

Chapter 4: Family Law 401: “Gift” Exchanges in Plan A Families

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[NOTE: This is a chapter from my book-in-progress *Love & Contracts*, which combines memoir and family law chapters. The memoir is about having a baby with my friend Victor then meeting and marrying a sharp, idealistic woman named Karen before our child starts kindergarten. The family law chapters show the role of contracts and mini-contracts I call “deals” in my family and also in others through reproductive technology, marriage, cohabitation, and open adoption. This chapter addresses Plan A families, by which I mean married. Like the other chapters, its substance and style are aimed at readers in other disciplines and outside the academy.]

Like lots of families, Victor and I are a mix of Plan A and Plan B. We’re a man and woman having a baby—Plan A for most people, and therefore common—but also gay friends instead of sweeties, which is less common and very Plan B. Blended families like my sister Anne’s represent another version of Plan A/B. She’s married to Alan, and they have a son, Henry, all very Plan A. On the B side, Anne was a single mom raising Kit when they met, and Alan had a daughter, Hannah, from his first marriage, adding in a not-as-common role of step-parents. Family law often seems to treat Plan A as a status, as if its frequency equated with a fixed law of Nature or God. In contrast, it treats Plan B—like step-parents or friends-having-a-baby—as more contractual, recognizing rights and duties only if the people involved explicitly sign onto them.¹ But a closer look shows that family law also treats Plan A families as deeply contractual. You just have to look under the hood to see the exchanges because they’re so deeply embedded in the machinery that makes families run.

Most obviously, marriage itself is a contract, generally begun with voluntary, reciprocal promises of support, care, and fidelity.² So is divorce, usually, because the vast majority of couples make legally enforceable agreements to end their marriage, split property, determine custody and set child support instead of having a judge make all those decisions.³ But exchanges also shape the years of family life between these bookends. When they’re legally binding they’re contracts; otherwise, they’re merely deals. Seven stories show the long, sometimes shocking history of Plan A family exchanges, how the line between contract and deal moves over time, and examples of today’s real-life contracts and deals.

The First Family

Martha, a wealthy 27-year-old widow with two kids, married George Washington in 1759 on her plantation, aptly named White House. Each got and gave something valuable. Martha got a father for her kids—who’d later become the father of our country—and George got enough money, land and slaves from her to triple the size of his Mt. Vernon Plantation.

Day-to-day during their long marriage, they cut other deals. She managed their immense holdings so he could leave the plantation to fight the American Revolution. Though Martha initially boycotted George's inauguration, she came around to supporting his political career by, among other things, acting as hostess at affairs of state. Over 200 years later, today's first couple Michelle and Barack Obama forged their own deals, including Michelle extracting promises from Barack and his campaign staff that he'd spend time with their daughters in exchange for her active engagement in his first presidential bid.⁴

Something New

The surface similarities between the Washington and Obama marriages belie the huge changes in marriage contracts over the last two centuries. Martha Washington's story shows how race and sex shaped marriage, and Michelle personifies the huge upgrades African-Americans and women have achieved to rise above their eighteenth-century status as property and/or subordinates. Martha Washington's story shows how race and sex shaped marriage. An ancient common law rule called "coverture" transferred Martha Washington's property, including both land and 285 enslaved children, men, and women, to George under the rationale that marriage "covered" Martha's legal identity with his. Apparently, one of those slaves, Ann Dandridge, was Martha's half-sister.⁵ Unlike Martha, Ann couldn't marry because family law didn't let slaves marry. Legally recognizing slaves' kinship would honor their humanity, which would undermine slave-law's treatment of them as mere things. Michelle Obama is free, unlike her enslaved ancestors, not only to contract a marriage, but also, unlike married women in the past, to enter contracts with landlords and banks. This economic citizenship mirrors her political citizenship, which she exercised by voting for her husband.⁶

Barack, too, illustrates expansions in who could marry. When he was born in 1961, over a third of the states still treated the marriage of his African father to the very white Ann Dunham as a crime instead of a covenant.⁷ The U.S. Supreme Court didn't make interracial marriage legally ordinary until 1967, when Richard and Mildred Loving successfully petitioned to overturn miscegenation laws.⁸ Today's version of that battle is same-sex marriage. States like Massachusetts and Iowa now allow same-sex couples to marry, while others ban it, and the federal government hovers on the edge of recognition.⁹ On the 40th anniversary of *Loving v. Virginia*, Mildred Loving emerged from her quiet life focused on family and church to speak for same-sex marriage: "I am still not a political person, but I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what *Loving*, and loving, are all about."¹⁰

Broken Engagements

The landmark *Loving* case upgraded interracial unions from mere deals to legally binding marriage contracts, but sometimes law moves in the opposite direction, demoting family contracts to mere deals. Engagements used to be legally binding. The exchange, "I'll marry you if you sleep with me" and its breach were so common that breach of promise to marry cases clogged nineteenth century court dockets.¹¹ Often, the plaintiff was pregnant and unmarried, which sharply limited her chances of ever marrying. An 1879 court ordered Enoch Chapman

pay \$6,000—which would be around \$140,000 in 2011 dollars—for injuring Alice Hattin by, in the judge’s words, using his promise of marriage to “ruin” her, “destroying her character and blighting all her prospects in life.”¹² By the 1930s, many states, alarmed by the number of breach of promise cases and sizeable judgments, passed so-called “heart balm” legislation that left jilted fiancées to bear their own losses, so that today, engagement is more of a deal than a contract. However, women can still sue for breach of promise to marry in some states, with limitations like Maryland’s requirement that they’re pregnant and have corroborating evidence.¹³ Even where heart balm legislation bars recovery for non-economic damages like humiliation, jilted fiancées can sue to get back engagement rings and gifts given in anticipation of the marriage.¹⁴

To Have & to Hold

Although engagement today is less contractual than it used to be, marriage retains many elements of a legally binding exchange. The marriage vows “to have and to hold” sound romantic, but they reference property rights, as in both owning (“having”) and possessing (“holding”) real estate. Marriage has long had financial implications like Social Security benefits and family law’s general rule that spouses share property upon divorce or death. When Richard Loving was killed by a drunk driver in 1975, the legal recognition of their marriage meant that Mildred could collect his Social Security benefits, inherit from him, and make decisions about burial.¹⁵

If they’d divorced, a court would have divided their property, and possibly awarded alimony. When there’s way more money at stake, and celebrity, these property settlements make the news. When Michael “greed is good” Douglas divorced his wife of 22 years, Diandra, she got \$45 million, and Ivana Trump is said to have left her marriage with the Donald with over \$20 million. Contractual reasoning undergirds this property sharing. One spouse contributes to the family welfare mostly through earnings and the other mostly through shopping, cooking, cleaning, homework help, and other tasks that sustain family life. Consequently, the reasoning goes, the homemaker owns a share of the property bought with the breadwinner’s paycheck because it’s the fruit of this exchange of financial support for caregiving.¹⁶

Wedding Alterations

Deciding whether to divorce also has become more contractual since the 1970s. Spouses could dissolve a marriage, just as partners dissolve a business partnership, once family law allowed people to part ways for “irreconcilable differences” instead of having to show “fault” like adultery or cruelty. No-fault divorce made legal marriage more of a contract—created and ended by people—and less of a fixed status ordained by God or Nature. It also paved the way for letting spouses contract around the general rule of property-sharing by entering a prenuptial agreement (nicknamed “prenup”) to tailor financial arrangements. Sometimes, that move toward contract is pitched as a boon for women. When Catherine Simone, an unemployed nurse, got divorced from her neurosurgeon husband Frederick in 1990, the Pennsylvania Supreme Court enforced their prenup, explaining that “women are no longer regarded as the ‘weaker’ party in marriage, or in society generally,” so that family law no longer

presumes “that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements.”¹⁷

Sometimes the people enter prenups the second time around. Michael Douglas’ second marriage, to Catherine Zeta-Jones—who has her own Academy and Tony Awards—apparently included a prenup providing that if they divorce she’ll get \$3.2 million for every year they’re married, plus a \$5 million “bonus” if he’s caught cheating. Similarly, when rap master and entrepreneur Jay-Z married singer Beyoncé in 2008—joining his \$300 million and her \$100 million—he’s reported to have agreed to pay her \$10 million if their marriage failed within two years, \$1 million for every year they stay together, and \$5 million for each child they have. Some prenups have a “sunset clause,” which contracts out of property sharing, then back into it if the marriage lasts, say, 10 years. GE CEO Jack Welch’s prenup with his second wife had a 10-year sunset clause, which meant that she got around \$180 million when Jack left her, after 14 years, for the woman who became his third wife.¹⁸

Like any business arrangement, couples can modify their contract when circumstances change. Golf god Tiger Woods and his wife Elin are said to have upped the \$20 million they initially agreed she’d get in an effort to patch things up after his infidelities became tabloid fare. When they did divorce, Elin got \$110 million, around a sixth of his net worth.¹⁹

Ordinary mortals also exercise their freedom to contractually alter property-sharing family law rules. When school teacher Betty Johnson got pregnant by her on-again-off-again boyfriend James Dawley, he reluctantly agreed to marry her if they entered a prenup that limited her rights to his earnings as an engineer and included his promise to support her and her daughter for at least 14 months. When they divorced seven years later, the California Supreme Court enforced their prenup, even though it seemed to encourage divorce, explaining, “ [s]pouses who enter into an antenuptial agreement cannot forecast the future; they must, as a realistic matter, take into account both the possibility of lifelong marriage and the possibility of dissolution.”²⁰ A good number of middle-aged newlyweds agree. When 40-something lawyer Lisa Padilla married 50-something businesswoman Allison Klein, they signed a prenup to protect the retirement funds each had built up during successful careers,²¹ just as the wealthy 46-year-old widow Gloria Perkinson entered a prenup with retired pipefitter Franklin to give him \$150,000 if they divorced (shielding \$4.8 million in stock from her late husband’s bottling company).²²

Sex, Drugs & Religion

Most prenups concern money, but couples also make written, formal agreements about big things like fidelity, drug use, and religion²³ as well as discrete issues like arbitration,²⁴ taking turns supporting each other through graduate school,²⁵ sharing the value of a spouse’s medical degree,²⁶ agreeing who gets frozen embryos stored at a fertility clinic,²⁷ and determining who pays attorney’s fees in child support or custody proceedings.²⁸ Family law treats some of these agreements as contracts and some as mere deals. When it comes to religion some agreements are just deals – like raising kids Jewish or Lutheran²⁹ -- while others are legally binding

contracts, like a Jewish Ketubah that promises to obtain a religiously-recognized divorce known as a “get” from a Jewish tribunal,³⁰ or a Muslim “mahr” that promises to pay the wife a set amount – say \$10,000 – if the marriage ends.³¹ Some kinds of agreements are always a mere deal, including any attempt to limit child support.³²

The odd thing is that family law applies a double-standard to agreements about the traditional exchange of financial support for homemaking, which I call the “pair bond exchange.” A richer spouse can contract to keep money to himself but a spouse who contributes more through caregiving can’t hold a provider to his promise to support her. Equally inexplicable is that family law treats agreements about money as more worthy of respect than agreements about fidelity or drug use. When a couple on the verge of divorce reconciles by putting their promises not to sleep around or use cocaine into writing, family law treats these agreements as mere deals. That’s wrong, this chapter argues. Just as family law honors property-hoarding prenups, it should honor exchanges that value caregiving, fidelity, and staying on the wagon.

Real Deals

Mere deals may not fly in court, but they can carry tremendous emotional and social weight in the wide world beyond the reach of law. A friend told me that her deal with her husband is that neither one gets fat, because, she explained, “he’s already hairy; can you imagine if he was fat *and* hairy?!” Chances are that guy might get less action with extra-large love-handles. Family law won’t enforce their agreement, any more than it will enforce an agreement to have sex twice a week. Indeed, family law won’t even enforce the basic wedding vow of financial support in an ongoing marriage, as Lydia McGuire discovered to her chagrin.

In 1953 Charles McGuire, a rich Nebraska farmer, refused his wife Lydia’s requests for indoor plumbing, a working furnace, and a car with heat. The court told her that she could get these basic necessities only if she divorced him, but as long as they were married their living conditions were entirely up to Charles.³³ That rule still holds true.³⁴

Other exchanges that make families run smoothly, despite everyone’s understanding that they’ll never be legally binding, include:

- A couple’s wedding vow to support each other’s careers;
- One cooks in exchange for the other cleaning up;
- One mows the lawn in exchange for the other vacuuming;
- An elderly widower tells his adult daughter: “If you move home and take care of me, you can have the house;”
- A Chinese-American mom agrees with her Jewish husband that they’ll raise the kids Jewish in exchange for having them learn to speak Mandarin;
- A wife looks the other way about a husband’s affairs in exchange for reliable social and financial support;

- A middle-aged son who quit his job to help his mom with at-home kidney dialysis exchanges his kidney so she could have a transplant, partly, he says, because “giving a kidney is a small price to pay for getting my life back;”
- Parents pay for college if their kid attends the state university; and
- A child swaps a week of daily piano practice for the DVD of *Harry Potter and the Deadly Hollows: Part II*.³⁵

These reciprocal promises between parents and children, spouses, and other family members pile up to help shape each family. Alongside love, legally binding contracts and other things like shared commitments, help make a family an “us.”

This chapter shows that family law treats a good number of Plan A family exchanges as binding, though it falls short by treating valuable things like caregiving and fidelity as one-sided gifts and thus outside contractual protection. But before we explore these legal rules governing Plan A, it’s worth saying a few words about who we’re talking about when we talk about Plan A families and exploring the stories that economists and evolutionary biologists tell to explain why most people opt for Plan A as well as the origins of family exchange s that play a key role in family life today.

“GIFT” EXCHANGES IN PLAN A FAMILIES

Conventional wisdom instructs that love is a gift, the very opposite of a bargained-for exchange. But it also says that you have to be a good friend to have a good friend, and that marriage is a two-way street. Anthropologists capture both truths with the phrase “gift exchange,” which evokes both altruism and expectation of a return gift down the road. We start with gift exchange in Plan A because it’s the most common family exchange, and perhaps the template for all others.

Defining Plan A

Common as they are, we still idealize Plan A families: married, straight, raising kids they conceived at home. I call this Plan A because nine out of ten Americans still get married at some point. Rises in divorce haven’t changed this fact, partly because so many divorced people remarry. The emotional and political intensity of the marriage equality movement stems from gay folks wanting desperately to marry, and anti-gay folks wanting to keep them from being “real” families.³⁶ Moreover, as we saw in Chapter 2 on reproductive technologies, 99% of American kids are conceived through sex instead of in a doctor’s office. But of course the minority -- 1% or 10% -- covers a lot of people who pick Plan B when law, luck, biology or something else gets in the way of Plan A.

Logically, family law sets its general—or default—rules to fit most people. Therefore marriage is the usual way to become an “us” that law recognizes. Yet family law also recognizes exceptions to the general rule, as we saw in repro tech. In Chapter 6 we’ll chart how family law treats plan B partnership, aka cohabitation. Right now, we’ll uncover exchanges embedded in Plan A families.

Just a decade ago, I'd have put gay folks in Chapter 6 because we were excluded from the most common family form—marriage—and could only legalize our relationships through contracts like living-together agreements or powers of attorney.³⁷ Today we're no longer criminals, thanks to a 2003 U.S. Supreme Court case proclaiming that Texas couldn't "demean" gay people by "making their private sexual conduct a crime." Just a few months after that decision Massachusetts recognized same-sex marriage, and other states followed suit, so that by 2012 over 130,000 gay couples are married in the U.S. Nevertheless gay folks remain on the borderland of Plan A and Plan B as long as more than half of the states and federal law ban same-sex marriage.³⁸

Experts predict that the ban on same-sex marriage will fall soon as both law and society continue to figure out that love comes in a variety of packages.³⁹ Once we acknowledge that Plan A families are not more natural than Plan B, we need a new organizing principle for family law. Instead of heterosexuality being natural, I've come to believe that connection is natural for most people. Exchanges provide a mechanism for people to forge and sustain family connections, and thus a principle upon which an updated family law could rely.

A Natural Link between Love & Contracts

Before we get to family law, it's important to stop and consider the forces that structure families. Economists and evolutionary scientists both offer insights about why exchange plays such an important role in family life.

No Such Thing as a Free Lunch

Economists and evolutionary biologists use different tools and ask different questions, but both would tell you that reciprocal exchanges have long shaped the human family. Because a number of scholars have published books using economic analysis to understand families,⁴⁰ we'll touch briefly on economics but focus most closely on less-well-known strands of evolutionary biology that chart the roots of family exchanges.

Few of us experience the back-and-forth of family life as a quid-pro-quo exchange, yet a close look shows that they're hidden in plain sight. Consider again the current First Family. Barack Obama tells a story of Michelle's exasperation as his political star rose, pulling him way from family activities, well before his memoir made them financially secure: "You're gone all the time *and* we're broke?," she asked him, "How's that a good deal?"⁴¹ Those expectations are common. Your husband's probably in the dog house if you throw him a birthday bash, and he never even gets you a card. He may get a pass during an unusually hectic time, as Barack probably got to speak to the Democratic National Convention, as long as he shows up in other ways. Even as President, Barack shows up for regular date nights with Michelle, and just about all of us reasonably expect some back and forth making dinner, paying for groceries, cleaning up, paying the rent, doing the laundry, mowing the lawn, and making the bed.

In economic lingo, the slacker spouse is a free-rider—like a commuter jumping the turnstile—for taking your time, money, and attention without "paying" by reciprocating.⁴² But

the dismal science, unsurprisingly, generally ignores how free-riding relates to love. Viviana Zelizer, an economic sociologist at Princeton, labels this myopia “nothing but” thinking. One famous “nothing but” approach is Nobel laureate economist Gary Becker’s view of marriage as nothing but “a written, oral, or customary long-term contract between a man and a woman to produce children, food and other commodities in a common household.”⁴³ According to Zelizer, this reduction of family life to “nothing but” a market exchange distorts social life. Indeed, Becker’s economic approach to families has so little room for love that he’s been known to bracket the word in scare quotes (“love”).⁴⁴

Sometimes “gift” needs scare quotes. Sperm “donors,” we saw in Chapter 2, get paid. In this chapter we’ll see that family law simultaneously sees spouses’ homemaking labor as a gift and yet generally treats it as entitling a homemaker to a share of family wealth. Marcel Mauss, gazing out from the anthropology wing of the ivory tower, identified emotion and community in the seeming “gifts” we exchange. According to Mauss and Zelizer, a gift usually comes with an obligation to reciprocate, and that back-and-forth creates a social and even spiritual bond. The slacker husband, in this view, dishonors himself by failing to reciprocate all your “gifts.” You’re better off finding someone better at holding his end of what Mauss calls “gift exchanges.”⁴⁵

Expectations of reciprocity also hold sway outside the family. Tithing 10% of your income is part of many religious communities, and some people say it helps pave the way to eternal life. Carpoolers take turns behind the wheel. Colleagues swap information to get ahead at work. It’s hard to imagine any kind of genuine, lasting, relationship that doesn’t include both giving and getting. Not really a tit-for-tat with precise accounting, but instead something more along the lines of a tit-for-two-or-three-tats.

The Evolution of Love & Contracts

Evolutionary biologists take a different route to the same conclusion.⁴⁶ They think in terms of humans’ long history and natural selection instead of rational negotiation, and also see a natural link between families and exchange. Without exchange, they contend, there would be no families, and indeed, no human beings.

The story evolutionary biologists tell starts more than a million years ago, long before courts, lawyers, governments, or even language, when they say that our proto-human ancestors started entering two kinds of exchanges that changed everything. These primal exchanges, they contend, provided the building blocks for both family and social organization and also shed light on the exchanges that shape today’s families.

Allergies to Sociobiology

Maybe you’re one of the many thinking people who find socio-biological explanations little more than just-so stories.⁴⁷ If so, you’re probably itching to throw this book under a bus. Please don’t. You don’t have to buy socio-biological arguments to agree with my central claim here that that family law can and should honor both sides of a pair bond exchange between

husbands and wives. If you like, skip the next few pages. But if you soldier on with an open mind you'll learn that "feminist sociobiologist" is not an oxymoron.

It Takes Two: Pair Bonding between Men and Women

Scholars of evolution assert that long ago and far away, our apelike ancestors began what anthropologist Helen Fisher calls "the most fundamental exchange the human race would ever make."⁴⁸ Our hairy fore-mothers, she explains, spent much of their days collecting roots and other vegetables, while their male counterparts ranged over wider territory hunting for a rabbit or mongoose. But while their ancestors had mated freely, these proto-humans gradually formed a pair bond exchange. A female would focus her sexual and grooming attention on a male, and share her foraged vegetables with him, while he, in turn, would share his proceeds from the hunt. Sociobiologists believe that whether these relationships lasted a few months, a year, or a lifetime, they were reciprocal. The female expected a share of meat brought back from hunting, and the male expected a share of "her" vegetables, leaving only surplus for outsiders. Gradually, Fisher contends, males also began to protect females from dangers like other animals, and, over thousands of years, males also began to help feed and protect the young. That exchange slowly transformed those children from "hers" into "theirs."

E.O. Wilson, known as the father of sociobiology, contends that these male-female pair bonds helped greatly in caring for completely helpless human babies and raising kids through the ten-plus years it takes humans to become self-sufficient. Pooling their resources was absolutely essential to get expensive-to-rear children to reproductive age so they could start the cycle again.⁴⁹ Wilson explains:

Mothers carry fetuses for nine months and afterward are encumbered by infants and small children who require milk at frequent intervals through the day. It is to the advantage of each woman of the hunter-gatherer band to secure the allegiance of men who will contribute meat and hides while sharing the labor of child-rearing. It is to *the reciprocal advantage* of each man to obtain exclusive sexual rights to women and to monopolize their economic productivity. If the evidence from hunter-gatherer life has been correctly interpreted, the *exchange* has resulted in near universality of the pair bond and the prevalence of extended families with men and their wives forming the nucleus.⁵⁰

In this view pair bonding helped females have four times more children than other primates, giving natural selection four times as many people from whom to select the genes of the smartest, fastest, strongest, and most cooperative to strengthen future generations. This exchange, according to mainline sociobiology, is echoed in today's social rituals, such as flirting, courting, love songs, and engagement rings.⁵¹

According to Wilson, pair bonding also brought us society itself. Over millennia, he asserts, our distant ancestors extended these reciprocal exchange networks, first between families then eventually—unlike other species—even among strangers.⁵² This last stage defines human society for Wilson:

Reciprocation among distantly related or unrelated individuals is the key to human society. The perfection of the social contract has broken the ancient

vertebrate constraints imposed by rigid kin selection. Through the convention of reciprocation, combined with a flexible, endlessly productive language and a genius for verbal classification, human beings fashion long-remembered agreements upon which cultures and civilizations can be built.⁵³

In short, research by both economists and anthropologists backs up this book's central claim that exchange is programmed deep into the DNA of family relationships.

It gets even better. Evolutionary science has matured since Wilson and other first-generation sociobiologists published research that a good number of feminists took to be overly focused on sex. Eminent scholars like Deborah Rhode and Anne Fausto-Sterling have objected to that approach because it seemed to justify rape, male infidelity, and domestic violence on the grounds that men were just heeding the call of nature.⁵⁴ In my very first academic publication, I was one of many feminists who crossed swords with legal giant Richard Posner over his book *Sex and Reason*, critiquing his reliance on sociobiology. To me, it seemed illogical that he said that sex between men was “contrary to nature’s plan,” and also that it was nature’s way of managing competition among men for women.⁵⁵ How could gay sex be both natural and unnatural? Maybe the problem wasn’t so much gay sex as the label “natural.” Best I could tell, the labels “natural,” and “unnatural” were just shorthand for “I like it” and “yuck,” hardly sufficient rationales for a legal rule. But Operation-Have-A-Baby with Victor changed my view of “nature,” which opened up my mind to evolutionary biology.

Over the years covered in the memoir chapters of this book, my view of sociobiology took a 175 degree turn. Instead of arguing against nature—as I did in a series of articles—I now see nature-based arguments can support the idea that family comes in both Plan A and Plan B configurations.

Victor and I began to indulge in armchair sociobiology as we slogged through infertility and marveled at the oddness of pregnancy. In that year of 100 inseminations, during one of our many phone conversations about trying this trick or that test to get pregnant, I asked him, “Have you noticed that I’m more determined than you to try every single thing to have a baby?”

“Yes,” he agreed, “but that seems pretty standard fare for the women I know. They seem much more driven to have kids than their husbands or would-be husbands.” He dressed up his observation in an old-school sociobiological argument based on Richard Dawkins’ book *The Selfish Gene*⁵⁶ that everyone’s driven to spread their genes around, but women have to sweat it more because our limited number of eggs and long gestation lower the number of kids we can have, pressing us to hop to it. Men, in contrast, he said, can have hundreds of children, up until their 80s. In our back-and-forth banter I asked how his story squared with adoption, telling him about a church friend’s long quest to adopt a girl from China, which did nothing for the adoptive mom’s genetic immortality.

“Maybe,” I suggested, “people also have a ‘lonely gene’ that drives us to connect. Maybe the *NY Times* announces weddings—but not births—because it’s news that the brides and grooms have achieved the great goal of getting someone to connect to them for life.”

I went on to dress up my argument with a list of things our cave-dwelling ancestors had to have help with before modern life made things so easy: foraging food, hauling water, keeping warm, and evading predators.

“Without grocery stores, running water and lots of company, you’re toast,” I concluded, pleased at having built this argument from little more than an intuition that homemaking labor somehow fit into this conversation.

“What’s the point of spreading your genes around,” I asked, “if the baby never makes it out of infancy?”

Let me be clear: I’m not saying that “nature” is the whole game. In that conversation with Victor, and now in this book, I cast my lot with decades of scholarly research showing that both nature and nurture make us who we are. The more interesting questions zoom in on proportion. Some things are “natural,” by which I mean largely unchanging biological drives like survival and protecting your kin, while others reflect “nurture,” a complex interplay of environment, politics, culture, and economics. If women were “naturally” breeders and nothing else, we’d never have gotten the vote, and if men were mindlessly driven to impregnate every woman they could, people wouldn’t practice birth control. A woman like Seattle lawyer Carla DewBerry would not be richer than her longshoreman-in-training husband, nor would family law have recognized a prenup that let her keep the property she bought with her higher earnings when they divorced.⁵⁷ Even Richard Dawkins, the man who popularized the idea of the selfish gene, concedes that evolutionary forces work different with people than other animals because our big brains let us imagine the future, evaluate the past, and think and write about the forever-fuzzy line between nature and culture.⁵⁸

All I’m saying is that it’s natural to speak of love and contracts in the same breath. For those of us who see a difference between women and doormats, it helps that you can even add feminist sociobiology to the mix.

It Takes a Village: Allomothering Exchanges among Mothers & Others

Second-generation sociobiologists have published books backing up my amateur assertions about the importance of connection (though no one, as far as I know, has isolated a “lonely gene”). University of California anthropologist Sarah Blaffer Hrdy is the most influential, having written to reach both scholars and lay readers. She argues that old-guard researchers’ focus on sex simply overlooked the hours, days, weeks, months, and years of work it takes to shepherd babies from infancy to young adulthood.⁵⁹ According to Hrdy, a mother with her mate could not have foraged the 13 million calories children consume before they’re self-sufficient, since he was so often out on the range. Moreover, according to Hrdy, the world that Wilson and Dawkins saw as chock-full of kill-or-be-killed contests for survival would be too contentious and too little concerned with the feed and care of children for our fragile new species to have taken off. Men who are continually busy battling each other for access to fertile women and cheating to propagate their genes more widely, she contends, have little time or energy left over for food sanitation, meal preparation, and child care.⁶⁰ Simply put, Wilson and other first-generation sociobiologists failed to notice what we now call childcare and homemaking, apparently because they were so focused on explaining aggressive activities

like war, sports and hunting. A second primal exchange, Hrdy insists, brought the species we know as human into existence.

The vast cast of characters in the memoir chapters of this book supports Hrdy's contention that it takes a village to raise a child. Indeed, her exhaustive research of ancient cultures and contemporary hunter-gatherer societies gave me a label for the Auntie Brigade that helped me so much in Salt Lake City, a shorthand for the exchange that I hoped would help me make it as a single mother. Hrdy's term for these mothers' helpers, "allomothers"—meaning "other mothers"—highlights the centrality of mothering.⁶¹ Moms and allomothers, she says, exchanged childcare, protection, food gathering and feeding to ensure that children get the immense amount of food, protection, and instruction they need to grow up. According to Hrdy, "[a]t some point in our distant past, care and provisioning from alloparents began to permit human mothers to breed at a faster pace than any ape ever before . . . Without help from others, such children could not survive."⁶²

Hrdy explains that proto-humans needed alloparents because we're different from other high apes. Most ape mothers hold their babies continually for a full year until they're weaned, not even allowing the father to hold the baby. Consequently they can't have another baby until the first grows up. Our ancient foremothers couldn't hold each child for the decade it takes children to mature, so they had to get help and develop skills in reading others' thoughts and feelings to be sure the helpers were trustworthy. Babies, she says, also evolved to charm those caretakers with babbling and smiling. Humans are just about the only apes who babble as babies, and later, as adults, we're the only ones who exhibit such a high level of empathy, trust and reciprocity.⁶³

Over more than a million years, Hrdy contends, these skills became part of the human repertoire. The children of moms who cultivated care networks were more likely to survive to adulthood, and, having inherited their moms' genes and learned behavioral tricks for figuring out who was trustworthy, passed these onto the next generation. The babies also passed on the ability to charm caretakers. Reading Hrdy made me see things in a new light. Now, when I coo back and forth with a baby, I have a feeling that we're both acting out an ancient script that made—and makes—us human as we happily echo each other's smiles and chatter.

Fathers do help out. But consistent with Victor's and my armchair anthropology, Hrdy's research shows that fathers' childcare contributions are too highly variable for the pair bond alone to have spurred human evolution. Moreover, some alloparent tasks can only be done by females, like the once-common practice of nursing moms breastfeeding each other's children.

More generally, however, men as well as women participate in what anthropologist Marcel Mauss called "gift exchanges." Hrdy explains that outside the family circle a cycle of seeming gifts often look, over time, more like exchange:

The people you treat generously this year, with the loan of a tool or gift of food, are the same people you depend on next year when your waterholes dry up or game in your home range disappears . . . Failures to reciprocate would result in loss of allies or, worse still, social exclusion.

In this view, people go to great lengths to avoid social exclusion. If Plan A to connect doesn't work out, they find a Plan B method of creating connection. Conveniently, contracts and deals, can be tailored to match the needs of the people involved. All of these swaps, alongside the occasional pure gifts and the pair bond exchange, facilitated our evolution into people. But alloparenting exchanges were especially important. "Without alloparents," Hrdy says bluntly, "there never would have been a human species."⁶⁴

It's worth repeating that neither Hrdy nor I argue that biology destines men to hunt and women to mind the hearth. She and I couldn't have conducted our research as university professors had we been chained to the kitchen table, and she thanks her husband for his emotional and practical support.⁶⁵ A hand-holding study demonstrates the value of other husbands' care-giving. University of Virginia psychologist James Coan administered a mild shock to married women that caused low-level pain to measure whether social support can reduce stress. Some of the women were alone, others held a stranger's hand, and the rest held their husbands' hands. The women holding hands showed lower neural activity in the part of the brain that regulates stress. But husbands' hand holding had the biggest effect, acting on the brain like a pain-reducing drug.⁶⁶

My point is to provide empirical support for this chapter's argument that (1) couples often swap homemaking labor for financial support; and (2) family law should recognize that it's a fair exchange because homemaking by mothers and all kinds of care-givers makes extraordinary contributions to everyone's happiness, health and welfare.⁶⁷ But you probably knew all that without reading about economic and anthropological data if you happen to be the one in your household who makes sure the kids get to school on time, rested and well fed with completed homework in their backpacks, as well as tending other tasks that help make families healthy, wealthy and wise.

Pair-Bonding in 21st Century America

Women continue to do much of this work. Today's American fathers, though they do more diaper changing than their fathers did, still do only about 30% of the work it takes to maintain a household and care for kids, leaving women holding the grocery bags about 70% of the time. Apparently lots of people like it that way. A 1997 study reported that 83% of American women in dual-earner couples, and an even higher percentage of the childrearing women, thought that a man should be the family's primary provider. All that care—for children and whole families—means that many women scale back on wage labor. One study showed that over their prime earning years American women earn 38% of men's wages, and mothers, on average, earn 67 cents for every dollar earned by fathers.⁶⁸ True, women represent 50% of the American workforce, and some make more than their male partners.⁶⁹ But on average women still work fewer hours for lower wages, so that one recent study reported that they only bring home 28%, on average, of the family income.⁷⁰ Though it may seem unfair at first glance, this updated version of the ancient pair bond exchange continues to be a good deal for many men and women.

Generally speaking, marriage improves health, happiness, and economic stability more than just about anything else. Husbands and children especially seem to benefit. Men who

marry and stay married have an almost 90% chance of living past 65, while women's life expectancy is not affected by marriage. As UCLA psychologist Shelley Taylor explains:

Married men typically get many perks that single men and married women do not usually enjoy. For example, depending on the marriage, husbands may be fed, clothed, and picked up after, at least more so than is true for single men or for women. Someone else very often shops, cooks, cleans the house, does the laundry, and may even buy their clothes and do their errands.⁷¹

Married men also, Taylor explains, eat more nutritious meals, and are less likely to smoke, drink heavily, or abuse illegal drugs than single men.⁷² Children with married parents similarly enjoy more financial stability, do better in school, and when they grow up are more likely to have good jobs and get married themselves.⁷³ The pair bond deal, in short, works well in many Plan A families, partly, I think, because everyone involved both gives and gets something.

To summarize: scholars in economics, anthropology, and psychology have documented links between love and contracts. If they're right, families can't be undermined by talking about family-based exchanges because families are already filled with exchanges. Here we'll focus on how the pair bond exchange informs the rules governing marriage, and in Chapter 8 we'll touch on how adoption rules increasingly acknowledge some aspects of allomothering.⁷⁴

Lawyers and judges may assume that homemakers give and give with nary a thought about getting anything in return, but the rules they apply also presuppose a pair bond exchange underlying most marriages. Most marriages fall under the general rule of property-sharing, so homemaking gets silently valued. But in prenup cases family the masking of homemaking as a gift translates to law failing to recognize the value of that side of the pair bond exchange.

III. LAW AS IT IS: FAMILY LAW RECOGNIZES PAIR BONDING EXCHANGE

Family law has long treated marriage as both a status and contract. When Martha Custis married George Washington, she contracted into the status of "covered" woman, losing her right to own property or enter a contract in exchange for George's promise to support her.⁷⁵ Today the marriage contract is very different. Instead of treating wives as incompetent, it gives them the same rights to own property as their husbands. Moreover, it generally requires husband and wife to share the property they acquire during the marriage. Even so, we'll see that modern family law preserves a remnant of coverture.⁷⁶

Coverture is imported to modern family law through a legal fiction that homemaking labor is a pure gift, done without expecting any return. While family law scholars have revealed various ways that the homemaking-as-gift fiction causes harm,⁷⁷ we zoom in here on three prenup cases and a reconciliation agreement with a fidelity clause. As a whole these four cases tell us that family law both assumes spouses enter a pair bond exchange and gives them the freedom to modify those off-the-rack terms of the marriage contract.

In the classroom I'd use the board to diagram this general rule of property-sharing, the prenup exception, and the way that both legal rules mask the value of homemaking:

General Rule: spouses split property on divorce because family law presumes that both wage-earning and homemaking contribute to families⁷⁸

Mask: gift rhetoric often covers up both sides of the exchange of financial support for homemaking

Exception: spouses can enter prenups that limit property sharing and alimony

Mask: gift rhetoric covers up the provider's free-ride of taking valuable homemaking labor without giving anything in return.

Some scholars argue family law should correct these problems by returning to the pre-1970s rule that treats marital contracts as mere deals.⁷⁹ But I think that the long history of family exchanges argues for spouses holding onto their contractual freedom. Instead, courts could recognize that property-hoarding prenups fundamentally alter a couple's pair bond exchange.

When a richer spouse contracts out of his obligation to share property, courts could and should recognize that the prenup transformed the relationship to a one-way exchange which, in legalese, is called an "illusory promise." In contract law illusory promises are mere deals because they're not reciprocal.⁸⁰ Therefore, in prenup cases courts could give up the legal fiction that all those trips to the grocery store and hours folding laundry were pure gifts, with no expectation of any return, because the provider didn't hold up his half of the "gift" exchange. Otherwise homemakers are like menial servants, toiling day and night without remuneration other than room and board. Finally, contractual freedom can support families in areas beyond homemaking. As we'll see in case #4 below, separated spouses have used formal written agreements to reconcile after an affair. Family law could and should support these agreements.

family law need only take off the mask covering up the cost of selective enforcement of marital contracts. It has too long mistaken exchanges for selfless gifts, falling into a trap that the Princeton sociologist Viviana Zelizer calls "hostile worlds" thinking.⁸¹ According to Zelizer, seeing love and exchange as hostile worlds—whose overlap corrupts both—distorts the reality of family life as badly as "nothing but" thinking that views love relationships as nothing but a rational economic transaction. Just as hostile worlds approaches bleach out exchange elements of marriage like the pair bond exchange, nothing but views bleach out love from family life.

Yet courts have traditionally taken a hostile worlds approach when examining family exchanges. Back in 1889 the Iowa Supreme Court treated Nancy Miller's homemaking labor as a pure gift when it refused to enforce her husband Robert's formal, written promise to pay her \$200 a year to "keep her home and family in a comfortable and reasonably good condition" in exchange for him providing "the necessary expenses of the family."⁸² The Millers were trying to patch things up after Robert ran around with other women. Alongside the finances, they agreed that "past subjects and causes of dispute, disagreement and complaint" would be "absolutely ignored and buried."⁸³ But rather than enforce the Miller's carefully worded reconciliation agreement, the court demoted it to a mere deal because, it reasoned, Nancy did

only what “the law already required her to do.”⁸⁴ As we’ll see shortly in Case #3, *Borelli v. Brusseau*,⁸⁵ this seemingly old-fashioned view remains good law today.

One thing has changed. Nineteenth-century courts treated any attempt to contract out of property sharing as merely a deal because, they reasoned, the government set the terms of the marriage contract, not the spouses themselves.⁸⁶ Our first case, the divorce of an ordinary couple, Mike and Eunice Flechas, illustrates spouses’ ability to contract around that rule, as well as the partnership idea behind the general rule of property-sharing that governs most marriages. Case #2—involving baseball legend Barry Bonds—is a more typical prenup case in which the court ignored the value of homemaking labor. Case #3 tells a vivid story of how family law refused to value Hildegarde Borelli’s ‘round-the-clock care for her rich, disabled husband, even though Michael contracted out of his duties under the pair bond exchange, essentially letting richer spouses free-ride on their poorer spouses’ time, money, and effort. Finally, Case #4 shows how contracts can support emotional aspects of marriage by giving reconciling spouses a way to rebuild trust after an affair.

Linking love and contracts may sound cold, but in truth it’s the current masking that devalues love. By the end of this chapter, and the book, I hope to convince you that contracts and deals can be a solution to family law problems instead of problems themselves.

Case #1: Marriage as Partnership: *Flechas v. Flechas*

The divorce case of businessman Miguel (“Mike”) and Eunice Flechas shows a typical pair-bond exchange and how the general rule of family law recognizes homemaking as a valuable part of that exchange.⁸⁷ Mike and Eunice married in 1991, when they were both 54. Like many mid-life newlyweds, they wanted to protect some property for their children from prior marriages. Eunice had around \$500,000 from selling her house in Georgia to move to Mississippi as well as an inheritance from her mother, about 1/12th of Mike’s net worth of \$6.4 million. Consequently they made an oral agreed to keep the property they brought into the marriage separate. But they didn’t say anything about Mike’s income, which ranged from \$217,000 to \$379,000 in the six years they were married. The divorce court had to decide whether to divide the \$1.6 million that Mike made while Eunice refurbished their home, kept house, cooked meals and took care of his younger son. The question was how to value what she did as well as all she’d given up to marry Mike: quitting her job as a teacher; selling her house; moving into Mike’s house, and not getting re-licensed to teach in Mississippi because they agreed she’d manage their household full-time.⁸⁸

The Mississippi Court of Appeals decided in Eunice’s favor. As a matter of contract law, it applied their prenup only to the property they brought into the marriage, and applied the general rule requiring property-sharing to Mike’s income earned during their marriage. The prenup’s silence about whether it covered Mike’s sizeable earnings meant that these were governed by the general rule. The court could have stopped there, and just awarded Eunice the \$300,000 she sought. But it expanded the case’s significance by explaining the rationale behind the property-sharing rule. Marriage, the court said, is an equal partnership:

marriage is considered a partnership with both spouses contributing to the marital estate in the manner in which they have chosen. Eunice . . . made indirect economic contribution to the marriage through quitting her job in Georgia, ending her career, selling her home to move to Pascagoula to become Mike’s wife, acting as custodian of the marital home and surrogate mother to Mike’s younger son, and contributing to the stability and harmony of the marital relationship while sacrificing her own career during her best earning years.

Consistent with the ancient exchange of swapping homemaking for financial support, the court insisted that both sides of the pair bond exchange contribute to family wealth:

although contributions of domestic services are not made directly to a retirement fund, they are nonetheless valid material contributions which indirectly contribute to any number of marital assets, thereby making such assets jointly acquired.⁸⁹

Since Eunice was, the court said, “chief cook and bottlewasher,” she was entitled to much more than the \$36,000 awarded by the trial court. If the lower court’s disregard for the value of Eunice’s sacrifices and contributions to the family had stood, Eunice would have gotten only around \$6,000 a year—plus room and board—in return for her years of labor and sacrifices for the marriage. A live-in maid would do better.

Other scholars have also argued that courts should follow the lead of *Flechas* by honoring the contributions—different and equally valuable—that both partners make to family life.⁹⁰ Unfortunately, most courts retain the fiction that the care-giving side of pair-bonding is a mere gift even when the provider opts out of his property-sharing obligations. The next case shows how most prenup cases simply ignore the homemaking half of the pair bond exchange.

Case #2: Barry Bonds Hits a Home Run for Prenups: *In re Marriage of Bonds*

Baseball superstar Barry Bonds took full advantage of family law’s willingness to enforce prenups.⁹¹ Bonds’ money and fame made the case unusual—the trial judge recused himself after word got out that he’d requested Barry’s autograph⁹²—but the part that matters for our discussion is the way it illustrates the exception to property sharing. Though most couples share property acquired during the marriage, some couples “contract out” of the pair bond exchange by signing an agreement saying that the one making the money gets to keep that money (and houses, cars, furniture, etc. bought with it).

Historically, as we’ve seen, couples could not contractually adjust the terms of their marriage. Back in the 1700s, even Martha Washington lacked “contractual capacity,” legalese for being able to make a legally binding contract. But today courts treat women as competent adults who can order their own affairs.⁹³ Of course, as courts began to enforce prenups like other contracts, they also applied rules that protect vulnerable parties in all contracts, like requiring genuine consent (absent when, for example, under extreme pressure to sign right away), and allowing for changed circumstances.⁹⁴

In 2000, Barry Bonds’ personal circumstances had changed sufficiently that he wanted out of his six-year marriage to Susann (known as Sun). He had a \$43 million six-year contract to play for the San Francisco Giants, but when Barry and Sun met in Montreal in 1987, he was not

yet a superstar. Both were twenty-three, and Barry was playing for the Pittsburgh Pirates. Neither one could have known that he would play for twenty-two years, set a record for most Major League Baseball home runs (762) and be named MVP seven times. She was newly emigrated from Sweden, working in a sports bar and harboring ambitions of doing makeup for the stars. Within months, they were living together, engaged, and planning to fly to Las Vegas for a small wedding. The day before the wedding, en route to the airport, Barry took Sun to his attorney's office.⁹⁵ There they signed an agreement that would change their pair bond exchange to one-sided agreement. It read

[w]e agree that all the earnings and accumulations resulting from the other's personal services, skill, efforts and work, together with all property acquired with funds and income derived therefrom, shall be the separate property of that spouse.

In plain English, as Barry testified at trial, this meant "what's mine is mine, what's yours is yours."⁹⁶ At the time, Sun had no property or income, and Barry took care of all her expenses. Her job was being the baseball player's wife, providing emotional and social support to him and later their two children as well. Without asking whether Sun performed her side of the pair bond exchange, the California Supreme Court let Barry evade his half.

The court focused on voluntariness, ruling that Sun signed the agreement of her free will. Unlike the lower court, the Supreme Court refused to see Sun as a timid victim bullied into signing the prenup, instead describing her as an "intrepid" woman who emigrated from her homeland at a young age, found employment and friends in a new country using two languages other than her native tongue, and in two years moved to yet another country, expressing the desire to take up a career and declaring to Barry that she "didn't want his money."⁹⁷

The focus on voluntariness overshadowed another important consideration. The court didn't mention domestic details like how much time Sun spent grocery shopping, preparing meals, and caring for their children and the household. Given the Bonds' income, they may have hired a lot of help, and Sun's job may have been to supervise the staff, spend time at the gym looking good, and to accompany Barry on the road. But with two kids and Barry's training, travel, and game schedule, it seems likely that she spent many hours each week on homemaking and child care. We'll never know, because family law on prenups deems all that time, and perhaps the work itself, as essentially irrelevant.

Many people thought Sun should have won. After the case came down, the California legislature passed a law to protect spouses in Sun's situation. It required the person signing to have at least a week to review the prenup and either have a lawyer or waive the right to counsel in a separate agreement.⁹⁸

But extra time, and counsel's advice, does not address the core issue of valuing the homemaking side of pair bond exchanges. In the next case Hildegard Borelli discovered how little the courts valued caregiving when she found at the end of the game that she'd married someone who took everything and gave basically nothing in return.⁹⁹

Case #3: Caring about Care Work: *Borelli v. Brusseau*

Seventy-something-year-old San Francisco businessman Michael Borelli married Hildegard in 1980, when she was 39. The day before their wedding, they signed a premarital agreement that reserved most of his property—worth around \$1.5 million—for his daughter from a prior marriage.¹⁰⁰ Unlike Sun Bonds, Hildegard didn't challenge the prenup's validity. Instead, she sought to enforce an oral agreement they made later to modify it.¹⁰¹ That oral agreement brought their arrangement back toward the pair bond exchange and California's general rule that spouses share property. Yet the California courts refused to allow Hildegard to enforce that modification.

Within a few years of getting married, Michael suffered heart problems and a stroke. By 1988, his doctors recommended that he live in a rest home because he needed constant nursing care. Understandably, he preferred to live at home, even though he and Hildegard would have to modify their house. Maybe he realized that his reduced marital obligations under their prenup would justify Hildegard in feeling less obliged under the caretaking half of the pair bond exchange. In any case, Michael offered to alter the prenup by changing his will to give Hildegard some of his property—around \$500,000, including money for her daughter's education—if she'd disregard the doctors' advice and provide the nursing care herself at their home.

Hildegard performed her part of their agreement, personally providing 'round-the-clock nursing care for Michael until his death a year later. But Michael didn't ever change his will. She sued and lost because family law clung to the fiction that caretaking was a pure gift even when Michael didn't keep up his end of the gift exchange.

To apply this double standard, the court had to ignore that Michael himself had slipped out of his half of the pair bond exchange. Instead of noticing Michael's property-hoarding prenup, it chastised Hildegard for trying to do what Michael actually did-- tailor the terms of the marriage contract – declaring that Hildegard couldn't adjust those terms because “a wife is obligated by the marriage contract to provide nursing type care to an ill husband.”¹⁰² Echoing the century-old views of marriage we saw in the *Miller* case,¹⁰³ the court in *Borelli* said that a husband's agreement to compensate a wife undermines the public policy of wives caring for husbands. Hildegard, as the spouse whose contributions came in the form of care, feeding, and cleaning, had no right to contractually adjust her side of the deal. The court waxed sentimental to justify depriving her of that contractual freedom:

the marital duty of support [under California law] includes caring for a spouse who is ill [It] means more than the physical care someone could be hired to provide. Such support also encompasses sympathy[,] comfort[,] love, companionship and affection. Thus, the duty of support can no more be “delegated” to a third party than the statutory duties of fidelity and mutual respect.

The court's contempt for Hildegard's conduct as “unseemly” and “sickbed bargaining” is unfair, given Michael's earlier bargaining to get out of his support obligations. By concluding that “even if few things are left that cannot command a price, marital support remains one of them,”¹⁰⁴ the court simply ignored that it allowed Michael, as a financial provider, to contract

out of his marital support obligations. This double standard undermines the very foundation of families and family law.

Under *Borelli*, family law sees agreements to value homemaking as contrary to public policy and therefore demotes them to mere deals. But it should be contrary to public policy to let Michael Borelli contract out of his provider obligations while holding Hildegard to her caregiving end of the pair bond exchange.¹⁰⁵

Our fourth and final case also involves a court refusing to enforce a marital contract because the court said the agreement violated public policy. The Diosdados used a formal written agreement to reconcile after an affair, yet the courts decided the case in a way that creates a perverse incentive for cheaters to make empty promises, just as Borelli encourages providers like Michael to make empty promises.

Case #4: Reconciliation Agreements: Investing in Fidelity: *Diosdado v. Diosdado*

Donna and Manuel Diosdado provide our final example of how contracts can help people honor and protect family connections. After Manuel had an affair in 1993, they separated. However, they managed to re-connect, and used a signed writing to formalize Manuel's promise never to cheat again if Donna would take him back. That agreement, they hoped, was an alternative to divorce. Manuel's attorney wrote its "Obligation of Fidelity" clause, which provided that they intended to be in an exclusive relationship premised on emotional and sexual fidelity and mutual trust. It also precisely defined breach as "any act of kissing on the mouth or touching in any sexual manner" anyone outside the relationship and set out the consequences of breach: the cheater would immediately move out of the house and also have to pay the other spouse \$50,000 off the top of any property settlement if they divorced.¹⁰⁶ They signed it, moved back in together, and things were fine for five more years. But unfortunately Manuel had another affair, and his breach landed them in divorce court.

Equally unfortunate, in my mind, is the court's demotion of Donna and Manuel's formal written reconciliation agreement to a mere deal. It reasoned that because spouses could get divorced without showing "fault" like adultery, courts couldn't enforce a reconciliation agreement including a fidelity term. Holding Manuel to his formal, written promise, the court said, would undermine the no-fault provisions of California's divorce laws by re-introducing the emotional angst that no-fault divorce meant to banish from the courtroom.

But the court misread the agreement. Donna and Manuel's agreement didn't reinstate fault-based divorce. It didn't say that they could only divorce for adultery or other kinds of fault. All it did was try to preserve their marriage by creating a clear and immediate consequence—moving out and giving up \$50,000 in property—to help Manuel keep his promise. It clearly defined that promise by specifying what counted as infidelity. Donna even had an eye-witness to prove he breached. California's refusal to honor to what amounted to a formal restatement of Donna and Manuel's marriage vows doesn't protect marriage. Instead, it encourages the cheaters of the world to continue making this kind of empty promise and punishes the faithful spouses who rely on them.

Indeed, the court in *Diosdado* explicitly said that California law values Barry Bond's right to keep his property to himself more than Manuel's promise of fidelity. Quoting from the *Bonds* case, the court explained that it had the power to displace Donna and Manuel's

judgment of what could save their marriage with what it called the law’s “social policy with respect to marriage.” “[m]arriage itself is a highly regulated institution of undisputed social value, and there are many limitations on the ability of persons to contract with respect to it.”¹⁰⁷ By enforcing Barry’s property-hoarding prenup but refusing to enforce Manuel’s promise to keep faithful, the California courts announced that they value property-hoarding more than fidelity.

Another California couple, Monica Mehren and Christopher Dargan, similarly found that Christopher’s written promise to give up some property if he relapsed into cocaine use was merely a deal.¹⁰⁸ Christopher, an attorney, even wrote up the agreement. It makes no sense that family law gives so much contractual freedom to a rich person like Barry Bonds to help him hoard his wealth, but so little to dutiful caregiving spouses like Hildegard Borelli or spouses like Donna and Monica trying to reconcile after affairs or drug addiction. Family law can do better, and contracts offer a means to that end.

III. LAW AS IT SHOULD BE: HONORING THE CONTRACTUAL FOUNDATIONS OF MARRIAGE

Family law can and should continue its trend toward honoring the contractual foundations of marriage by fully honoring both sides of the pair bond exchange, and also honoring couples carefully negotiated reconciliation agreements. We’ll address the homemaking issue first, then fidelity.

The Three Step Solution: Unmasking the Fiction of Homemaking-as-Gift

We can correct the errors of *Borelli* without returning to the old rule that deprived spouses of freedom of contract, much as some might like to return to an imagined golden age untainted by exchange.¹⁰⁹ Recall that the *Flechas* case treated marriage as a partnership, using a commercial template for the most personal of relationships. The proposal I make to correct the problem of devaluing Sun Bonds and Hildegard Borelli’s caregiving builds on partnership metaphor adding a rule that prevents a property-hoarding spouse from having his cake and eating it too. If marriage is a partnership, both are entitled to return on their time and resources invested in their joint enterprise. If one contracts out of that partnership—by hoarding partnership property to him or herself—it’s no longer a joint enterprise. The promise to share is now illusory. Accordingly, the property-hoarder should be treating as having contracted out of the privilege of treating “housewifely duties” as mere gifts.

If we were in a classroom, I’d write the three steps on the board and remind students that family law already follows Step 1 and most of Step 2:

- (1) General Rule: pair bond exchange → property sharing
- (2) Exception: prenup can evade property-sharing
 - Question: is the prenup involuntary, one-sided, or contrary to public policy?
 - Yes → revert to Step 1 & apply general rule
 - No → prenup = contract → go to Step 3
- (3) Pair bond exchange now illusory promise → abandon fiction of homemaking as gift → calculate the market value of cooking, cleaning, home health care, etc.

Adding Step 3 would correct the current double standard that allows providers but not caregivers to contractually adjust the terms of the pair bond exchange. It’s fine—and may facilitate generosity in families—to pretend that homemaking labor is a gift as long as the

homemaker is protected by property-sharing rules. But if richer spouses contract out of financial support, then courts should abandon that legal fiction and award the homemaking spouses the value of all that work.

Here's how it would work:

Step 1: When a couple divorces, the court assumes that marriage is a pair bond exchange and consequently divides the family's property and perhaps awards alimony. If there's a prenup limiting property sharing or alimony, the court proceeds to Step 2 to determine whether it's legally binding.

Step 2: The court figures out whether the prenup is a contract or a mere deal by asking how long the person signing had to read it, whether she had counsel, whether a non-marital pregnancy, domestic violence, or the threat of deportation exerted undue pressure to sign, and whether it's in writing.¹¹⁰ If one of these defenses reduces the prenup to a deal, the court reverts to Step 1 (the general rule) and divides the property. But if the prenup is a binding contract, I propose that the court should add Step 3 to the analysis.

Step 3: The court figures out whether the prenup contract frees the provider from holding up his side of the pair bond exchange. If so, the court should recognize that the prenup changed the pair bond exchange to an illusory promise. Illusory promises are 1-way deals—and therefore not legally binding—so a property-hoarding prenup should make the courts let go of the legal fiction that homemaking is a pure gift. Freed of the homemaking-as-a-gift fiction, the court could then calculate an amount to fairly compensate caregivers like Sun Bonds, Eunice Flechas, and Hildegard Borelli for the months and years of shopping, cooking, cleaning, and caring for sick family members. Barry might argue that Sun didn't do much, but it's clear that both Hildegard and Eunice would be entitled to compensation for what their husbands would have had to pay a cook, housekeeper, and caregiver.

Accounting for Prenup Modification

In *Borelli*, the court would go through these steps first for the Borellis' prenup that they signed right before the wedding, and then for the modification they made after Michael got sick. If the initial agreement was binding at Step 2, the court would then examine the modification under Step 2 for voluntariness and other requirements for legal enforceability. If the court concluded that the modification was legally binding at Step 2, it wouldn't have to calculate the value of Hildegard's care-giving at Step 3 because Michael and Hildegard had already agreed that it was worth around a third of his estate. But if the modification was not legally binding, perhaps because it was oral instead of in writing, or if Michael didn't have a lawyer review it, then the initial prenup still would still render the pair bond exchange an illusory promise. Accordingly, the court would drop the pretense that Hildegard's bed-pa-empting and other care was a pure gift and calculate what Michael would pay to get the tending that Hildegard did for him over their entire marriage, including that last year of 'round-the-clock in-home medical care.

The dissenting judge in *Borelli* wrote a separate opinion suggesting that he might be open to this approach. Judge Poché criticized the majority of applying a double standard by allowing Michael but not Hildegard to alter family law obligations, pointing out that the pre-WW II stereotypes upon which the majority relied no longer held sway because, he said,

“modern attitudes toward marriage have changed,” with many wives working outside the home, and many husbands doing “domestic chores that make a house a home.”¹¹¹ Since California allows spouses to contract with each other and gender roles are changing, Judge Poché reasoned, spouses’ duties to provide medical care for one another shouldn’t be taken to impose a state-mandated duty to *personally* provide that nursing care. Judge Poché wrote when Bill Clinton was president, and worried that the majority’s ruling, applied to the Clintons, meant that “if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her.”¹¹² But in 2012, Hillary Clinton is the Secretary of State, and the *Borelli* decision would require her to drop everything to care for Bill personally if he became ill, jeopardizing diplomatic relations and other issues of national importance.

Difficulties in making exact calculations shouldn’t make courts retain the fiction that homemaking is a pure gift. Sure, you can buy Cadillac care or Hyundai homemaking. But the courts could rely on average rates. A home health aide in 2012 runs around \$20, a housecleaner about \$15 an hour, while daycare is around \$20 an hour, and the average taxi cab ride costs \$13-\$14.¹¹³ In breach of contract cases courts don’t require mathematical precision in calculating losses, just reasonable certainty of damages. Since homemaking is one of the tasks that is invisible if done well -- from help with homework to addressing holiday cards -- lots of tasks would inevitably go unaccounted for despite the most precise calculations. At the end of the day, the goal should be to provide economic and social support for homemaking labor to correct the current rule’s policy of ignoring it.

In sum, the problem in prenup cases isn’t too much contract, but too little. Ignoring exchange, in other words, can harm families as much or more than recognizing the value of both sides of the pair bond exchange. But as we saw with Donna and Michael Diosdado, couples exchange much more than money and care-giving. Unfortunately, family law has failed to properly value fidelity in reconciliation agreements just as it’s failed to value homemaking labor in prenup cases. Courts should change course and enforce those exchanges just as they currently enforce property-hoarding prenups.

Doing Justice to Reconciliation Agreements

Courts should enforce reconciliation agreements like Donna and Manuel Diosdado’s fidelity agreement, not to mention other so-called “bad boy” clauses like Christopher Dargan’s promise not to slide back into cocaine abuse. Those clauses don’t reinstate fault-based divorce because they have no effect on the grounds for divorce, only the consequences of conduct that leads to divorce. A number of states still account for fault like adultery in deciding issues like alimony and property distribution on divorce.¹¹⁴

Enforcing a reconciliation agreement would not mean that courts would force a couple to stay married. This result is similar to the general rule of contract law, under which Courts usually award money damages when a person breaches a contract, instead of forcing that person to complete the contract. In reconciliation agreements, a court would merely enforce the terms of the couple’s carefully negotiated agreement, such as the Diosdados’ agreement that the cheater wouldn’t prosper, or at least would take a hit to reflect the harm done to his or her spouse.

Conclusion

All this freedom of contract exercised by so many Plan A families cast a shadow long enough for Victor and me to make our contracts and deals about both money and emotional issues. In the next chapter, I assign him the task of getting a stroller and baby seat for the car, while I agreed to set up my Salt Lake bungalow for baby. We did a birthing class together, though we definitely stood out the other expectant Salt Lake moms and dads. When the cheerful instructor told us to get a mat to lay out on the floor, Victor perked up, surveying the husbands in the room, and asked, like he was getting an unexpected surprise, “Matt? Which one is Matt?” Not everyone laughed with us, but the teacher did.

Little by little, Victor and I swapped enough pleasures and pressures of becoming parents—and the closest of friends—that we became an “us.” But conclusory statements, lawyers say, are not enough to make an argument. The next chapter gives the down and dirty details of a few contracts and deals that came out of—and shaped—my newly minted AB family.

¹ HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 263-64 (2d ed. 1988); Walter Waddlington & Raymond C. O’Brien, *Family Law in Perspective* 1-4 (3d ed. 2012) (describing the Plan B “trend toward private ordering among adults” as opposed to Plan A family law that “promot[ed] the objective values of society”).

² While scholars debate the proportions of status and contract in marriage, everyone agrees that there’s a good measure of contract in marriage, though the proportions of status and contract change over time. *See, e.g.*, MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000); JOHN WITTE JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (2d ed. 2012); Marjorie Maguire Shultz, *Contractual Ordering in Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982). Some feminists contend that highlighting marriage’s contractual elements harms women, while others, like me, see benefits for women in contract. *Compare* CAROLE PATEMAN, *THE SEXUAL CONTRACT* 154-88 (1988), *with* LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 94 (1999).

³ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁴ JOHN HEILEMANN & MARK HALPERIN, *GAME CHANGE* 67-68, 73 (2010).

⁵ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442 (describing coverture); HENRY WIENCEK, *AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES, AND THE CREATION OF AMERICA* 84-86 (2003).

⁶ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 52 (2000). Married Women’s Property Acts, starting in the mid-nineteenth century, gave married women the right to form contracts and own property. *Id.* at 52-55; *see also* Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

⁷ Between 1951 and 1963, 11 western states repealed their miscegenation statutes, leaving, in 1965, 17 states that still banned interracial marriage. PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 242-43 (2009).

⁸ *Loving v. Virginia*, 388 U.S. 1 (1967). Shortly after the Civil War, many states from the former Confederacy changed their marriage laws to allow interracial unions, based on a federal statute that mandated that all persons shall have the same right to make and enforce contracts “as is enjoyed by white citizens.” 42 U.S.C. § 1981 (2006); PASCOE, *WHAT COMES NATURALLY*, *supra* note 7, at 115. However, by the 1880s, these states made interracial marriage a crime again, reasoning that it didn’t discriminate against Blacks because neither whites nor Blacks could enter interracial marriages. *Pace v. Alabama*, 106 U.S. 583 (1883). Even after *Loving*, officials in Delaware, Florida, Alabama, and Mississippi tried to prevent interracial couples from marrying. Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of Loving v. Virginia*, in *FAMILY LAW STORIES* 7, 20-21 (Carol Sanger ed., 2008).

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- ⁹ Goodridge v. Dep't Pub. Health, 798 N.E.2d 941 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Press Release, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.
- ¹⁰ Mildred Loving, Loving for All (remarks prepared for delivery on June 12, 2007, the 40th anniversary of the Supreme Court decision), *available at* http://www.freedomtomarry.org/page/-/files/pdfs/mildred_loving-statement.pdf.
- ¹¹ VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 134 (2005). Women and their families also brought actions under the tort of seduction. Jane E. Larson, "Women Understand So Little They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993).
- ¹² Hattin v. Chapman, 46 Conn. 607, 608 (1879). Sarah Reed recovered \$10,000 from William Clark for breaking their engagement. Reed v. Clark, 47 Cal. 194 (1873).
- ¹³ MD. CODE ANN., FAM. LAW § 3-102 (2006); Elaine Marie Tomko, Annotation, *Rights in Respect of Engagement and Courtship Presents When Marriage does not Ensue*, 44 A.L.R. 5TH 1 (1996).
- ¹⁴ ZELIZER, *supra* note 11, at 134-45. *But see id.* at 145 ("[G]enerally speaking, courts treat engagement rings as quintessential conditional gifts, returnable to the donor almost regardless of the circumstances that ended the engagement.").
- ¹⁵ Pratt, *The Case of Mr. and Mrs. Loving*, *supra* note 8, at 22; VA intestacy rule in 1975 (year he died). Before, when interracial couples couldn't marry, they could provide for one another by making wills. Many white men used wills to bequeath property to African-American women that legal scholars call "concubines" to distinguish them from wives or prostitutes. *See, e.g.*, Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 230 (1999).
- ¹⁶ Forbes Staff, *By the Numbers: The 10 Most Expensive Celebrity Divorces*, FORBES, Apr. 12, 2007, http://www.forbes.com/2007/04/12/most-expensive-divorces-biz-cz_lg_0412celebdivorce_slide_4.html?thisSpeed=undefined; Jane Lewis, *Profile: Ivana Trump*, MONEYWEEK (London), Dec. 12, 2005, <http://www.moneyweek.com/news-and-charts/profile-ivana-trump>; UNIF. MARRIAGE AND DIVORCE ACT § 307 (1970) (amended 1971 and 1973) 9A U.L.A. 132 (Supp 2012).
- ¹⁷ Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).
- ¹⁸ *Ain't Love Expensive*, SUNDAY TELEGRAPH (Sydney), Oct. 9, 2000, at 102; *Beyonce and Jay-Z's \$25 million prenup!*, THE RUNDOWN, May 5, 2008, <http://www.therundown.tv/headlines/say-what/beyonce-and-jay-zs-25-million-prenup/>; Donna Bertaccini, *Lovers Seek Lawyers as Divorce Booms*, BBC, Nov. 8, 2004, <http://news.bbc.co.uk/2/hi/business/3992381.stm>; Margaret Littman, *Is a Prenup Expiration Date an Ex-Wife's Best Revenge?*, CHICAGO TRIBUNE, Mar. 27, 2002, http://articles.chicagotribune.com/2002-03-27/features/0203270022_1_prenuptial-agreements-jane-welch-clauses. Similarly, rumor has it that Nicole Kidman's husband won't get anything if he relapses into drug use. *See* Chris Price, *When It's Time for a Clean Break*, GLOUCESTERSHIRE ECHO, Feb. 12, 2011, at 12.
- ¹⁹ Jay Busbee, *Details of Elin Woods' Newly Written Prenup Emerge*, YAHOO SPORTS, Dec. 3, 2009, http://sports.yahoo.com/golf/blog/devil_ball_golf/post/Details-of-Elin-Woods-newly-rewritten-prenup-em?urn=golf,206529; Steve Helling, *Tiger Woods and Elin Nordegren's Divorce is Final*, PEOPLE, Aug. 23, 2010, <http://www.people.com/people/article/0,,20414961,00.html>.
- ²⁰ *In re* marriage of Dawley, 551 P.2d 323, 329 (Cal. 1976).
- ²¹ Louise Rafkin, *If 'Forever' Doesn't Work Out: The Same-Sex Prenup*, N.Y. TIMES, Apr. 1, 2012, at ST17.
- ²² Perkinson v. Perkinson, 802 S.W.2d 600 (Tenn. 1990).
- ²³ Diosdado v. Diosdado, 118 Cal. Rptr. 2d 494 (Ct. App. 2002) (agreement to pay wife \$50,000 if husband cheats); *In re* Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009) (agreement to pay wife \$2600 per month alimony if husband cheats); *In re* Marriage of Mehren and Dargan, 13 Cal. Rptr. 3d 522 (Ct. App. 2004) (agreement to give wife extra property if husband relapsed into cocaine use).
- ²⁴ Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993) (agreement to arbitrate alimony and child support).
- ²⁵ Pyeatte v. Pyeatte, 661 P.2d 196 (Ariz. Ct. App. 1983) (agreement to support wife through grad school after she supported him through law school).

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- ²⁶ Ashby v. Ashby, 227 P.3d 246 (Utah 2010) (agreement to share value of medical degree for support during education).
- ²⁷ AZ v. BZ, 725 N.E.2d 1051 (Mass. 2000) (clinic consent form giving wife embryos for implantation if the parties separate); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (consent form giving embryos to clinic for scientific purposes).
- ²⁸ *In re Marriage of Meiers*, 2005 WL 1983707 (Cal. App. 2005) (agreement waiving rights to attorneys fees and costs for custody or child support proceedings).
- ²⁹ *In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339 (Ct. App. 1996) (promise to raise kids Jewish); *In re Marriage of Nuechterlein*, 587 N.E.2d 21 (Ill. App. Ct. 1992) (agreement to raise the kids Lutheran).
- ³⁰ Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y.), *cert. denied* 464 U.S. 817 (1983) (promise in Jewish wedding contract, or Ketubah, to “live in accordance with Jewish law of marriage” by obtaining a “get” or Jewish divorce, through an Orthodox Jewish court); Becher v. Becher, 706 N.Y.S.2d 619 (Sup. Ct. 2000) (agreement to substitute Jewish court proceedings for civil divorce proceeding).
- ³¹ Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ch. Div. 2003); Aziz v. Aziz, 488 N.Y.S.2d 123 (Sup. Ct. 1985); Chaudry v. Chaudry, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978). Thousands of Americans make Muslim marriage contracts and Kebubot are not only common at Jewish weddings, but even, increasingly, at Christian ones. Laura W. Morgan, *Enforcement of Islamic Antenuptial Agreements*, DIVORCE LITIG., Mar. 2003, at 41; Mark Oppenheimer, *Where Divorce can be Denied, Orthodox Jews Look to Prenuptial Contracts*, N.Y. TIMES, Mar. 17, 2012, at A16; Samuel G. Freedman, *Christians Embrace a Jewish Wedding Tradition*, N.Y. TIMES, Feb. 11, 2011, at A15.
- ³² UNIF. PREMARITAL AGREEMENT ACT (1983), 9C U.L.A. 35 (2001). Twenty-six states have adopted the UPAA.
- ³³ McGuire v. McGuire, 59 N.W.2d 336, 341 (Neb. 1953).
- ³⁴ Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL’Y 225, 227-236 (2011).
- ³⁵ Friends, family, colleagues, and a woman I met on a plane, told me about these deals. Others are from AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* 7 (2011); RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?* 51-54 (2011); PAULA SZUCHMAN & JENNY ANDERSON, *SPOUSONOMICS: USING ECONOMICS TO MASTER LOVE, MARRIAGE AND DIRTY DISHES* 10, 34 (2011); Kevin Sack, *60 Lives, 30 Kidneys, All Linked*, N.Y. TIMES, Feb. 19, 2012, at A1.
- ³⁶ ANDREW CHERLIN, *MARRIAGE GO ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 9 (2009). *See, e.g.*, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Civil Marriage Protection Act, 2012 Md. Laws ch. 2 (to be codified at MD. CODE ANN. FAM. LAW §§ 2-201, 2-202); Richard Vatz, Op-Ed., *Don’t Cue the Wedding Bells Just Yet*, BALT. SUN, Aug. 10, 2012 (discussing the ballot referendum to decide whether the law allowing single sex marriage would be passed by the voters in the state).
- ³⁷ Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 80-81 (2001).
- ³⁸ Lawrence v. Texas, 539 U.S. 558, 578 (2003); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). However, federal law, as of Nov. 2012, refuses to recognize same-sex marriage under the Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006). The federal government has ceased defending DOMA, and still enforces it, but challenges are under consideration in the U.S. Supreme Court. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, No. 12-144 (Dec. 7, 2012); Windsor v. United States, 699 F.3d 199 (2d Cir. 2012), *cert. granted*, No. 12-307 (Dec. 7, 2012).
- ³⁹ Stephanie Coontz, *The Heterosexual Revolution*, N.Y. TIMES, July, 5, 2005.
- ⁴⁰ *See, e.g.*, BECKER, *A TREATISE ON THE FAMILY* (1991); POSNER, *SEX & REASON* (1994).
- ⁴¹ Jodi Kantor, *The First Marriage*, N.Y. TIMES MAG., Nov. 1, 2009, at 44.
- ⁴² WILLIAM POUNDSTONE, *THE PRISONER’S DILEMMA* 125-26 (1992).
- ⁴³ BECKER, *supra* note 40, at 43.
- ⁴⁴ ZELIZER, *THE PURCHASE OF INTIMACY*, *supra* note 11, at 30-32; BECKER, *supra* note 43, at 124.
- ⁴⁵ MARCEL MAUSS, *THE GIFT* (1923); VIVIANA ZELIZER, *THE SOCIAL MEANING OF MONEY* (1995).
- ⁴⁶ RICHARD DAWKINS, *THE SELFISH GENE* 212 (rev. ed. 1990).
- ⁴⁷ *See, e.g.*, NATALIE ANGIER, *WOMAN: AN INTIMATE GEOGRAPHY* (1999).
- ⁴⁸ FISHER, *THE SEX CONTRACT: THE EVOLUTION OF HUMAN BEHAVIOR* 94, 99-100 (1982).

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- ⁴⁹ E.O. WILSON, ON HUMAN NATURE 83, 123, 139 (1978; 2004). See also FISHER, *supra* note 48, at 101-02; HRDY, MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING 146 (2009).
- ⁵⁰ WILSON, *supra* note 49, at 139 (emphasis added).
- ⁵¹ WILSON, *supra* note 49, at 141. Emily Post represents the high point of social rituals such as anniversary gifts, such as paper for the first, silver for the twenty-fifth, and gold for the fiftieth. EMILY POST, ETIQUETTE IN SOCIETY, IN BUSINESS, IN POLITICS AND AT HOME 378 (1922).
- ⁵² WILSON, *supra* note 49, at 1-3.
- ⁵³ WILSON, *supra* note 49, at 158.
- ⁵⁴ DEBORAH L. RHODE, JUSTICE AND GENDER 82 (1989); ANNE FAUSTO-STERLING, MYTHS OF GENDER (2d ed. 1985); Gillian Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992); Natalie Angier, *Men, Women, Sex and Darwin*, N.Y. TIMES, Feb. 21, 1999, § 1 at 16.
- ⁵⁵ Martha M. Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485, 1591 (1993) (reviewing RICHARD A. POSNER, SEX & REASON (1992)). *Id.* at 1591 (citing Posner, *supra* note xx, at 88-108, 220, 292 & 226-27).
- ⁵⁶ DAWKINS, *supra* note 46.
- ⁵⁷ *DewBerry v. George*, 62 P.3d 525, 526 (Wash. Ct. App. 2003), *cert. denied*, 77 P.3d 651 (Wash. 2003).
- ⁵⁸ DAWKINS, *supra* note 46. EO Wilson's most recent book, *The Social Conquest of Earth*, argues cooperation plays a much bigger life in evolution and today's interaction than he thought in the past. However, he doesn't even mention Sarah Hrdy's work.
- ⁵⁹ SARAH BLAFFER HRDY, MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION 46-47 (1999).
- ⁶⁰ *Id.* at 209-13. See also WILSON, *supra* note 49, at 139-40; DAWKINS, *supra* note , at 140.
- ⁶¹ SARAH BLAFFER HRDY, MOTHER NATURE 201-02 (1999). First-generation sociobiologists called this practice "cooperative breeding," a phrase that washed the gender, and the day-to-day work of parenting, out of the story.
- ⁶² SARAH BLAFFER HRDY, MOTHER NATURE 140, 201-02 (1999). Only about 3% of mammals, and 9% of "roughly 10,000 species of birds" engage in cooperative breeding. *Id.* at 177.
- ⁶³ *Id.* at 122 (noting that only one other primate family, Callitrichidae, pass through the babbling stage, and they are among the few cooperative breeding primates).
- ⁶⁴ *Id.* at 122, 151, 87, 180, 6 and 109.
- ⁶⁵ HRDY, MOTHER NATURE, Dedication (1999).
- ⁶⁶ Tara Parker-Pope, *Is Marriage Good for your Health?*, N.Y. TIMES MAGAZINE, Apr. 18, 2010, at 46, 51.
- ⁶⁷ SHELLY E. TAYLOR, THE TENDING INSTINCT: HOW NURTURING IS ESSENTIAL FOR WHO WE ARE AND HOW WE LIVE 151 (2002).
- ⁶⁸ JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 26 (2010) (citing Stephen Rose & Heidi Hartmann, *Still a Man's Labor Market, The Long-Term Earnings Gap*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (2004) available at <http://www.iwpr.org/publications/pubs/still-a-mans-labor-market-the-long-term-earnings-gap>; JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 68 (2005)).
- ⁶⁹ HANNAH ROSIN, THE END OF MEN: AND THE RISE OF WOMEN (2012).
- ⁷⁰ WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE, *supra* note 68, at 33.
- ⁷¹ TAYLOR, THE TENDING INSTINCT, *supra* note 67, at 114-15.
- ⁷² *Id.* at 115.
- ⁷³ Jason DeParle, *Two Classes, Divided by 'I Do'*, N.Y. TIMES, July 15 2012, at A1.
- ⁷⁴ A growing number of family law scholars would have family law recognize some friendship bonds. See, e.g., Laura Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189 (2007); Laura Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008).
- ⁷⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *442.
- ⁷⁶ Joan Williams, *Is Coverture Dead?: Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Arrangements*, 7 TEX. L. REV. 17, 31 (1998); Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and*

Privacy, 105 YALE L.J. 2117, 2119 (1996) (introducing the concept of “preservation-through-transformation” to family law).

⁷⁷ MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* (1991); Ertman, *Commercializing Marriage*, *supra* note 76, at 17-18; Lloyd Cohen, *Marriage Divorce, and Quasi Rents: Or, “I Gave Him the Best Years of my Life,”* 16 J. LEGAL STUD. 267 (1987); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993).

⁷⁸ UNIF. MARRIAGE AND DIVORCE ACT § 307 (1970) (amended 1971 and 1973), 9A U.L.A. 132 (Supp 2012).

⁷⁹ Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U.L. REV. 65, 135 (1999).

⁸⁰ RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e; § 77 cmt. a (1981).

⁸¹ ZELIZER, *PURCHASE OF INTIMACY*, *supra* note 11, at 22.

⁸² *Miller v. Miller*, 42 N.W. 641 (Iowa 1889).

⁸³ *Id.* at 641. The detail about Mr. Miller’s wandering appears in an earlier opinion in the same case, *Miller v. Miller*, 35 N.W. 464 (Iowa 1887).

⁸⁴ *Id.* at 642.

⁸⁵ *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993).

⁸⁶ COTT, *PUBLIC VOWS*, *supra* note 6, at 11.

⁸⁷ *Flechas v. Flechas*, 791 So. 2d 295 (Miss. Ct. App. 2001).

⁸⁸ *Id.* at 298; Brief of Appellant at 5, *Flechas*, 791 So. 2d 295 (Miss. Ct. App. 2001) (No. 00-CA-00223) 2000 WL 34429904.

⁸⁹ *Flechas* at 301-02; *id.* (quoting *Flechas v. Flechas*, 724 So. 2d 948, 953 (Miss. Ct. App. 1998)).

⁹⁰ Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buy-outs and Dissociation under No-Fault*, 60 U. CHI. L. REV. 67 (1993)

⁹¹ *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783 (Ct. App. 1999).

⁹² *Judge Who Heard Barry Bonds’ Child Support Case Has Withdrawn From the Case*, JET, Sept. 26, 1994, at 48.

⁹³ For a discussion of the transition, see NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS* (2001) and Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

⁹⁴ See, e.g., *In re Estate of Hollett*, 834 A.2d 348 (N.H. 2003); *Bloomfield v. Bloomfield*, 764 N.E.2d 950 (N.Y. 2001); *Krejci v. Krejci*, 667 N.W.2d 780, 788-89 (Wis. Ct. App. 2003); UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2) (1983).

⁹⁵ Murray Chass, *Giants Make Investment: \$43 Million in Bonds*, N.Y. TIMES, Dec. 6, 1992, <http://www.nytimes.com/1992/12/06/sports/baseball-giants-make-investment-43-million-in-bonds.html>; *Bonds*, 83 Cal. Rptr. 2d at 787-88; *Barry Bonds Career Stats*, MAJOR LEAGUE BASEBALL http://mlb.mlb.com/team/player.jsp?player_id=111188 (last visited Jan. 27, 2012).

⁹⁶ *In re Marriage of Bonds*, 5 P.3d 815, 817 (Cal. 2000).

⁹⁷ *Id.* at 837.

⁹⁸ CAL. FAM. CODE. § 1615 (2004).

⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e; § 77 cmt. a (1981).

¹⁰⁰ *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993); Wendy L. Hillger, Note, *Borelli v. Brusseau: Must a Spouse also be a Nurse? A Feminist Critique*, 25 PAC. L.J. 1387, 1414-16 (1994).

¹⁰¹ *Borelli*, 16 Cal. Rptr. 2d at 17-18.

¹⁰² *Id.* at 19.

¹⁰³ *Miller v. Miller*, 42 N.W. 641, 642 (Iowa 1889).

¹⁰⁴ *Borelli*, 16 Cal. Rptr. 2d at 20 (citations omitted).

¹⁰⁵ A number of scholars have critiqued *Borelli v. Brusseau*. Karen Engle et al., *Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 219-20 (2003) (Professor Adrienne Davis discussing *Borelli* in a roundtable); Silbaugh, *supra* note 79, at 124; Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249, 257-62 (1999).

¹⁰⁶ *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 495 (Ct. App. 2002).

¹⁰⁷ *Id.* at 497 (quoting *in re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000)).

¹⁰⁸ *In re Marriage of Mehren and Dargan*, 13 Cal. Rptr. 3d 522 (Ct. App. 2004).

¹⁰⁹ See e.g., Gail Fromer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J. L & Feminism 229, 279 (1994).

¹¹⁰ See, e.g., *Holler v. Holler*, 612 S.E.2d 469 (S.C. Ct. App. 2005) (pre-marital agreement unenforceable because it had been signed by pregnant woman who would be deported if she did not marry a citizen within eight days).

¹¹¹ *Borelli*, 16 Cal. Rptr. 2d at 657.

¹¹² *Id.* at 660.

¹¹³ *Costs of Care*, NAT'L CLEARINGHOUSE FOR LONG TERM CARE INFO., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, http://www.longtermcare.gov/LTC/Main_Site/Paying/Costs/Index.aspx (last visited Dec. 4, 2012) (reporting the average hourly rate for a home health aide was \$21 in 2010); *Occupational Employment Statistics: Maids and Housekeeping Cleaners*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (Mar. 27, 2012), <http://www.bls.gov/oes/current/oes372012.htm> (reporting the national mean hourly wage rate for housecleaners and maids in 2011 was \$10.31); *Occupational Employment Statistics: Childcare Workers*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (Mar. 27, 2012), <http://www.bls.gov/oes/current/oes399011.htm> (the national mean hourly wage rate is \$10.25); *Taxi Fares in Major U.S. Cities*, SCHALLER CONSULTING (last updated Jan. 2006), <http://www.schallerconsult.com/taxi/fares1.htm> (reporting that "the fare for an average trip ranges from under \$11 in Cleveland to over \$18 in Honolulu.").

¹¹⁴ See, e.g., Barbara Bennett Woodhouse, *Property and Alimony in No-Fault Divorce*, 42 AM. J. COMP. L. SUPP. 147 (1994); Barbara Bennett Woodhouse, with comments by Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994).