges' discretion. The current New Jersey legislation and the Uniform Premarital and Marital Agreements Act ("UPMAA") are emblematic of these changes. 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.<sup>86</sup>

Until the seventies, courts declared premarital agreements concerning divorce planning unenforceable on the grounds that they violated public policy by encouraging divorce.<sup>87</sup> 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 upon divorce.<sup>88</sup> Still, most courts examined the fairness of prenuptial agreements more closely than they would have under general contractual principles.<sup>89</sup> In other words, 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)—a.k.a., "secondlook" provisions.<sup>90</sup>

The second stage began with the promulgation of the Uniform Premarital Agreement Act in 1983.<sup>91</sup> The Act, or some portions of it, was adopted by twenty-two states and the District of Columbia;<sup>92</sup> it embraced a strong proenforcement approach.<sup>93</sup> The Act "facilitates treatment of premarital agreement as essentially ordinary contracts . . . [and] reduces the high burden of

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<sup>85</sup> See Oldham, *supra* note 81, at 88.

<sup>86</sup> For excellent reviews of the development of enforcement of prenuptial agreements, see Silbaugh, *supra* note 32, at 70–75 and Bix, *supra* note 84, at 145, 148–58.

<sup>87</sup> Silbaugh, *supra* note 32, at 72–73.

<sup>88</sup> See, e.g., *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Unander v. Unander*, 506 P.2d 719 (Or. 1973).

<sup>89</sup> Bix, *supra* note 86, at 154.

<sup>90</sup> See, e.g., *Button v. Button*, 388 N.W.2d 546, 552 (Wis. 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*, 622 S.E.2d 812, 814 (Ga. 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).

<sup>91</sup> See UNIF. PREMARITAL AGREEMENT ACT (UNIF. LAW COMM'N 1983).

<sup>92</sup> DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 842 (3d ed. 2012); Oldham, *supra* note 81, at 84 (only thirteen states enacted the law without significant changes).

<sup>93</sup> See Bix, *supra* note 86, at 155.

disclosure and conscionability . . . .<sup>94</sup> In fact, when it comes to review of unfairness, the UPAA required a higher burden from the challenger than conventional contracts require.<sup>95</sup> 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 unconscionable at the time of execution *and* the affected party did not receive fair disclosure of the financial status of the other party.<sup>96</sup> Conversely, under traditional contractual doctrine, each element alone (fair disclosure *or* unconscionability) can serve as a cause for unenforceability.<sup>97</sup>

The third stage in the evolution 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.<sup>98</sup> Before the revision, New Jersey's law included a second-look provision, authorizing courts to examine the fairness of the agreement at the time of enforcement.<sup>99</sup> In addition, the law listed unconscionability as a stand-alone cause for unenforceability.<sup>100</sup> The amendment, however, not only limits the examination of unconscionability to the time of execution (and thus eliminates the secondlook provision) but also narrows the scope of unconscionability, defining four specific factors that determine whether or not an agreement is deemed unconscionable.<sup>101</sup> Under the provision of this amendment, the party seeking to set aside the prenuptial must prove that she 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.<sup>102</sup> The result is that, in

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<sup>94</sup> ABRAMS, *supra* note 92, at 840.

<sup>95</sup> Bix, *supra* note 86, at 156.

<sup>96</sup> UNIF. PREMARITAL AGREEMENT ACT § 6(A)(2) (UNIF. LAW COMM'N 1983).

<sup>97</sup> Bix, *supra* note 86, at 155–56.

<sup>98</sup> N.J. S. JUDICIARY COMM. STATEMENT, S.B. 2151, 215th Sess. (2012) ("This bill would strengthen the enforceability of premarital and pre-civil union agreements.").

<sup>99</sup> N.J. STAT. ANN. § 37:2–38(b) (West Supp. 2015) (deleted by amendment, P.L.2013, c. 72).

<sup>100</sup> See N.J. STAT. ANN. §§ 37:2–38(b)–(c).

<sup>101</sup> N.J. STAT. ANN. § 37:2–38(c)–(d) ("An agreement shall not be deemed unconscionable unless the circumstances set out in subsection c. of this section are applicable.").

<sup>102</sup> See *Hearing on S2151 Before the S. Judiciary Comm.*, 2012 Leg., 215th Sess. 1 (N.J. 2012) (statement of S. Nicholas Scutari, Speaker, S. Judiciary Comm.).

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.<sup>103</sup> 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.<sup>104</sup> 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.”<sup>105</sup> 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 decisionmaking and less on substantial unfairness.

Like its predecessor, the UPMAA specifies that the agreement be in writing and signed by both parties.<sup>106</sup> However, the proposed UPMAA changes, in quite significant ways,<sup>107</sup> 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 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.<sup>108</sup> The UPMAA sets forth that when one party did not have a reasonable opportunity for representation, the contract will not be enforced.<sup>109</sup> 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.<sup>110</sup> If a lawyer did not represent the party, the UPMAA requires the challenger to sign a clear waiver of the rights that she is relinquishing under the agreement.<sup>111</sup>

<sup>103</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (UNIF. LAW COMM’N 2013).

<sup>104</sup> See Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 314–15 (2012).

<sup>105</sup> *Id.* at 315.

<sup>106</sup> *Id.* at 338.

<sup>107</sup> *Id.* at 339 (“The standards for enforceability, however, diverge significantly from the UPAA.”).

<sup>108</sup> See Oldham, *supra* note 81, 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).

<sup>109</sup> See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(a)(2) (UNIF. LAW COMM’N 2013). Section 9(b) defines what counts as available independent legal counseling. *Id.* § 9(b).

<sup>110</sup> See *id.* § 9(b)(1)–(2).

<sup>111</sup> *Id.* § 9(a)(3) (requiring that the agreement include a “notice of waiver of rights” or “an explanation in plain language” of the rights that the challenger waived).

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 fair disclosure of the other party's financial condition.<sup>112</sup> The UPMAA uncouples financial disclosure from unconscionability, thus compelling adequate disclosure of the partners' financial situations as a stand-alone prerequisite for enforceability.<sup>113</sup> It also 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—which means that the defense of unconscionability is more easily available to challengers of prenuptials.<sup>114</sup>

Three, the UPMAA, unlike its predecessor, leaves the door open for invalidation of antenuptial agreements based on changed circumstances during the marriage that result in “substantial hardship.”<sup>115</sup> Because the drafting committee was divided about the need to have a second-look provision,<sup>116</sup> it 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.<sup>117</sup>

So far, only two states have adopted the UPMAA and two others have introduced a bill but have not finalized the legislative process, and it is unlikely that many other states will adopt it. Of the two adopting states, Colorado has done so without the bracketed section (the second-look provision).<sup>118</sup> 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.<sup>119</sup> However, Colorado still allows for evaluation of unconscionability at the time of enforcement, but only as applied to spousal support and attorney's fees.<sup>120</sup> In fact, when it comes to distribution of property, substantive unconscionability is unavailable. Similarly, Mississippi, where the legislation

<sup>112</sup> See UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2) (UNIF. LAW COMM'N 1983).

<sup>113</sup> See UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(a). The Act states that a party has “adequate” financial disclosure if: (1) the party receives a description of the property income and liability that belong to the other party; (2) waives in writing such disclosure; or (3) the party has or should have adequate knowledge of the property income and liabilities of the other party. *Id.* § 9(d).

<sup>114</sup> See Atwood & Bix, *supra* note 104, at 342.

<sup>115</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(f)(2).

<sup>116</sup> Atwood & Bix, *supra* note 104, at 333.

<sup>117</sup> UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 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”).

<sup>118</sup> COLO. REV. STAT. § 14-2-309 (2015).

<sup>119</sup> *Id.* (“A premarital agreement or marital agreement or amendment thereto or revocation thereof that is otherwise enforceable after applying the provisions of subsections (1) to (4) of this section . . .”).

<sup>120</sup> *Id.* § 14-2-309(5).

has only been introduced, chose (in its bill) the same system as Colorado did.<sup>121</sup> Conversely, North Dakota has adopted the whole act, including the bracketed second-look provision;<sup>122</sup> 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).<sup>123</sup>

What we see here, therefore, is the emergence of a new attitude in the 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 that adopted the UPAA without significant changes<sup>124</sup>); and those that offered robust protection, both procedural and substantive (for example, states that adopted second-look provisions).<sup>125</sup> 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.

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 by the general spirit of the UPMAA—is the 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, to better understand why the law that governs premarital agreements adopts neoclassical 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 agreements by the parties.<sup>126</sup> The default rules of the marriage contract are the state's laws regarding division of property and spousal support upon divorce. In the absence of a marital contract (prenuptial, postnuptial, or divorce settlement) that modifies these default

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<sup>121</sup> H.B. 1042, 2014 Miss. Leg., Reg. Sess. (2014), <http://billstatus.ls.state.ms.us/documents/2014/html/HB/1000-1099/HB1042IN.htm> [<https://perma.cc/FGW3-ZSEF>].

<sup>122</sup> N.D. CENT. CODE §§ 14-03.2-01 to -11 (Supp. 2015).

<sup>123</sup> B. 20-0217, D.C. Leg., 20th Sess. (2013), [http://lims.dccouncil.us/\\_layouts/15/uploader/Download.aspx?legislationid=29377&filename=B20-0221-HearingRecord1.pdf](http://lims.dccouncil.us/_layouts/15/uploader/Download.aspx?legislationid=29377&filename=B20-0221-HearingRecord1.pdf) [<https://perma.cc/4BGW-S5WU>].

<sup>124</sup> See Oldham, *supra* note 81, at 84 (listing the states that adopted the UPAA with slight variations).

<sup>125</sup> See *id.* at 103–11 (describing different approaches to substantive review of premarital agreements).

<sup>126</sup> Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 565 (2006).

terms, the spouses will follow the financial obligations established by the state upon divorce.<sup>127</sup>

The study of marital default rules is sometimes separated from the exploration of rules pertaining to enforcement of premarital contracts.<sup>128</sup> However, the two topics—the contractual doctrine and the default rules—cannot be separated because some default rules have a significant effect on people’s incentive to contract and on the substance of the contract itself.<sup>129</sup> 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 Part examines the default rules of marital breakdown.

Default rules have been changing in a way that favors the wealthier, nonprimary caregiver partner.<sup>130</sup> The rules tend to order division of assets equitably in the distribution of property arena, but some rules still disfavor the dependent spouse. In the spousal support arena, the developments are toward strong restrictions of maintenance.<sup>131</sup>

By using the term “homemaker,” “primary caregiver,” or “dependent spouse,” I refer not only to spouses who do not work outside the home, but also, and primarily, to those who work the “second shift” at home or take the “mommy track”—those who have invested more in the household, including raising the children, and made sacrifices that are likely to result in lost career opportunities.<sup>132</sup> By doing so, I do not mean to ignore the reality that the American family has changed significantly, and the typical household does not consist only of couples that adopt traditional specialization of labor arrangements. Indeed, there are various arrangements and bargains that

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<sup>127</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 n.10 (1989); Scott & Scott, *supra* note 28, at 1306.

<sup>128</sup> The UPMAA, for example, did not discuss the rules of distribution of property and alimony or their effect at all. See Atwood & Bix, *supra* note 104, at 330–31 (reporting that the mandate given to the UPMAA committee was limited to premarital and postmarital contracts, despite expectation that it would include cohabitation contracts as well). Similarly, typically family law casebooks discuss the two topics separately. See, e.g., PETER N. SWISHER, ANTHONY MILLER & HELENE S. SHAPO, *FAMILY LAW: CASES, MATERIALS, AND PROBLEMS* 567, 1003 (3d ed. 2012) (chapter 7 discusses “economic consequences of divorce” and chapter 11 discusses “marital contracts: premarital and separation agreements”).

<sup>129</sup> See *infra* note 190 and accompanying text (discussing the effect of default rules on the content of the prenuptial agreement); *infra* notes 263–270 (discussing the effect of default rules on financial obligations between cohabitants).

<sup>130</sup> See, e.g., Scott & Scott, *supra* note 28, at 1312–18 (suggesting that contemporary alimony laws disfavor the spouse who undertakes the main home assignments).

<sup>131</sup> J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 433 (2008) (“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.”).

<sup>132</sup> See Oldham, *supra* note 81, at 124 (“In relationships where the parties raise children, the primary caretaker customarily incurs lifetime career damage.” (footnote omitted)). For a discussion and statistics about “homemakers” and gender roles, see *infra* note 183 and accompanying text.

partners make all the time. However, it is still the reality that, especially in households with children, specialization of carework is still prevalent. Some less-traditional family structures also embody this characteristic. “As with different-sex couples, there are a number of factors that produce and maintain power as well as gender in a same-sex marriage.”<sup>133</sup> Studies show same-sex couples “still adopt default patterns of specialized labor within the household, even while preferring a narrative of equality within marriage.”<sup>134</sup>

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 spouses’ marital assets equally or equitably.<sup>135</sup> Each state has its own rules concerning what counts as marital property and separate property (and thus not included in the pool that is divided).<sup>136</sup> The nuances of 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.<sup>137</sup>

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.<sup>138</sup> At the same time, a few significant rules still disadvantage dependent spouses.<sup>139</sup> For example, in 2009, Alabama enacted a law that precludes division of retirement benefits when the marriage lasted less than ten years.<sup>140</sup> In Indiana, unvested retirement benefits are not considered marital property,<sup>141</sup> and because “pension rights frequently are the most

<sup>133</sup> Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1271 (2015).

<sup>134</sup> *Id.* at 1268; see also KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 208–24 (2015) (discussing the way that financial obligations of marriage, which were tailored according to the needs of heterosexual couples, do not fit the type of relationships same-sex couples form, and particularly the way that prenuptial agreements that same-sex couples utilize differ from those executed by opposite-sex couples); Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1436–37 (2015) (discussing the distribution of administrative work within the household among same-sex couples and noting that while they tend to split the work more equally than opposite-sex couples, some aspects of administrative work are still divided unequally).

<sup>135</sup> See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 100 (2004). Equal distribution means fifty-fifty division, while equitable distribution requires fair division of the assets and retains more discretion to the judges in deciding about the division. See Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 868–87 (1988).

<sup>136</sup> J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220 (1989).

<sup>137</sup> See, e.g., Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51, 63 (1998) (arguing that “virtually any outcome is legally possible”); 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.”).

<sup>138</sup> See Oldham, *supra* note 131, at 429–30.

<sup>139</sup> Tait, *supra* note 133, at 1272–85.

<sup>140</sup> ALA. CODE § 30-2-51 (2011).

<sup>141</sup> See IND. CODE § 31-9-2-98 (1998).



valuable part of the marital estate," this law creates a significant loss to the homemaker.<sup>142</sup> Except for New York,<sup>143</sup> no other states recognize a license or professional degree as marital property,<sup>144</sup> 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 license provides.<sup>145</sup> 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."<sup>146</sup> In Georgia, the Supreme Court recently held that property acquired during the marriage is presumed separate property unless proven to be marital.<sup>147</sup> This is contrary to the rules in all other states<sup>148</sup> and can result in unjust outcomes because it is difficult between married couples to prove who acquired the property, and when.<sup>149</sup>

In any event, in many cases distribution of property is less of an issue, as most couples do not accumulate significant assets;<sup>150</sup> the more important question involves interest in spousal support (the spouse's future income).<sup>151</sup> 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; a job found at this later stage is not likely to promise satisfactory financial security.<sup>152</sup> When it comes to spousal support, not only do courts currently grant fewer alimonies, but the alimonies are

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<sup>142</sup> Oldham, *supra* note 131, at 430. One study found that pensions accounted for twenty-five percent of the parties' total wealth on average. *Id.* at 434.

<sup>143</sup> See *O'Brien v. O'Brien*, 489 N.E.2d 712, 713 (N.Y. 1985) (recognizing a medical license as marital property).

<sup>144</sup> 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 . . . ." (footnote omitted)).

<sup>145</sup> *Id.* ("Other jurisdictions may grant the nonprofessional spouse certain relief in limited circumstances.").

<sup>146</sup> Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1115 (1989).

<sup>147</sup> See *Newman v. Patton*, 692 S.E.2d 322, 323 (Ga. 2010); *Dasher v. Dasher*, 658 S.E.2d 571, 572 (Ga. 2008).

<sup>148</sup> 1 Equit. Distrib. of Property, 3d § 5:4 ("In states with no statutory presumption, the burden of proof is still ultimately on the spouse who asserts that property owned by one or both parties falls within the definition of separate property. Some courts have reached this result directly." (footnote omitted)).

<sup>149</sup> Oldham, *supra* note 136, at 220 ("Problems relating to tracing are common in divorce since most spouses do not keep property in the same form throughout a marriage."); see Frantz & Dagan, *supra* note 135, at 101–02 ("The 'substantial evidence' to overcome such a presumption is rarely forthcoming . . . ." (footnote omitted)).

<sup>150</sup> See ABRAMS, *supra* note 92, at 471.

<sup>151</sup> See Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 403–04 (1992). But see Oldham, *supra* note 131, 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.").

<sup>152</sup> See Stake, *supra* note 151, at 403–04.

shorter term and of lesser amount.<sup>153</sup> Even before the recent trend of alimony reform, courts infrequently granted spousal support.<sup>154</sup>

The type of spousal support has also radically changed. Whereas before, permanent spousal support was the prevailing rule,<sup>155</sup> most states now prefer rehabilitative spousal support: a time-limited order meant to assist the nonworking spouse to become self-supporting.<sup>156</sup> Furthermore, many states now restrict permanent alimony to long-term marriages<sup>157</sup> (e.g., twenty years in Massachusetts).<sup>158</sup> A few states are considering alimony reforms that piggyback on Massachusetts's reform.<sup>159</sup> 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.<sup>160</sup>

In conclusion, the default rules of marriage, and especially the rules governing spousal support, do not adequately compensate the person who gave up employment opportunities in order to invest more in the household and family.<sup>161</sup> 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 neoclassical approach provides sufficient protection to those who are potentially vulnerable to harm from 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.<sup>162</sup> One, the wealthier partners (business owners and people

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<sup>153</sup> See Judith G. McMullen, *Spousal Support in the 21st Century*, 29 WIS. J.L. GENDER & SOC'Y 1, 6–7 (2014).

<sup>154</sup> See *id.* at 6.

<sup>155</sup> Under an order of permanent spousal support, the payor pays until his death or until the payee remarries.

<sup>156</sup> See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 22 (1989).

<sup>157</sup> See Frantz & Dagan, *supra* note 135, at 119 (“Those few awards of alimony are almost entirely time-limited.”).

<sup>158</sup> MASS. GEN. LAWS ch. 208, § 49(b), (f) (2014).

<sup>159</sup> McMullen, *supra* note 153, at 8.

<sup>160</sup> TEX. FAM. CODE ANN. §§ 8.051, 8.054 (West Supp. 2015).

<sup>161</sup> See e.g., Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 717–18 (2000); Scott & Scott, *supra* note 28, at 1316 (“Current alimony law distorts these incentives by imposing on the homemaker a disproportionate share of the financial costs of divorce.”).

<sup>162</sup> C.f. Ryznar & Stepieñ-Sporek, *supra* note 83, at 33. (“Premarital agreements may be drafted to either significantly favor or disfavor the more vulnerable spouse upon di

who expect to inherit family wealth also execute premarital agreements more frequently than ever before)<sup>163</sup> want to protect themselves from unpredicted changes in the default rules.<sup>164</sup> Likewise, they aspire 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).<sup>165</sup> This group can also include people who remarry and strive to protect their family assets.<sup>166</sup> The second group comprises the primary caregivers.<sup>167</sup> 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.<sup>168</sup>

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voice.” (footnote omitted)). These incentives can be theoretical—they assume that the parties know the default rules and overcome other cognitive problems that prevent parties from executing prenuptial agreements.

<sup>163</sup> See *id.* at 61; see also Laura Petrecca, *Prenuptial Agreements: Unromantic, But Important*, USA TODAY (Mar. 11, 2010), [http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08\\_cv\\_n.htm](http://usatoday30.usatoday.com/money/perfi/basics/2010-03-08-prenups08_cv_n.htm) [<https://perma.cc/P4KG-BAXD>] (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”).

<sup>164</sup> See Ryznar & Stepieñ-Sporek, *supra* note 83, at 61 (“Premarital agreements may also be more common among prospective spouses with significant income or age disparities.” (footnote omitted)); Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 6 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper Series, Paper No. 436, 2003), [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1224&context=harvard\\_olin](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1224&context=harvard_olin) [<http://perma.cc/Q46D-DHRC>] (“[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.”).

<sup>165</sup> Oldham, *supra* note 136, at 219 (defining “kitchen sink” states as allowing the “court to divide all property owned by either spouse at the time of divorce” (footnote omitted)).

<sup>166</sup> Sherman, *supra* note 81, at 373 (“[P]renuptial agreements are more common for second marriages than for first marriages.” (footnote omitted)); Ian Smith, *The Law and Economics of Marriage Contracts*, 17 J. ECON. SURVS. 201, 208 (2003).

<sup>167</sup> See Mahar, *supra* note 164, at 6.

<sup>168</sup> See, e.g., Jeff Landers, *Deciding To Become A Stay-At-Home Mom? Consider This Cautionary Tale*, FORBES (May 29, 2014), <http://www.forbes.com/sites/jefflanders/2014/05/29/deciding-to-become-a-sahm-stay-at-home-mom-consider-this-cautionary-tale/#1c3f57a87fe4> [<https://perma.cc/5U9V-5E96>] (“[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, *supra* note 151, at 402–04, 415 (arguing that current spousal support rules pose a risk to the homemaker and proposing that prenuptial agreements could ease this problem). Such prenuptial agreement should compensate the partner who serves as the primary caregiver for his or her sacrifices in giving up employment opportunity and guarantee that upon divorce the caregiver will maintain a similar lifestyle to the one he or she had prior to divorce. Alternatively, the prenuptial should allow the caregiver to catch up on the years of lost networking, skills, and employment experience. In practice, such a prenuptial should be tailored to the specific couple—depending on the type of lost career opportunities— but generally such agreement should provide for a longer alimony period (than the one warranted by the default rules) allowing the caregiver to come close to what he or she has lost in the years of taking care of children and household. Additionally, such agreement

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.”<sup>169</sup> In accordance, ample evidence indicates that the majority of prenuptial agreements are initiated by the economically privileged partners in order to shield their assets.<sup>170</sup> 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.”<sup>171</sup>

A few reasons explain why primary caregivers execute prenuptials infrequently— despite their strong interest.<sup>172</sup> Some reasons for failure to execute prenuptials agreements are applicable to both parties. For instance, some partners may not be aware of the benefit of executing a prenuptial agreement.<sup>173</sup> Most people are ignorant of the complex rules surrounding the financial consequences of marriage dissolution;<sup>174</sup> they assume that the default rules will be more or less similar to their expectations.<sup>175</sup> Relatedly, many parties are too optimistic regarding the likelihood of divorce and thus devalue the potential benefit of a prenuptial agreement.<sup>176</sup> Further, drafting can be costly.<sup>177</sup> Parties can use boilerplates, but then they risk signing an agreement that does not suit their needs.<sup>178</sup> And some parties think that suggesting a prenuptial signals that they are untrustworthy, or that they are

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can include a mechanism for compensation for enhanced earning capacity incurred by the spouse who did not give up career development (for example, stipulating that a professional license is a marital property).

<sup>169</sup> Smith, *supra* note 166, at 212.

<sup>170</sup> See *id.* at 208; see also 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 economically stronger spouse, who in most cases will have the better bargaining position.”). 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.” Oldham, *supra* note 81, at 89 (footnotes omitted).

<sup>171</sup> Oldham, *supra* note 81, at 103 (footnotes omitted).

<sup>172</sup> See also Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CAL. L. REV. 235, 264–65 (2011) (suggesting four reasons for why the state could reasonably refuse to enforce contracts between romantic partners).

<sup>173</sup> Mahar, *supra* note 164, at 9.

<sup>174</sup> *Id.* at 7–8.

<sup>175</sup> 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 (1993).

<sup>176</sup> See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 254 (1995); Mahar, *supra* note 164, at 9.

<sup>177</sup> Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 461 (1998).

<sup>178</sup> See Ryznar & Stepie’n-Sporek, *supra* note 83, at 41 (analyzing the advantages and disadvantages of using boilerplates in prenuptial agreements).

opportunistic; others are uncomfortable raising these issues for other reasons.<sup>179</sup> While both partners may share ignorance and cognitive bias, the result will typically be harsher for the economically disadvantaged partner.

Some other reasons explain why the primary caregiver is more inclined not to enter into prenuptial agreements or will enter into a less favorable one. Generally, even if partners execute an agreement, their over-optimism about the longevity of their marriage may cause them to invest less in negotiating ideal terms.<sup>180</sup> 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."<sup>181</sup> Importantly, 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).<sup>182</sup>

But not only are primary caregivers less likely to enter into protective agreements, 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.<sup>183</sup> The division of gender specialization also holds true for wealthier couples—those who are most likely to use prenuptial agreements.<sup>184</sup> Meta-analyses of studies of women as negotiators persistently show that women have different negotiating styles than men, which may lead to detrimental results.<sup>185</sup> Women are generally "less likely than men to

<sup>179</sup> See Rasmusen & Stake, *supra* note 177, at 461.

<sup>180</sup> Smith, *supra* note 166, at 214.

<sup>181</sup> Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 63 (1990).

<sup>182</sup> *Id.* at 82–83.

<sup>183</sup> See U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 2 (2013), <http://www.bls.gov/cps/wlf-databook-2012.pdf> [perma.cc/AR25-3HBX] (noting that in 2011, 64.2% of mothers with children under six years did not work outside the home, compared with 76.5% of mothers with children six to seventeen years of age, and 27% of employed women usually worked part-time, while only 11% of men did); Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 20–26 (2000) ("[S]acrifices 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, 206–07 (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." (footnote omitted)).

<sup>184</sup> Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 25 (2010) ("[T]he more wealth a married couple has, the more profound their gender specialization tends to be." (footnote omitted)).

<sup>185</sup> Deborah M. Kolb, *Negotiating in the Shadows of Organizations: Gender, Negotiation, and Change*, 28 OHIO ST. J. ON DISP. RESOL. 241, 242–43 (2013); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*,

ask, less likely to initiate negotiations, less positively disposed toward negotiation, less confident, and more likely to set lower goals.”<sup>186</sup> The differences in bargaining styles are especially great when ambiguous terms such as “equitable distribution” are involved.<sup>187</sup> Furthermore, women generally 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.<sup>188</sup> For this reason, some women may feel more willing to enter into a marriage that includes a bad bargain than to begin searching again for a partner.<sup>189</sup>

An additional important reason that prenuptials can pose greater harm to the primary caregiver is that 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 . . . .”<sup>190</sup> 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<sup>191</sup> 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 can reasonably expect.

For these reasons, primary caregivers may be better off bargaining divorce settlements than prenuptial agreements. While the consensus among scholars is that primary caregivers are better off bargaining before marriage (compared with during marriage or upon divorce),<sup>192</sup> this is not always the

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84 VA. L. REV. 509, 579–80 (1998) (citing research that suggests that women are not as effective in negotiating as men are).

<sup>186</sup> Kolb, *supra* note 185, at 243 (footnotes omitted).

<sup>187</sup> Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 LAW & INEQ. 109, 111–12 (2008).

<sup>188</sup> Wax, *supra* note 185, at 545–56.

<sup>189</sup> *See id.* at 650–52.

<sup>190</sup> Halley, *supra* note 30, at 49 (emphasis omitted).

<sup>191</sup> *Cf.*, M.M. Slaughter, *Marital Bargaining: Implications for Legal Policy* 29, 40–41, in MAKING LAW FOR FAMILIES (Mavis Maclean ed. 2000) (discussing the effect that endowments have on the marital bargaining and arguing that social and cultural expectations regarding gender roles in marriage pose a limit on women’s bargaining powers in premarital agreements).

<sup>192</sup> 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 166, 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 151, 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* Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 233

case. Taking into consideration the trend toward strict enforcement of premarital agreements, the dependent spouse could, in some cases, be better off negotiating ex-post (at the time of divorce) when the default rules of spousal support are based on need.<sup>193</sup> Because the alimony award is often based on need, in the case of changed circumstances or when the couple was married for a long time,<sup>194</sup> 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 prenuptials 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.<sup>195</sup> Executing a prenuptial has other advantages—like saving transactional costs of future litigation, which can be prohibitively expensive, and reducing the accompanying acrimony<sup>196</sup>—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, 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 dependent spouses to enter into antenuptial agreements that disfavor them, even significantly.<sup>197</sup>

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(2010) (“[I]t is undisputed that women are worse off after divorce than men.” (footnote omitted)); Matthew McKeever & Nicholas H. Wolfinger, *Reexamining the Economic Costs of Marital Disruption for Women*, 82 Soc. Sci. Q. 202, 215 (2001); Scott & Scott, *supra* note 28, at 1317 n.214 (“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.”). In addition, finding out before getting married that the prospective husband is opportunistic can be a warning signal to the future bride; the prospective bride can then choose a different partner while she still has good prospects for getting married. *Cf.* Wax, *supra* note 185, at 651 (arguing that forcing parties to negotiate before marriage makes for more efficient agreements because it may eliminate “the possibility of opportunistic renegotiation or defection” and “expensive, inefficient self protective behavior and underinvestment,” which may lead to women capturing greater bargaining power, predictability, stability, and permanence). 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.

<sup>193</sup> *Cf.* Scott & Scott, *supra* note 28, at 1307 n.191 (“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.”).

<sup>194</sup> See Tait, *supra* note 133, at 1283 (“To begin, the low- or non-earner must often pass a needs test in order to qualify for alimony.”).

<sup>195</sup> *Cf.* Scott, *supra* note 181, at 73–74 (“Also troublesome is that events not anticipated at the time of marriage may result in unfairness if precommitments are enforced.” (footnote omitted)).

<sup>196</sup> Stake, *supra* note 151, 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.”).

<sup>197</sup> See Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171 (2013) (arguing that the duress doctrine fails to recognize power imbalance and

Against this backdrop, we can move now to examine the type of protection that the neoclassical 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 are 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.<sup>198</sup> 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 teaches that you do not solve the problem of bad decisions by giving people information.”<sup>199</sup>

Without mandatory legal advice,<sup>200</sup> 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 nor does it assist with the inability to predict unanticipated contingencies in their lives.<sup>201</sup> Even legal advice does not guarantee that the prospective spouse will bargain wisely. As explained by Jens M. Scherpe, “Even negotiating or renegotiating the terms of the agreement

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showing how such a narrow approach disfavors the weaker party in prenuptial enforcement proceedings).

<sup>198</sup> Cf. Atwood & Bix, *supra* note 104, at 332 (2012) (“[R]equiring that one have a basic understanding of what he or she is waiving seemed appropriate as a matter of fundamental fairness.”).

<sup>199</sup> Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 720 (2011).

<sup>200</sup> 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. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(b) (UNIF. LAW COMM’N 2013). 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. *Id.* § 9(a). In addition, there is a requirement of fair disclosure of assets and liabilities, unless the other party already has knowledge or a reasonable basis for knowledge of the information. *Id.* § 9(d)(3). No doubt these rules help in assuring that partners have more knowledge before signing a prenuptial. The rules will be effective in preventing the somewhat common practice of a partner suggesting a prenuptial agreement just a short time prior to the wedding.

<sup>201</sup> With regard to the contingency problem, Elizabeth Scott suggests that it may be mitigated by using standard forms and by background rules that define the conditions of modification and excuse. Scott, *supra* note 181, at 85–90. 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. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 9(e).



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.”<sup>202</sup> Indeed, as stated by an appellate court in New Zealand, legal advice does “not protect one who ignores or disregards the advice.”<sup>203</sup> Thus, “even the best legal advice cannot be more than a safeguard, but never *the* safeguard.”<sup>204</sup>

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 styles under the present adversarial system, and do not give any weight to the general disadvantage that women face bargaining in the shadow of the marriage market.

Not only do the procedural safeguards fail to offer sufficient protection to the primary caregiver, but they are also 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.<sup>205</sup> However, often when full disclosure is made, “an empty but formally correct disclosure can keep the contract from being unconscionable, however problematic its terms.”<sup>206</sup> 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 neoclassical approach. The law focuses on imposing requirements for formation of contracts that aim to assure the parties’ consent to the agreement. But the neoclassical approach disregards the reality of the marriage market, the inequality of the bargainers, the design of default rules, and unfair results.<sup>207</sup> It also strengthens predictability while diminishing judges’ dis-

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<sup>202</sup> Jens M. Sherpe, *Marital Agreements and Private Autonomy in Comparative Perspective*, in *MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE* 443, 495 (Jens M. Sherpe ed., 2012).

<sup>203</sup> See *Coxhead v. Coxhead* (1993) 2 NZLR 397, 404 (N.Z.).

<sup>204</sup> Sherpe, *supra* note 202, at 495.

<sup>205</sup> Lonegrass, *supra* note 73, at 12.

<sup>206</sup> Ben-Shahar & Schneider, *supra* note 199, at 739.

<sup>207</sup> See 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.” (footnotes omitted)).

cretion and making the excuse of obligation more difficult—all characteristics of neoclassical contract theory.<sup>208</sup>

In conclusion, the neoclassical trend adopted to alleviate bargaining imbalance in the premarital-agreements context reflects 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.”<sup>209</sup> As long as the procedural requirements are met, those mechanisms’ primary purpose is to assure the enforceability of the contract and reduce the power of courts to invalidate unfair bargains.<sup>210</sup> 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,<sup>211</sup> and in legislative work, as evidenced by the work of the UPMAA committee<sup>212</sup>—the two have clear connections. One main correlation is in the way that the rules that govern enforcement of both types of contracts potentially influence 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

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<sup>208</sup> Cf. Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 808 (2000) (“[T]he 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.”); Feinman, *supra* note 17, 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.”).

<sup>209</sup> 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, 624 (1982).

<sup>210</sup> See Lonegrass, *supra* note 73, 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.” (footnote omitted)).

<sup>211</sup> See, e.g., SWISHER, *supra* note 128, at 173, 1003 (dealing with “disputes between unmarried cohabitants” in chapter 2 and discussing marital contracts in chapter 11).

<sup>212</sup> Atwood & Bix, *supra* note 104, 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).

would be better off cohabiting than marrying.<sup>213</sup> If, on the other hand, cohabitation without express contract imposes financial obligations, some people may be better off being married with a prenuptial agreement.<sup>214</sup> 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.<sup>215</sup> State rules range from complete non-enforcement, 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, this section will describe it only briefly, focusing more on the evolution of the law and its consequences.<sup>216</sup>

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.<sup>217</sup> 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.<sup>218</sup> 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.”<sup>219</sup> The *Marvin* court thus made possible an expansive interpretation of contractual obligations between partners, including those that derive from alternative theories of liability based on unjust enrichment.<sup>220</sup>

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<sup>213</sup> See e.g., *Blumenthal v. Brewer*, 24 N.E.3d 168, 179 (Ill. App. Ct. 2014) (arguing that refusing to enforce obligations between unmarried partners may “create[ ] an incentive for some to not marry”).

<sup>214</sup> 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.

<sup>215</sup> Halley, *supra* note 30, at 20.

<sup>216</sup> See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 38–79 (2010) (detailing an excellent and comprehensive analysis of the legal treatment of unmarried partners in the United States).

<sup>217</sup> See *id.* at 48.

<sup>218</sup> *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976).

<sup>219</sup> *Id.* (citations omitted).

<sup>220</sup> Halley, *supra* note 30, at 20.

Today, all states except for three<sup>221</sup> enforce written contractual obligations between unmarried partners.<sup>222</sup> In so doing, many states have adopted a neoclassical 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,<sup>223</sup> 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.<sup>224</sup> Other states, either by legislation or court decisions, require that cohabitation contracts be subject to the terms of the statute of frauds.<sup>225</sup> Still others—for example, New York—enforce only express agreements.<sup>226</sup> Furthermore, as Cynthia Bowman points out, it is probable that “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.”<sup>227</sup> While additional states enforce implied-in-fact promises and recognize equitable theories for liability, the general trend has been toward strengthening procedural requirements for entrance into a binding legal contract, such that they are more restrictive than those in other conventional contracts.<sup>228</sup>

Not only are the formal requirements heightened for creating a legally binding cohabitation contract, the exit from such an agreement can be difficult, too. The very few courts that have discussed express, written contracts

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<sup>221</sup> See *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983). The third state, Illinois, has for a long time been resistant to the enforcement of cohabitation contracts, and that resistance is still good law. See *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979). However, recently an appellate court allowed unmarried partners to bring unjust enrichment claims. *Blumenthal v. Brewer*, 24 N.E.3d 168 (Ill. App. Ct. 2014). In Mississippi, a valid precedent holds that “cohabitation is prohibited as against public policy and that the Legislature has not extended the rights of married persons to cohabitants.” *Cates v. Swain*, No. 2010-CT- 01939-SCT, 2013 WL 1831783, at \*4 (Miss. May 2, 2013). Mississippi thus does not authorize ordering division of property between cohabitants when the claim is “based upon a relationship.” *Id.* However, the Supreme Court of Mississippi recently held that a cohabitant may recover the amounts she contributed toward the purchase and improvement of one joint residence based on a theory of unjust enrichment. *Id.*

<sup>222</sup> See Aloni, *supra* note 1, at 587.

<sup>223</sup> William H. Danne, Jr., Annotation, “Palimony” Actions for Support Following Termination of Nonmarital Relationships, 21 A.L.R. 6th § 10 at 351 (2007).

<sup>224</sup> N.J. STAT. ANN. § 25:1-5 (West Supp. 2015).

<sup>225</sup> See, e.g., MINN. STAT. §§ 513.075–.076 (2014); *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997) (noting that cohabitation contract must be in writing); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992) (“If live-in companions intend to share property, they should express that intention in writing.”).

<sup>226</sup> See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980).

<sup>227</sup> BOWMAN, *supra* note 216, at 51.

<sup>228</sup> Cf. Gregg Strauss, *Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1281 (2015) (“Despite their radical potential, the practical significance of these new cohabitation doctrines should not be overemphasized. Reported cases applying these rules are sparse, the courts have been hesitant to expand the rules, and the courts tend to impose substantial evidentiary burdens for successful claims.”).

between cohabitants have employed firm rules of enforceability and declined to invalidate these contracts based on unfairness.<sup>229</sup> For 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.<sup>230</sup> 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.”<sup>231</sup>

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.<sup>232</sup> This is another basic principle deriving from classical contract 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.”<sup>233</sup> Thus, as a doctrinal matter, the option to contract about financial obligations can preclude the use of quasi-contract theory.<sup>234</sup> 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.<sup>235</sup>

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

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<sup>229</sup> Cf. Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 255 (“If a couple has an express written agreement, enforcement is usually straightforward.”).

<sup>230</sup> *Wilcox v. Trautz*, 693 N.E.2d 141, 147 (Mass. 1998) (“An agreement between two unmarried parties is not governed by the threshold requirements that apply to an antenuptial agreement.” (citation omitted)).

<sup>231</sup> *Id.* (citation omitted).

<sup>232</sup> Cf., e.g., *Slocum v. Hammond*, 346 N.W.2d 485, 494 (Iowa 1984) (declining to grant equitable remedies where no evidence of oral contract between cohabitants existed); *In re Estate of Alexander*, 445 So. 2d 836, 840 (Miss. 1984) (recognizing that deceased spouse wanted his partner to have an interest to his property but declining to grant any equitable remedies in the absence of a will or a contract); *Tarry v. Stewart*, 649 N.E.2d 1 (Ohio Ct. App. 1994) (denying claims for unjust enrichment by cohabitants because the claimant had already benefited from the relationship).

<sup>233</sup> Feinman, *supra* note 72, at 5; see also 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).

<sup>234</sup> See 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.” (footnote omitted)).

<sup>235</sup> See *id.*

centuries, palimony claims must be viewed with great skepticism and must be subjected to harsh and unremitting scrutiny.<sup>236</sup> Indeed, this determination supports the argument herein that cohabitant contracts also tend toward the neoclassical. The prevailing trend is to condition their enforcement on formalities and reduce the availability of alternative theories of liability; 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.<sup>237</sup> Some states have also adopted implicit default rules that domestic services provided during the relationship are presumed gratuitous and do not merit compensation.<sup>238</sup> 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 . . . .”<sup>239</sup>

In two states, however—Washington and Nevada—courts have adopted opposite default rules. In these states, if the couple lived in a “committed intimate relationship”—established by such flexible factors as duration of the relationship and the pooling of resources—they can apply the community-property law by analogy.<sup>240</sup> Thus, if partners do not want to assume an equitable division of property, they need to opt out in order to alter the default rule.<sup>241</sup>

However, those two states are an isolated minority. To see how the defaults operate in other states, consider the following case. In *M v. F*, the partners lived together informally for thirteen years and had a child together.<sup>242</sup> 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 gross revenue of twenty million dollars.<sup>243</sup> 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 woman’s com-

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<sup>236</sup> *Devaney v. L'Esperance*, 949 A.2d 743, 758 (N.J. 2008).

<sup>237</sup> See Scott, *supra* note 229, at 229.

<sup>238</sup> *Id.* at 257.

<sup>239</sup> *Sullivan v. Delisa*, 923 A.2d 760, 769–70 (Conn. App. Ct. 2007) (quoting *Cotter v. Cotter*, 73 A. 903, 903 (1909)).

<sup>240</sup> *Oliver v. Fowler*, 168 P.3d 348, 354 (Wash. 2007); Strauss, *supra* note 228, at n. 112 (“Nevada’s case law begins with implied-in-fact contract theory, *Hay v. Hay*, 678 P.2d 672, 674–75 (Nev. 1984), but recent cases deemphasize the implied exchange in favor of an inquiry into whether the couple ‘impliedly agreed to hold their property as though they were married.’ *W. States Constr.*, 840 P.2d at 1224.”).

<sup>241</sup> Aloni, *supra* note 1, at 590.

<sup>242</sup> *M v. F*, No. 350065/09, 2010 WL 1379034, at \*1 (N.Y. Sup. Ct. Mar. 23, 2010).

<sup>243</sup> *Id.*

plaint, she was raising their mutual daughter and supporting his two children from previous relationships, 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, kept promising her “what’s mine is yours” and made other promises to keep supporting her and sharing their properties.<sup>244</sup> Upon the couple’s breakup, the man refused to give her any rights to his multiple properties, including their residence, and the woman sued for her share based on a theory of constructive trust.<sup>245</sup> 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.”<sup>246</sup>

### 3. *Functional Analysis*

In the context of cohabitation contracts, the neoclassical approach to family contracts is doing the opposite work than it does in premarital contracts: it protects one’s freedom *from* contract.<sup>247</sup> The different approach stems from the fact that marital contracts already warrant obligations between the partners—thus, by executing a prenuptial agreement, parties opt out from the marital contract and protect their freedom to enter into a contract different than the one dictated by the state. Conversely, the rules concerning cohabitation contracts protect parties from obligations to the other party if they have not specifically delimited those obligations (opt-in approach). This goal is achieved by the symbiosis of default rules and rules of formation, which places 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.<sup>248</sup> The doctrine also protects partners from liability that they may purposely choose to avoid by not getting mar-

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<sup>244</sup> *Id.* at \*1–2.

<sup>245</sup> *Id.* at \*2.

<sup>246</sup> *Id.* at \*4 (citation omitted).

<sup>247</sup> See Kennedy, *supra* note 209, at 568–70 (deconstructing the principle of freedom of contracts into rules that permit freedom to bind oneself and rules that support the freedom not to bind oneself without a will).

<sup>248</sup> See BOWMAN, *supra* note 216, at 51; Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW.

<sup>249</sup> 272–73 (2010); Scott, *supra* note 229, at 256–57 (“[T]he ability of third parties (for example, courts) to discern accurately the parties’ expectations on the basis of their conduct in this context is limited.”).

ried.<sup>249</sup> Thus, to protect parties from the ascription of 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 most sophisticated party, whose decision not to get married may be motivated by his desire to protect his wealth.<sup>250</sup> The set of rules concerning obligations among unmarried couples leaves it to the weaker party to protect herself or himself by contracting to create commitment.<sup>251</sup> The problem is, however, that unmarried partners often do not think in contractual terms and do not have sufficient understanding of the rules surrounding legal obligations between unmarried partners.<sup>252</sup> Sometimes, as well, the partners do not know how their relationship will develop and thus fail to protect themselves.<sup>253</sup> Additionally, signing a cohabitation contract can be costly and thus unavailable to the economically weaker party.<sup>254</sup> The weaker party can attempt to use boilerplates that are readily available, but without knowledge of the rules, she may be hesitant to sign one, or to sign what she may fear to be an unfair bargain. Further, some people are unaware of the required formalities<sup>255</sup> or think that common law marriage—despite its significant diminishment—will protect them.<sup>256</sup>

Reliance on contractual principles, and in particular on opt-in requirements to create obligations, threatens to adversely affect the primary caregiver in another way.<sup>257</sup> The system ignores gender realities: women's

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<sup>249</sup> See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation 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 state—after the fact—decides for them."); Lifshitz, *supra* note 5, 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" (footnote omitted)).

<sup>250</sup> Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 30 (2001) ("Failure 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.").

<sup>251</sup> See BOWMAN, *supra* note 216, at 228.

<sup>252</sup> Ellman, *supra* note 31, at 1367, 1369; Lifshitz, *supra* note 5, at 1577–78 ("Typical couples, however, are rarely consciously thinking of the legal aspects of their relationship.") (footnote omitted).

<sup>253</sup> BOWMAN, *supra* note 216, at 52.

<sup>254</sup> Cf. Eskridge, *supra* note 1, at 1976–77 ("[F]ew Americans have the foresight or the resources to contract for all the possibilities that can arise in family relationships . . .").

<sup>255</sup> See Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 135 (1976); Eskridge, *supra* note 1, at 1979.

<sup>256</sup> BOWMAN, *supra* note 216, at 231–32.

<sup>257</sup> Cf. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1107 (1985) ("[C]ourts can justify the failure to enforce cohabitation arrangements as mere nonintervention, overlooking the fact that the superior position in which



reluctance to bargain, their less attractive options in the employment market, and their bigger loss from leaving the relationship.<sup>258</sup> It does not address the still-common situation in which female cohabitants devote time to caregiving, contribute to household expenses, and so forth.<sup>259</sup> Indeed, “the cohabitants’ unequal bargaining power leads to unjust results under contract theory.”<sup>260</sup>

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.<sup>261</sup> 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.”<sup>262</sup>

Setting the default rules this way also ratifies possible informational asymmetry between the more sophisticated party and the less informed one.<sup>263</sup> Ian Ayres and Robert Gertner argue that in the context of informed and less informed parties, the efficient way to design default rules is 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.<sup>264</sup> If, however, the default rules are favorable to the informed party, 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.<sup>265</sup> In the case of cohabitation, the informed partner does not have a legal incentive to reveal any information

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nonaction tends to leave the male partner is at least in part a product of the legal system.” (footnote omitted)).

<sup>258</sup> 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 . . . .” (footnote omitted)).

<sup>259</sup> See BOWMAN, *supra* note 216, at 227.

<sup>260</sup> Blumberg, *supra* note 258, at 1163.

<sup>261</sup> Scott, *supra* note 229, at 260.

<sup>262</sup> *Id.*

<sup>263</sup> Cf. Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331, 345 (Robin Fretwell Wilson ed., 2006) (discussing unequal information or expectation between unmarried partners).

<sup>264</sup> Ayres & Gertner, *supra* note 127, at 91.

<sup>265</sup> *Id.* at 96–100.

about his intentions regarding financial obligations. He can use the ignorance of the weaker party (in terms of not knowing about the penalty) to avoid obligations.<sup>266</sup> If the rule were the opposite, the informed party would be encouraged either to stay with the default (and thus be committed to undertaking 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.<sup>267</sup> 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 any 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, "Contracting 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."<sup>268</sup> In particular, in the case of cohabitation contracts, defaults reflect the assumption that carework 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 contribution.<sup>269</sup> Thus, the default rules also confer a bargaining disadvantage on the homemaker.<sup>270</sup>

Based on the function of the rules, it is safe to conclude that contractual obligations between unmarried partners also adopt a neoclassical approach. Construed with rigid rules of formation, diminishing the 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 neoclassical 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 better to reflect the values of freedom of contract and predictability of enforcement over fairness and distributive justice.

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<sup>266</sup> See *id.* at 99.

<sup>267</sup> Scott, *supra* note 263, at 345.

<sup>268</sup> Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 675 (1998).

<sup>269</sup> Scott, *supra* note 229, at 257; see also Wax, *supra* note 185, at 583.

<sup>270</sup> A modest change in the default rules could create 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 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. See Scott, *supra* note 263, at 258–65. The main idea is simply that a humble change in contractual rules can affect the reality of cohabitants without imposing over-inclusive obligations.

### III. CHALLENGING THE MYTHOLOGY OF FAMILY LAW PLURALISM

Finding that principles furthered by premarital and cohabitation agreements strongly favor contractual autonomy over other values—and thus do not reflect the principles of value pluralism—still does not determine whether 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. That is, even if laws governing prenuptial and cohabitation agreements reflect neoclassical principles, other regulatory regimes on the menu (such as marriage without prenuptials) embody other types of values—making the system as a whole pluralistic. In this way, arguably, the system itself, with its various options, reflects a more diverse set of values. In this Part, 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 effective choice and incorporating a balance of values.

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 better fits them.<sup>271</sup> Put differently, we also need to learn how the different institutions interact with one another such that they channel the parties' choice.<sup>272</sup>

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.<sup>273</sup> Thus, my methodology is to examine the functions that the system serves in the regulation of relationships.

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. For each regulatory regime, the table identifies how the default rules and the rules that determine 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 neoclassical jurisdictions, and

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<sup>271</sup> See Eskridge, *supra* note 1, at 1977.

<sup>272</sup> Cf. Aloni, *supra* note 1, at 606 (arguing that proponents of a menu of options failed to explore the way that the different institutions on the menu affect couples' choice in selecting the right framework).

<sup>273</sup> See Cass R. Sunstein, *Incommensurability and Kinds of Valuation: Some Applications in Law*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 234, 238 (Ruth Chang ed., 1997).

not of many states that still maintain a more balanced approach or those that take a strong pro-enforcement stance.<sup>274</sup>

TABLE 1

	Default Rules	Rules of Formation and Enforcement
<b>Informal cohabitation</b>	<ul style="list-style-type: none"> <li>• No automatic financial obligations between the partners (opt-in requirement)</li> <li>• Entrenches possible informational asymmetry</li> <li>• Protects freedom from contracts</li> <li>• Helps the stronger partner to avoid obligations</li> </ul>	<ul style="list-style-type: none"> <li>• Writing requirement or express contract</li> <li>• Could result in reducing availability of other theories of liability (unjust enrichment)</li> <li>• Protects freedom from contracts</li> <li>• Favors party with knowledge of the law and the means to execute contract</li> </ul>
<b>Cohabitation with written or express contract</b>	<ul style="list-style-type: none"> <li>• Bargaining in the shadow of default rules directing that no obligations at all can serve as a limit to achievement and entrenching devaluation of housework and care work</li> </ul>	<ul style="list-style-type: none"> <li>• Strict enforcement, even if unfair</li> <li>• Likely to exclude the option of other theories (such as unjust enrichment)</li> </ul>
<b>Marriage</b>	<ul style="list-style-type: none"> <li>• Default rules that generally disadvantage the primary caregiver (short-term alimony, no division of enhanced income from professional degree)</li> </ul>	<ul style="list-style-type: none"> <li>• Public policy doctrine warrants that bargains about nonmonetary terms during the marriage will likely not be enforced<sup>275</sup> thus disadvantaging the primary caregiver</li> </ul>
<b>Marriage with prenuptial</b>	<ul style="list-style-type: none"> <li>• Bargaining in the shadow of defaults that disfavor the primary caregiver can result in limited success for the bargain</li> </ul>	<ul style="list-style-type: none"> <li>• A trend toward strict enforcement, without second-look provisions</li> <li>• Emphasis on procedure and informed decisionmaking over substantive review</li> </ul>

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 obli-

<sup>274</sup> For a discussion of states that made it easier to contest an alimony waiver, see Oldham, *supra* note 81, at 86–87.

<sup>275</sup> Courts have traditionally refused to enforce agreements concerning obligations of the spouses in an ongoing marriage, invoking the public policy doctrine. See Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 225 (2011) (“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 . . . .” (footnote omitted)); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 192 (2013).

gations 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 in 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.<sup>276</sup> Facilitation of diverse legal options that embed diverse modes of valuations is not tantamount to embodiment of free-market principles. 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.”<sup>277</sup>

The current family law system fails to facilitate a functional structure that infuses various and balance of values. Instead, the structure is grounded predominantly in notions of negative autonomy: allowing the parties (rather than the state) to determine the content of their obligations.<sup>278</sup> 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.<sup>279</sup> Indeed, choice and autonomy are not the same.<sup>280</sup> Table 1 demonstrates that the system is mainly devoted to the preservation of choice, but focusing on choice grants autonomy disproportionately to the economically stronger partner. The type of autonomy that is most emphasized in the structure 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 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. 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

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<sup>276</sup> See William A. Galston, *Value Pluralism and Liberal Political Theory*, 93 AM. POL. SCI. REV. 769, 777 (1999).

<sup>277</sup> Dagan, *supra* note 22, at 1429.

<sup>278</sup> MICHAEL J. TREBILOCK, *THE LIMITS OF FREEDOM OF CONTRACTS* 9 (1993) (discussing theories that “emphasize a more expansive conception of individual liberty that has both negative and positive dimensions”).

<sup>279</sup> See *id.* at 243.

<sup>280</sup> Singer, *supra* note 26, at 1538–39.

party with insufficient spousal support at the end of the relationship. Finally, in both circumstances, express contracts will likely provide only minimal benefits to the weaker party since the parties need only meet procedural requirements and because the weaker party bargains in the shadow of a less favorable endowment.

While the menu also embodies the notion of gender equality, this is imbalanced and eroding. Commitment to gender equality is supposedly 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<sup>281</sup>—thus, arguably, the menu supports gender equality by encouraging the formation of family structures that transform entrenched notions of rigid gender roles and parenthood. However, the unenforceability of contracts that use non-monetary consideration such as housework devalues the worth of such carework and allows less freedom in structuring the relationships in the way that partners want.<sup>282</sup> 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, the differing effect of the marriage market on men and women, and devaluation of housework have the potential to affect women disproportionately.

To be sure, the existing system represents an attempt to balance between competing values. For example, as mentioned before, the trend governing enforcement of prenuptials aims to balance freedom of contract, predictability, and fairness.<sup>283</sup> 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 often be reasonable to conclude that choices made under such circumstances are not autonomous.”<sup>284</sup> Indeed, a system that is focused more on rules and procedures, declares contracts legally binding once a procedural checklist is satisfied, and disproportionately relies on autonomy, is closer to a monist system and does not reflect the principles of value pluralism.<sup>285</sup> Such 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.<sup>286</sup>

<sup>281</sup> Matsumura, *supra* note 275, at 191.

<sup>282</sup> See 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.” (footnote omitted)).

<sup>283</sup> See, e.g., Atwood & Bix, *supra* note 104, at 315.

<sup>284</sup> TREBILOCK, *supra* note 278, at 243.

<sup>285</sup> See Dagan, *supra* note 22, at 1410.

<sup>286</sup> Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1046–48 (2010).

Conversely, a pluralistic 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.”<sup>287</sup>

One explanation for the limited success in providing effective choices and protections for the vulnerable party is the adoption of the neoclassicist approach, which favors form over substance and rules over standards. Such an approach is antipluralistic because neoclassicism prefers freedom of contract and autonomy while pluralism is committed to plurality of values, including fairness and substantive equality. 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.”<sup>288</sup> In other words, the parties are free to make their choices—as long as they signal that these choices were made voluntarily. Formalities, thus, from their 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 is respected.

In conclusion, it is unlikely that a menu of options that is built primarily on ex-ante bargaining between the partners will be able to advance a meaningful pluralism—because it will continue to entrench the unequal bargaining positions of the parties. 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 Part examines this question.

#### IV. TOWARD A TRULY PLURALISTIC VISION

Can pluralistic theory—one that is not a fig leaf for neoclassicism—serve as a normative foundation for family law? Put differently, is it only the adoption of neoclassicism that fails pluralistic theory, or is pluralistic theory problematic in and of itself? I propose that pluralistic theory, as so far developed, while showing 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 poses a risk: the adoption of freemarket policies under the rhetoric of pluralism—a problem that is exacerbated by the theory’s commitment to autonomy as a prominent value.

Dagan’s version of pluralism—and value pluralism generally—may be too elastic to serve as a productive guideline for the construction of family law. An essential characteristic of value pluralism is 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

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<sup>287</sup> *Id.* at 1048.

<sup>288</sup> Kennedy, *supra* note 14, at 1691.

satisfy or maximize, nor can the variety of ultimate values be compared to one another along a single scale or metric.”<sup>289</sup> This character of pluralism presents a question about its suitability to guide family law. If a plurality of good values—at times, conflicting values—exists, and can generate multiple and contradictory answers to a particular question—how can pluralistic theory help in determining which values should compose the menu of options?<sup>290</sup> Just as one example: if autonomy is a good value, then the system should hold people to their promises or respect their choice not to enter into a contract—even if the result is less favorable to one party. But if fairness is important, too, then it means that some promises should not be enforced or that some obligations should be ascribed—perhaps even in the face of a specific intention to avoid such obligations. The example is quite simplistic, and yet raises the question: what is more important—autonomy or fairness? And how can pluralistic theory guide policymakers in solving this dilemma? The question thus is how much of fairness or equality versus autonomy should the menu of options embed?

Hence, the problem with using pluralistic principles to guide family law is that the theory (or theories) still does not provide any satisfying tools to weigh 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 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.”<sup>291</sup> Thus, “[i]t does not tell lawmakers which rationally

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<sup>289</sup> David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 BUFF. L. REV. 529, 531 (2014) (footnote omitted). 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*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, 196, 203 (Ruth Chang ed., 1997).

<sup>290</sup> 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.” (footnote omitted)). Thus, some argue incommensurability 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. 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.”); Sunstein, *supra* note 273, at 13–34 (surveying seven types of leading incomparability arguments and asserting that none is compelling). 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.

<sup>291</sup> Henry S. Mather, *Law-Making and Incommensurability*, 47 MCGILL L.J. 345, 378 (2002).



permissible resolution they should prefer.”<sup>292</sup> Because pluralistic theory is amenable to so many compositions, it does not provide sufficient guidance for construction and evaluation of family law.

Value pluralism *does* help 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.”<sup>293</sup> 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 significance.<sup>294</sup> In addition, while pluralistic principles do not offer one answer to a policy dilemma, in a world in which goods are incommensurable and often in conflict, pluralism can help to infuse family law doctrine by fleshing out the alternatives (instead of looking at one alternative, we might look at a few alternatives where different possibilities are acceptable in a liberal democracy). For instance, when deciding whether recognition of non-marital unions is desirable, pluralistic theory can guide the policymaker toward creating a range of options that will allow diverse types of family structures to tailor the obligations with some room to innovate but still promise financial security.<sup>295</sup>

However, beyond these contributions, pluralistic theory does not add much to an ongoing debate about private ordering and the choice of regulatory framework in family law.<sup>296</sup> In particular, the main and most fiercely debated question that has occupied family law in the past decade has been which types of families will get the recognition and protection of the law and what type of regulation will be appropriate.<sup>297</sup> 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 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

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<sup>292</sup> *Id.* at 388.

<sup>293</sup> Lifshitz, *supra* note 5, at 1569 (emphasis omitted) (footnote omitted).

<sup>294</sup> See, e.g., NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW: 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.”).

<sup>295</sup> See, e.g., Aloni, *supra* note 1, at 613–19 (proposing a flexible registration scheme that fits diverse types of families).

<sup>296</sup> 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 31, 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 216, at 201–06 (describing the Netherlands’ approach as “a cafeteria approach to cohabitants’ rights”).

<sup>297</sup> See, e.g., Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293 (2015) (evaluating which types of non-married families will be likely to secure recognition by the state).

theory offers relatively insignificant guidance for these last questions.<sup>298</sup> Eskridge is right in noting that his pluralistic analysis “do[es] *not* tell us which values family law ought to serve, [or] how to prioritize competing values.”<sup>299</sup> Indeed, debates about the content of the menu of options “are enduring issues for public discourse, and their resolution will depend on the force of social practice and evolution of public norms.”<sup>300</sup>

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 neoclassical approach—or a thin notion of autonomy—while creating a false facade of pluralism. This is a genuine risk because pluralistic theory is immensely 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.”<sup>301</sup>

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.<sup>302</sup> But the basic presumption of validity of contracts makes it especially amenable to the adoption of principles that vindicate freedom of contract over other values. Under this view, the adoption of the neoclassical approach and the focus on contractual instruments as the principle manifestation of family law pluralism (while the trend is toward diminishing registration schemes) are not merely a coincidence. They are a manifestation of the autonomy-based approach that underlines pluralistic theory.

Relatedly, the other risk presented by pluralistic principles is that, while normatively it is committed to accommodating diverse values, in reality, the pluralistic system is especially prone to the entrenchment of existing values and balances, rather than to innovation. As the case of family law pluralism demonstrates, contract doctrine mostly operates to favor the status quo—

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<sup>298</sup> Merely saying that a pluralistic approach is not 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 provide too little protection and favor the wealthier party.

<sup>299</sup> Eskridge, *supra* note 1, at 1947.

<sup>300</sup> *Id.*

<sup>301</sup> Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 849 (1994).

<sup>302</sup> *Id.* (“[E]ven a system that generally respects freedom of contract may block exchanges on several grounds. Typically such grounds involve some form of market failure . . .”).

hardly a step toward value pluralism. As stated by Jedediah Purdy, “being constituted by well-established social practices, [Dagan’s pluralistic theory] tend[s] toward familiar values and balances of value, not radical innovations.”<sup>303</sup> 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 existing system is composed of familiar contractual principles and committed to the privatization of dependency. (And, in any event, most of these registrations were marriagemimic, showing again how pluralism tends to be less imaginative and more inclined toward entrenching the status quo). If pluralistic theory had followed the normative orders that are spelled out by Dagan, the registration schemes should have survived the legalization of same-sex marriage and modified in a way that enables accommodation of diverse forms of kinships.

Is a pluralistic theory that provides adequate choice and still maintains a robust substantive equality and autonomy possible? Such family law is likely to encounter the barriers, discussed above, stemming from the principles and rhetoric of pluralism. Yet, to move in this direction, family law ought to adopt a pluralistic version that is bounded by core values of substantive autonomy and equality. A vision of what such autonomy looks like is advanced by Maxine Eichner, who 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. 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.<sup>304</sup>

A pluralistic vision that follows Eichner’s vision must balance between fostering individuality, on the one hand, and commitment and interdependency, on the other. Such a menu of options cannot rely solely on principles of private rulemaking and on commitments to form over substance. Rather, such a pluralistic regime requires the introduction of opt-out mechanisms,

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<sup>303</sup> Jedediah Purdy, Commentary, *Some Pluralism About Pluralism: A Comment on Hanoch Dagan’s “Pluralism and Perfectionism in Private Law,”* 113 COLUM. L. REV. SIDEBAR 9, 18 (2013).

<sup>304</sup> Maxine Eichner, *Beyond Private Ordering: Families and the Supportive State*, 23 J. AM. ACAD. MATRIM. L. 305, 342 (2010).

change in default rules, different registration schemes (more creative than simply marriage-by-a-different-name), and rules that prevent opportunistic behavior and substantive reviews of contracts.

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 the guidance of the field. Moreover, the plasticity of the theory risks its adoption of laissez-faire policies under the guise of autonomy and diversity.

#### CONCLUSION

Pluralistic theory is “hot” in legal academia, and family law—which has already started its progression toward offering multiple options—can generally serve as a laboratory to examine the potential and the pitfalls of pluralistic theory. The family law laboratory exposes that pluralism is a false hope and quite oversold. One emerging cautionary tale is that structural pluralism tends to revolve around principles of 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),<sup>305</sup> the emerging U.S. pluralistic structure relies mainly on contractual elements. Not only is this pluralism manifested by the expansion of options for private rulemaking, but also the values underpinning this system are primarily those of the free market. The manifestations of pluralism under the guise of familiar and traditional concepts raise the concern that, in practice, pluralistic structure tends to be non-innovative.

In political science referencing the United States, pluralistic theory—concisely, the idea that political power is distributed among interest groups—has been the dominant theory for years.<sup>306</sup> The critique of the theory—primarily that it fails to account for economic inequality in the U.S. and ignores the way businesses exert influence on the political agenda—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 for political theory.<sup>307</sup> Scholars have thus developed a new and relatively accepted theory titled “neopluralism.”<sup>308</sup> Neopluralism “is a more pessimistic perspective” than classical pluralism in terms of belief in the power of di-

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<sup>305</sup> The French Pacte Civil de Solidarité is an institution that is semi-contractual semiregistration. For a description of the French PACS, see Aloni, *supra* note 1, at 632–38.

<sup>306</sup> See John F. Manley, *Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II*, 77 AM. POL. SCI. REV. 368, 369–71 (1983).

<sup>307</sup> *Id.* at 382.

<sup>308</sup> See, e.g., Alexander Hicks & Frank J. Lechner, *Neopluralism and Neofunctionalism in Political Sociology*, in THE HANDBOOK OF POLITICAL SOCIOLOGY: STATES, CIVIL SOCIETIES, AND GLOBALIZATION 54 (T. Janoski et al. eds., 2005).

verse groups to influence the political agenda, and provides a normative framework that recognizes power differences between groups in society.<sup>309</sup>

Current scholarly accounts in family law have not followed the lead of political scientists and addressed the connection between distributive justice and pluralism. This Article shows that, without a particular commitment to core values that would limit choice, pluralism will likely revolve around freedom of contract and autonomy. Commitment to distributive justice requires an embodiment of substantive notions of liberty and equality. 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 a 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 a commitment to individual autonomy, cannot serve as the basis for policymaking in family law.

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<sup>309</sup> ROB BAGGOTT, *PRESSURE GROUPS TODAY* 37–40 (1995).