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## EXCHANGE AS A CORNERSTONE OF FAMILIES

Martha M. Ertman

*University of Maryland School of Law*, [mertman@law.umaryland.edu](mailto:mertman@law.umaryland.edu)

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# EXCHANGE AS A CORNERSTONE OF FAMILIES

MARTHA M. ERTMAN\*

## INTRODUCTION

Ivan Illich's cut-to-the bone linkages between gender and industrial capitalism in *Gender*<sup>1</sup> leave me nearly speechless. Nevertheless, like Salieri stuttering about Mozart's genius, I cannot help but offer a few thoughts about his grand screed against economic thinking, accusing it of undermining gender, social organization, and our very humanity. His ideas, which incensed some feminists in the 1980s,<sup>2</sup> have retained their shock value, and even freshness, despite the many changes in law and culture over the past three decades. By combining far-left and far-right thinking to up-end cozy assumptions like equality-is-good-for-women, Illich all but guaranteed feminist ire. But *Gender* deserves, indeed demands, a second and third look, despite, or even because of, its stubborn resistance to easy categorization. If we can read Illich in a way that is consistent with our deepest convictions about equality, dignity, autonomy, and the way that men and women interact in the day-to-day world, his work could inform legal doctrinal changes. His novel concepts, like "shadow work,"<sup>3</sup> "counterproductivity,"<sup>4</sup> and "vernacular gender,"<sup>5</sup> in particular, may well suggest new solutions to old, stubborn problems like the systemic devaluation of the home-making labor in family law and other areas. We certainly need a way to show lawyers, judges, legislators, and policymakers the value

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\* Carole & Hanan Sibel Research Professor, University of Maryland Francis King Carey Law School. Many thanks to Jennifer Levi and Erin Buzuvis for convening the Illich Symposium, to the editors of the *Western New England Law Review* for able editing, to Shannon Minter and other members of the feminist legal theory reading group for enriching my understanding of Illich's views, to the Thurgood Marshall Law Library for research support, and to the Carey Law School at the University of Maryland for financial support of this project and other interdisciplinary scholarship.

1. IVAN ILLICH, *GENDER* (1982).
2. Symposium, *Beyond the Backlash: A Feminist Critique of Ivan Illich's Theory of Gender*, 3 *FEMINIST ISSUES* 2 (1983).
3. ILLICH, *supra* note 1, at 45-46.
4. *Id.* at 15-17.
5. *Id.* at 67-89.

of day-to-day cooking, cleaning, and help with homework that sustains millions of families, and thus, children and society more generally.<sup>6</sup>

Illich's approach is magisterial and absolutely unapologetic. But bluster alone is not enough. The job of grand theories like law and economics and postmodernism is to both explain the world as it is and predict how it can and should look in the future. We test a theory's explanatory and predictive power by applying it, checking for any weak points by poking, prodding, and even slamming it against the wall, like the ape in the 1970 American Tourister luggage commercials who demonstrated a suitcase's strength by stomping on it.<sup>7</sup> If an idea can survive that kind of beating, it can carry solutions to the problems that law must address. Consider this Article such a test.

I start within Illich's worldview. Like *Gender*, this Article adopts a profoundly essentialist, sweeping approach, drawing on a range of literatures and periods of history. He presents an image of men, women, and society, inviting, or even commanding, that we look to see if it reflects what we see in families. But looking into Illich's depiction produces, for me, a mirror image, the very opposite of his. Where he condemns exchange for undermining gender, burdening women with shadow work, and robbing both men and women of coherent social organization and their very humanity, my own research about love and contracts reveals that exchange created the world of gender. Reciprocal exchanges, from the very dawn of humanity, have served to facilitate, not undermine, gender, family, and social organization. They enabled our very evolution from hairy bipeds to modern humans uniquely able, among all species, to write, read, and argue about books like *Gender*, not to mention invent the internet and root for a favorite contestant in *Dancing with the Stars*.<sup>8</sup>

My dance with this intellectual star draws heavily on a book project of my own, titled *Love & Contracts*.<sup>9</sup> Like Illich, I put exchange at the center of my analysis and also seek to protect what is

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6. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. Rev. 1, 21 (1996). See generally JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

7. 1971 American Tourist "Gorilla" Commercial, YOUTUBE (May 19, 2010), <http://www.youtube.com/watch?v=8C-e96m4730>.

8. *Dancing With the Stars* (An ABC television broadcast).

9. MARTHA M. ERTMAN, LOVE & CONTRACTS: THE HEART OF THE DEAL (2012) (unpublished manuscript) (on file with author).

most dear to us, from relationships to social organization outside families. Like Illich, I worry about the disproportionate cost borne by women who perform mountains of shadow work. But while he sees exchange in domestic relationships as unique to the industrial West, and inherently dehumanizing and subordinating, I argue for exchange as a foundational building block for forming families, and, indeed, a central factor in our evolution through pre-history, allowing us to survive and even thrive through millennia scraping by in subsistence living before the advent of central heating and grocery stores (not to mention plumbing, roads, and Penicillin). Today, exchanges still help us every day to create, sustain, mend, and even, when necessary, end family relationships.

My book *Love & Contracts*,<sup>10</sup> like Illich's work, invites readers to think about old, familiar ideas and relationships in new ways. Primarily, I hope to convince readers that families—seemingly sites of the most selfless, unconditional love—are also, at their very foundation, grounded in mutual exchanges. If you are like most people, this view runs aground on your strongest intuitions, which treat family love as unconditional. *Love & Contracts* includes memoir chapters about having a baby with a gay friend, and then, when the child is still in diapers, meeting the woman I will marry, who becomes a third parent in our extraordinary family. The book is, in large part, my thank you note for this grand gift. I cannot define love, of course, but, but I do try to show love's power. Like any gift exchange, getting love inspires reciprocation, just as the gifts of a strong body and a good mind call you to "give back" by putting your particular talents to good use. Family love, I argue, calls for back and forth exchanges, day-in and day-out.

Like Illich, I up-end common assumptions. And like him, I have come up with some new terms to help readers understand my new take on old standard views of family. Old, familiar language tends, unfortunately, to lead us to think in old, familiar ways, narrowing our thoughts. I offer a new vantage point on families by using two distinctions that reveal the symbiotic relationship between love and contracts: (1) "contracts" and "deals"; and (2) "ordinary" and "extraordinary" families.

The first distinction I offer is between "contracts" and "deals." "Contract" is a legal term of art to describe the kind of agreement courts enforce.<sup>11</sup> You "contract" to buy a car or rent a vacation

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10. *Id.*

11. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

apartment, which means that if you do not pay, the dealership or condominium owner can sue you. But courts will not enforce some agreements, like illegal drug deals, or a husband's promise to pay his wife \$50,000 if he cheats on her again.<sup>12</sup> I call these non-binding agreements "deals," and argue that they shape our lives even though they are not legally binding. What matters is that deals, like contracts, are voluntary and reciprocal exchanges. Both contracts and deals create and sustain families: contracts for renting an apartment, mortgages, joint credit cards, and beneficiary designations on retirement accounts, just for starters, and deals like agreeing that one will be a full-time mom or dad while the other engages in wage labor to support the family.<sup>13</sup> Those exchanges, day-in and day-out, provide a way to act out being an "us" with your boyfriend, girlfriend, husband, wife, and kids—not to mention your parents, brothers, sisters, and anyone else you consider "family." Not tit-for-tat, exactly, nor a pure, unreciprocated gift, but something in between the two that contains both self-interest and generosity.<sup>14</sup> By looking at both non-binding contracts and more informal deals, I hope to pull back the curtain wrapped around families that makes their give and take look like pure gifts instead of mutual exchanges, explain why exchanges build relationships, and, finally, show how recognizing the key role of exchanges in our love lives can improve family law as well as family life.

I also distinguish between "ordinary" and "extraordinary" families. Seeing the exchanges underlying all kinds of families makes it easier to see the many differences among families as morally neutral variations. What matters most is connection through exchange, not the particular form the connection. Therefore, I talk

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12. *Id.* §§ 17, 71, 178; *Diosdado v. Diosdado*, 18 Cal. Rptr. 2d 494 (Cal. App. 2002).

13. See PAULA SZUCHMAN & JENNY ANDERSON, *SPOUSONOMICS: USING ECONOMICS TO MASTER LOVE, MARRIAGE, AND DIRTY DISHES* 24 (2011); Lois Smith Brady, *State of the Unions: No Tethering, and It's All Good*, N.Y. TIMES, Sept. 24, 2010, at Style 17, available at <http://www.nytimes.com/2010/09/26/fashion/weddings/26unions.html> (quoting singer Judy Collins' description of her marriage to Louis Nelson: "I cook, he washes up . . . . Sometimes it's just as basic as that . . .").

14. Economic sociologist Viviana Zelizer expertly charts the vast territory lying between the extremes of self-interested transactions and altruistic intimate relationships, giving examples like engagement rings and support agreements, demonstrating the complex ways that economic exchanges and intimacy interact. See generally VIVIANA A. ZELIZER, *ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY* (2011); VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* (1985); VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005); VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994).

about “ordinary” and “extraordinary” families instead of “traditional” and “unconventional” families to displace assumptions that form matters more than the function of families to connect. Ordinary families are the most common: married, straight, raising kids they conceived at home. Family law sets its default rules based on the assumption that most people fall into these categories. But sometimes luck, law, or biology pushes people toward Plan B, leading them to live together instead of marrying, form same-sex unions, and/or have kids through reproductive technologies or adoption. These Plan B families are best described as “extraordinary” because they’re literally out of the ordinary. A type of family can change from being “extraordinary” to “ordinary,” as when, in 1967, the Supreme Court designated interracial couples as legally ordinary after Mildred and Richard Loving successfully challenged Virginia’s anti-miscegenation law.<sup>15</sup> Today, same sex couples who can marry in states like Massachusetts and Iowa are making same-sex couples more legally ordinary, though, as of this writing, we remain extraordinary under federal law.<sup>16</sup>

I hope, by calling families “ordinary” or “extraordinary,” to help family law, and society more generally, to finally shake off outdated views that some families are natural while others are unnatural. What’s natural, I have come to believe, is the human desire to connect. Exchanges, big and small, sustain that connection, day in and day out, in all kinds of families. Connection is such a primal need that people go to great lengths to cobble together a Plan B way to connect when Plan A doesn’t work out.

We will always have some extraordinary families, because all crucial functions have back-ups. The ordinary way down from the 25th floor is an elevator, but stairs serve the same function when the power goes out. Parents ordinarily put their kids to bed, but babysitters pitch in when parents go out or work late. Family law should recognize different kinds of families—ordinary and extraordinary—to honor the importance of connection in the lives of the men, women, and children in those families, and also in society more generally.

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15. *Loving v. Virginia*, 388 U.S. 1 (1967).

16. *Goodridge v. Dept. Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Defense of Marriage Act*, 1 U.S.C. § 7, 28 U.S.C. § 1738(C) (2010). The federal government has ceased defending DOMA, but still enforces it. Marc Ambinder, *Obama Won't Go to Court Over Defense of Marriage Act*, NAT'L JOURNAL, Feb. 23, 2011.

My terminology, recognizing the deep structural similarity between contracts and deals, and comparing “ordinary” and “extraordinary” families, helps reveal the many exchanges that shape families, and also the way that those exchanges, by definition, vary, producing different kinds of families. All of these families exist to address our fundamental human need to connect. Illich might well have approved of this focus on connection and cooperation as first principles, given his eloquent support for conviviality.<sup>17</sup>

This Article proceeds in four parts. First, it describes Illich’s allergy to exchange as the agent that replaced households defined by vernacular gender with married pairs in “inhumane”<sup>18</sup> sex-neutral economic partnerships. Second, it challenges Illich’s view of exchange as a destroyer that has meddled in families for only a few hundred years.<sup>19</sup> I use sociobiological literature to counter his case against exchange with one valorizing two exchanges that I call “primal deals” that played crucial roles in the evolution of humans, families, and day-to-day life. Third, it contends that primal deals—especially the primal pair-bonding deal between men and women—continue to play a central role in families and family law today. Finally, this Article concludes by proposing a change in family law to reflect the contractual nature of families by allowing spouses to contract out of the primal deal, but at the same time recognize that those prenuptial agreements effectively cancel the primal deal between spouses. Accordingly, courts enforcing prenuptial agreements should also compensate the spouses who gave up property sharing rights in the prenuptial agreements for the hours, months, and years spent making and sustaining the home and family.

## I. ILLICH’S ALLERGY TO EXCHANGE

Illich’s critique of exchange in domestic arrangements is closely linked to his larger critique of industrial capitalism, and indeed, economic growth. Only negative economic growth policies, he warns, can “reduce sexism” and create “peace between men and women.”<sup>20</sup> Contrary to conventional wisdom, he argues that protecting “equal rights,” and seeing marriage as a partnership, may give “a sense of accomplishment to the elites who proposed and obtained them, but [leave] the majority of women untouched, if not

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17. See generally IVAN ILLICH, *TOOLS FOR CONVIVIALITY* (Harper & Row 1973).

18. ILLICH, *supra* note 1, at 76.

19. *Id.* at 4, 11-13.

20. *Id.* at 15-16.

worse off than before.”<sup>21</sup> Illich makes numerous and complex arguments to prove these grand assertions. Nevertheless, without too much over-simplification, we can distill his main argument into three main points: (1) gender is uniquely human and beneficial; (2) exchange destroys gender; and, consequently, (3) exchange dehumanizes us by replacing vibrant gendered households with sex-neutral economic partnerships.<sup>22</sup> Each of these points merits brief elaboration.

#### A. *Gender is Uniquely Human and Beneficial*

Illich defines sex and gender idiosyncratically. While many feminists see gender as the social or cultural aspect of biological sex,<sup>23</sup> Illich presents gender as more innate, and sex, which he dubs “economic sex,” as socially constructed.<sup>24</sup> “[O]ne is born and bred into gender,” he tells us, while “the sex role is something acquired.”<sup>25</sup> Gender, which he calls “vernacular gender,” is, in his view, “substantive,” like being either a square or a circle.<sup>26</sup> He defines “sex” as “the sex of economic neuters,” and sees it as a “modern experiment to deny or transcend” gender.<sup>27</sup> Gender, in this view, is intimately bound up with our humanity, and therefore, in family structure and function.<sup>28</sup>

“Kinship,” he explains, “is possible only between what we conceive as men and women; it only specifies the fit between gendered people . . . . They fit like the right fits the left.”<sup>29</sup> This fit, like right and left hands, does not, Illich clarifies, mean that the left hand is in any way inferior, as people used say as they forced left-handed children to become right-handed.<sup>30</sup> The complementarity of left and right, for Illich, protected women, as well as men, for most of

21. *Id.* at 16-17.

22. *Id.* at 74, 76, 168 n.120.

23. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley, trans. Vintage Books 1974). Other feminists see only culture, with sex being one social construction, and gender another. See, e.g., JUDITH BUTLER, *BODIES THAT MATTER* (1993); JUDITH BUTLER, *GENDER TROUBLE* (1990).

24. ILLICH, *supra* note 1, at 14 n.7.

25. *Id.* at 81. Though initially it seems that Illich has simply reversed the conventional view of gender as cultural and sex as biological, he explicitly resists this simple mapping, contending that “[b]oth gender and sex are social realities with only a tenuous connection to anatomy.” *Id.* at 14 n.7.

26. *Id.* at 80-81.

27. *Id.* at 74, 80-81.

28. See *id.* at 67-68, 81.

29. *Id.* at 70.

30. *Id.* at 71.



human history, all those many millennia while our ancestors lived in subsistence, pre-industrial communities. In a subsistence society, unlike prior to our own “push-button society,” he contends, “[e]ach man and woman . . . depends for survival on the interplay of two hands.”<sup>31</sup> Men and women performed different tasks, and still do in some places, he explains, citing wide-ranging ethnographies and other literature on pre-capitalist communities.<sup>32</sup> “In one valley of the Alps,” he tells us, men and women meet on the threshing floor, “he with the flail and she with the sieve,”<sup>33</sup> while in a Dijon village women choose which pig will be slaughtered, and address it as “Monsieur,” but the men “set the day for the slaughter.”<sup>34</sup> Men do men’s work, in short, and women do women’s work, though precisely which tasks get assigned to men or women varies greatly across communities.<sup>35</sup> What seems to matter most to Illich is the community-centered coordination of male and female labor.<sup>36</sup> He sees it as undergirding the dominant domestic institution, the household, which in turn mediated relationships “between the individual and the village community, not the twosome, the parents, the couple.”<sup>37</sup> These patterns survived for millennia, he contends, giving way only in the wake of economic thinking.<sup>38</sup>

### B. *Economic Exchange Destroys Gender*

According to Illich, that economic, exchange-oriented view of interactions with people, the land, and communities destroyed gender, and at the same time, deprived us of an essential element of our humanity.<sup>39</sup> By inventing the idea of scarcity, he contends, economic thinking encouraged economic exchange to manage purported scarcity, dethroning gender as an organizing principle for daily life, social organization, and our very humanity.<sup>40</sup> In Illich’s view, this change demoted us from fully human, gendered men and women to vastly inferior genderless individuals: “for me, what is unique about *Homo sapiens* as a human phenomenon is the constant *incarnation* of the symbolic duality of gender . . . .

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31. *Id.* at 72.

32. *Id.* 106-09 (providing literature on different cultures).

33. *Id.* at 106.

34. *Id.* at 108.

35. *Id.* at 108, 110, 113-14.

36. *Id.* at 109.

37. *Id.* at 109-10.

38. *Id.* at 111.

39. *See id.* at 76 n.57.

40. *Id.*

[G]enderless modern humans behave almost as apes.”<sup>41</sup> The culprit for our degeneration from humane gender to “inhumane” sex, according to Illich, is “commodity-intensive industrial society”<sup>42</sup> fueled by individualism. Illich views individualism—the view of us as gender-neutral humans—as the lynchpin of a worldview centered on exchange.<sup>43</sup> It created industrialization, which, he contends, supplanted good values like “decency,” “protect[ing] the weakest from ruin,” and respect between men and women.<sup>44</sup> In their stead, industrialization gave us only the isolated rights of individuals, and permitted men and women to do the same work.<sup>45</sup> Doing the same work as individuals, he reasons, has turned out to be a lousy deal for women. It has led men in industrial economies to engage more intensely in wage labor, and leaves women to perform an immense amount of what Illich calls “shadow work,” like servicing the car (and paying insurance on it) so she can drive to grocery stores, where she will buy food that she will prepare and clean up at home.<sup>46</sup> This “shadow work,” according to Illich, “constitutes an economic activity on which the cash flow, salaries, and surplus value for capital formation all ultimately depend.”<sup>47</sup> Rather than produce significant value, shadow work consumes time and energy, endlessly depletes women and their spirits.<sup>48</sup> In sum, Illich up-ends conventional assertions that individualism and gender-neutrality is better for women than pre-industrial gender duality, arguing that economic individualism paradoxically produces the opposite result: a new class of human being, de-gendered women, treated, for the first time, as a second sex.

His genealogy of this demise runs back to the sixteenth century.<sup>49</sup> Illich, a Catholic priest, lays the blame squarely on the shoulders of the Protestant Reformation, naming Martin Luther as “the true inventor of the modern doctrine that there is something inherently dignified and praise-worthy about labor, that the man who bears the burden in the heat of the day is somehow more

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41. *Id.* at 76.

42. *Id.* at 76, 94.

43. *Id.* at 10.

44. *Id.* at 111, 116.

45. *Id.* at 50.

46. *See id.* at 45 n.30.

47. *Id.* at 55.

48. *See id.* at 57.

49. *Id.* at 23.

pleasing to God than the man who takes his ease in the shade.”<sup>50</sup> That misconception, according to Illich, laid the groundwork for what Illich describes as “the slow establishment of wage labor as the prototype of work that should be dignified, gratifying, meaningful, and accessible to all.”<sup>51</sup> In typical contrarian style, he turns this view of independence bought with market labor on its head by describing living off wages as “not . . . simple poverty but . . . misery.”<sup>52</sup>

### C. *Exchange Replaced Vibrant Gendered Households with Sex-Neutral Economic Partnerships*

Illich’s remedy, it seems, is to reinstate, or at least valorize, re-gendering women’s and men’s work to remedy women’s current second-class citizenship. Only if households of men and women return to living as two complementary genders, performing gendered tasks for their community, can we escape today’s marriages made up of men and women acting “almost as apes”<sup>53</sup> as they mechanically enact a “genderless economic partnership between a wage laborer and a shadow worker.”<sup>54</sup> We will achieve true equality between men and women, he argues, only when we abandon the fiction of gender-neutrality that underlies an individualist-centered, economic-growth oriented society.<sup>55</sup> This change, far from being backward, in his view, would correct a brief and misguided detour away from gender, and reassert gender to correct the “profound discontinuity” he sees “between all past forms of existence and Western individualism.”<sup>56</sup> Only valuing work that is gendered, it seems, can correct the degradation of women that Illich attributes to gender’s demise.<sup>57</sup>

There is a lot to like about what Illich says. First, his concept of “shadow work” gives name to the avalanche of petty tasks that we perform to keep twenty-first century households running—paying bills, registering cars, making doctor’s appointments, let alone navigating phone trees to make those appointments—that, to-

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50. *Id.* at 23 n.13 (quoting H.L. MENCKEN, *THE AMERICAN LANGUAGE: AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* (1980)).

51. *Id.*

52. *Id.*

53. *Id.* at 76.

54. *Id.* at 168 n.120.

55. *Id.* at 10 n.5.

56. *Id.*

57. *Id.* at 126 (“[T]he loss of gender does and must degrade women even more than men.”).

gether, threaten to overwhelm even the most patient of us.<sup>58</sup> Second, I agree with him that Protestant ideas played a key role in investing individuals with the power to shape their lives, which ushered in our current idealized view of marriage as a partnership among purported equals.<sup>59</sup> Third, he is properly names the persistence of gender inequality despite decades of legal and cultural attempts to treat men and women as if they were gender-neutral citizens.

But he and I differ in diagnosing the cause of the disconnect between our contemporary rhetoric of formal equality and the lived experience of men and women that results in too many women working an uncompensated second shift on household labor, and too narrow a view of what constitutes a family. Where Illich charges exchange with the crime of dethroning gender, and ushering in an inhumane sex-neutral regime that, nevertheless, values men and masculinity more than women and femininity,<sup>60</sup> I see exchange as the very foundation of our humanity, gender, our families, and the various arrangements that people have long made in different ways in different times and places to keep body and soul together.

## II. GENDER, HOUSEHOLDS, AND FAMILIES BROUGHT TO US BY EXCHANGE

Without exchange there would be no gender and no families. Indeed, according to some anthropological research, we would not exist as human beings. Millions of years ago, before courts, lawyers, governments, or even language, our proto-human ancestors entered two kinds of exchanges that changed everything. I call both “primal deals” because these exchanges functioned as fundamental, primeval engines of family and social organization.<sup>61</sup>

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58. Craig Lambert, Opinion, *Our Unpaid, Extra Shadow Work*, N.Y. TIMES, Oct. 30, 2011, at SR12, available at <http://www.nytimes.com/2011/10/30/opinion/sunday/our-unpaid-extra-shadow-work.html?pagewanted=all>.

59. See generally JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND THE LAW IN THE WESTERN TRADITION* (Don S. Browning & Ian S. Evison, eds., 1997).

60. ILLICH, *supra* note 1, at 76.

61. 7 THE OXFORD ENGLISH DICTIONARY 471 (2d ed. 1991) (defining primal as “[b]elonging to the first age or earliest stage; original, . . . primitive, primeval . . . . Relating or pertaining to such needs, fears, behaviour, etc., as form the origins of emotional life, esp. as in Freud’s theory”; as well as “Of first rank, standing, or importance; chief, . . . fundamental, essential”).

The first exchange, sometimes known as the “sex contract” in anthropological literature,<sup>62</sup> is a primal deal between men and women to form a pair bond. According to sociobiologists<sup>63</sup> like E.O. Wilson, women exchanged sexual exclusivity and foraged food for men’s bounty from the hunt and a bit of protection and help with the children. The deal served the larger goal of getting their genes to the next generation, which many sociobiologists see as the fundamental goal of every action taken by humans, every other species, and life itself.<sup>64</sup>

The second primal deal has more recently come to light in work by evolutionary scholars like anthropologist Sarah Blaffer Hrdy and psychologist Shelley Taylor. Hrdy and Taylor focus on different questions—Hrdy as a primatologist, and Taylor as a social psychologist—but both document, in ancient as well as contemporary cultures, exchanges among women—often mothers—to help raise their children and care for other close intimates.<sup>65</sup> These two primal deals—pair bonding and tending—together enabled us to evolve into a species apart. More importantly, those primal deals continue to define key features of family life, and therefore, appropriately serve as a backbone for family law. The reciprocal exchange at the heart of the first deal, pair bonding between men and women, may well explain why legal rules have long described marriage as a civil contract.<sup>66</sup>

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62. See generally HELEN E. FISHER, *THE SEX CONTRACT: THE EVOLUTION OF HUMAN BEHAVIOR* (1982); SARAH BLAFFER HRDY, *MOTHERS & OTHERS* 147 (2009).

63. Illich, to be fair, would likely dismiss these sociobiological arguments as inherently sexist and racist. ILLICH, *supra* note 1, at 75-79. Nevertheless, sociobiology seems hardly to have faded as the “academic fad” Illich charges it with being. Instead, it now includes feminists like Sarah Blaffer Hrdy and Shelley Taylor, who demonstrate that evolutionary biology and psychology can uncover complementarities between genders of the sort Illich valorizes.

64. See generally RICHARD DAWKINS, *THE SELFISH GENE* (3d ed. 2006); E.O. WILSON, *ON HUMAN NATURE* (rev. ed. 2004).

65. While men participate in what Taylor calls “tending” exchanges, they are more often on the receiving end of care than the giving end.

66. 1 WILLIAM BLACKSTONE, *COMMENTARIES* 433 (1884). Family law, of course, has changed greatly since Blackstone. In the eighteenth century, the common law treated women and children as essentially property of men, subject to the control and discipline of the man of their household. Over the past 150 years, however, family law rules have changed to treat women and children as more fully human, for example, by recognizing wives’ rights to contract and own property, protecting women and children from domestic violence, and also treating fathers of non-marital children as legal fathers. See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 *GEO. L.J.* 2127 (1994); Joseph Warren, *Husband’s Right to Wife’s Services*, 38 *HARV. L. REV.* 421 (1925). Accordingly, I make no

### A. *Pair Bonding between Men and Women*

Millions of years ago, anthropologist Helen Fisher tells us, our apelike ancestor began “the most fundamental exchange the human race would ever make.”<sup>67</sup> Our hairy fore-mothers, she explains, spent their days collecting edible roots and other vegetables, while their male counterparts ranged over wider territory looking for a rabbit or mongoose to eat.<sup>68</sup> But while their ancestors had mated freely, these proto-humans gradually formed pair bonds structured by an exchange. A female would focus her sexual and grooming attention on one male, and share her foraged vegetables with him, while he, in turn, would share his proceeds from the hunt. Whether these relationships lasted a few months, a year, or a lifetime, they were reciprocal. She expected a share of meat brought back from hunting, and he expected a share of “her” vegetables. Outsiders got only surplus. Gradually, he also began to protect her from dangers like other animals.<sup>69</sup> Little by little, over thousands of years, men in his position extended their efforts beyond sharing food, and also began to help feed and protect the young. Those actions, like coaching little ones about what foods were safe to eat, and helping out when they were sick or sad,<sup>70</sup> transformed those children from “hers” into “theirs.”

E.O. Wilson, often called the father of sociobiology,<sup>71</sup> also sees this reciprocal exchange as central to human families, allowing us to evolve to our current state with large, complex brains that produce language and cooperation unseen in other mammals.<sup>72</sup> These male-female pair bonds helped greatly in raising young who start out absolutely helpless and do not become self-sufficient for more than ten years.<sup>73</sup> With pair bonding, women could bear four times as many children as they would otherwise, giving natural selection four times as many people from whom to select the genes of the

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claim that the ancient provenance of the primal deals I discuss has produced identical legal rules over time and place. Such a claim would be patently false.

67. FISHER, *supra* note 62, at 94.

68. *Id.* at 99.

69. *Id.* at 100.

70. *Id.*

71. Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 76 (Deborah L. Rhode ed., 1990).

72. FISHER, *supra* note 62, at 102; WILSON, *supra* note 64, 123, 139.

73. HRDY, *supra* note 62, at 101.

smartest, fastest, strongest, and most cooperative to convey to future generations.<sup>74</sup>

Moreover, those smarts are costly. A human infant, then child's, brain requires phenomenally high caloric intake, which in turn requires cooperation among people to collect enough food to get a child to reproductive age, when he or she can start the cycle again.<sup>75</sup> As Wilson explains, that slow, expensive breeding gave our ancestors who could strike deals with one another a leg up in getting their genes to the next generation:

Human beings, as typical large primates, breed slowly. 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.<sup>76</sup>

In this view, genes need a lot more than bare reproduction to get to the next generation. Flirting, courting, and the elaborate social rituals—from love songs to designating appropriate gifts for particular wedding anniversaries<sup>77</sup>—facilitate and support the pair bond exchange that increases the chance of each child maturing to reproductive age, and starting the cycle again.<sup>78</sup>

Two aspects of this story undermine Illich's charge that exchange dehumanizes men and women. First, it shows that male contributions in the pair-bonding primal deal made it possible for us to become gendered humans in the first place. While mothers in

74. FISHER, *supra* note 62, at 102.

75. HRDY, *supra* note 62, at 146 (“No creature in the world (unless, just possibly, a bowhead whale) takes longer to mature than a human child does. Nor does any other creature need so much for so long before his acquisition and production of resources matches his consumption.”).

76. WILSON, *supra* note 64, at 139 (emphasis added).

77. Emily Post codified the appropriate anniversary gifts: paper for the first anniversary, and so on, up to silver for the twenty-fifth wedding anniversary, and gold for the fiftieth, or golden, wedding anniversary. EMILY POST, *ETIQUETTE IN SOCIETY, IN BUSINESS, IN POLITICS AND AT HOME* 378 (1922).

78. WILSON, *supra* note 64, at 141; *see also* DAWKINS, *supra* note 64, for an extended argument that all human activities, indeed all activities of all species, are aimed to get their genes to the next generation.

nearly all mammalian species care for young,<sup>79</sup> the pair bond vastly increases human fathers' contributions toward their young, far above other species. Most other high primate fathers are deadbeat dads, absent at best. In some species, fathers get credit for resisting the temptation to eat their young. The very singularity of human male willingness to exchange the scarce resources of time, food, and energy for sexual exclusivity and a share of gathered roots and vegetables played a tremendous role in making us the big-brained, talking, writing, cooperative species that engages in the type of elaborate social rituals of gender division that Illich valorizes.

Second, the pair bonding exchange enables elaborate human cultures to form. Our distant ancestors began to cooperate in pair bonds over a million years ago. Bit by bit, over millennia, they developed reciprocal exchange networks, first within families, then between families, and, eventually, so different from other species,<sup>80</sup> even among strangers. This last stage, exchange among strangers, 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.<sup>81</sup>

In other words, the pair-bonding primal deal paved the way for everyone's family, and also the more general human evolution that allows me to write, and you to read, this Article, as well as much grander efforts like creating democracies, eradicating polio, building the Pantheon, and organizing flash mobs.

Helen Fisher, alongside sociobiologists like Richard Dawkins, treat sex as the central focus of the pair bond,<sup>82</sup> a myopia that E.O. Wilson and other "Harvard School" sociobiologists<sup>83</sup> remedy somewhat to consider the many social rituals that facilitate and support pair bonding. But even Wilson leaves a huge part of the story in the shadows. The primal pair bonding exchange is about more than just sex. You do not have to be a biologist to know that human

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79. HRDY, *supra* note 62, at 39.

80. *Id.* at 1-3.

81. WILSON, *supra* note 64, at 158.

82. DAWKINS, *supra* note 64, at 161; FISHER, *supra* note 62, at 99.

83. HRDY, *supra* note 62, at 148-51.



evolution requires reproduction. But traditional sociobiological insistence that sex and romance are enough to get your genes to the next generation undervalues the hours, days, weeks, months, and years of work it takes to shepherd babies from infancy through childhood and young adulthood so they, too, can become parents.<sup>84</sup> That myopia produces significant distortions by viewing human interactions as, at core, kill-or-be-killed contests for survival. Men battle other men for access to fertile women. Parents ration food and protection, giving children only enough to ensure that the parents' genes will get to the next generation, and playing favorites if one child seems more likely than others to survive to adulthood and continue the reproductive cycle. Dawkins's version of the battle of the sexes is even fiercer, with fathers and mothers each trying to "cheat" each other by skimping on their children, so that each can, in Dawkins's words, "have more to spend on other children by other sexual partners, and so propagate more of his genes."<sup>85</sup>

Evolutionary biology evolves, like the organisms it studies, making room for new research that has corrected significant defects in Sociobiology 1.0. Wilson sees pair bonding, which includes, but is not limited to, sex, as the main event.<sup>86</sup> That pair bonding, Wilson reasons, keeps the male around to help out, which increases the chance of both adults and children surviving, and also of children growing up and passing on their genes to the next generation.<sup>87</sup> But like many men, Wilson spends much more time talking about sports, hunting, and other forms of aggression than about the admittedly prosaic food sanitation, meal preparation, and child care required to ensure a gene's survival in coming generations. Only when female researchers like Shelley Taylor and Sarah Blaffer Hrdy joined the scholarly dialog did the focus expand more fully to encompass another primal deal, between mothers and other, usually female, caretakers.

## B. *The Primal Deal among Mothers and Others*

Scientists have demonstrated that it takes a village to raise a child, consistent with the popular saying. Hrdy focuses on our primate ancestors, documenting a primal deal among female caregivers that, she argues, greatly aided human evolution by al-

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84. *Id.* at 46-47.

85. DAWKINS, *supra* note 64, at 140.

86. WILSON, *supra* note 64, at 139-40.

87. *Id.*

lowing mothers to have children spaced just a few years apart.<sup>88</sup> Since our children are dependent on their parents longer than most other species—unlike foals, say, who stand up minutes after being born—our survival to adulthood generally requires at least ten years of daily, hourly, and sometimes even minute-by-minute care.<sup>89</sup> Hrdy acknowledges the power of male-female pair bonds in evolution, but asserts that the pair-bonding deal accompanied a deal that, she contends, was even more central to our evolution. Like Illich and me, she coins a new vocabulary to make this revolutionary point. She uses the term “alloparents” to describe the adults and older children with whom mothers exchange childcare protection, and food gathering and preparation that give children the roughly thirteen million calories necessary to bring them to maturity.<sup>90</sup> These alloparents—literally meaning *other-parents*—Hrdy asserts, played an instrumental role in human evolution:

Few animals are born needier or remain dependent longer than humans. At 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.<sup>91</sup>

Alloparenting, also known as cooperative breeding, sets humans apart from most other primates.<sup>92</sup>

High ape mothers tend to hold their babies continually for the first year or more until they are weaned, not even allowing the father to hold them, but human mothers get help from the outset.<sup>93</sup> Mothers had to develop extraordinary skills in reading the thoughts and feelings of others so they could be sure they were entrusting the baby or child with someone trustworthy. Babies, in turn, evolved to charm those caretakers with babbling, smiling, and other socially-bonding interactions that only humans and the very few cooperatively breeding primates exhibit.<sup>94</sup> Little by little, in a process that took some two million years, these crucial skills became part of the

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88. SARAH BLAFFER HRDY, *MOTHER NATURE* 201-02 (1999).

89. *Id.*

90. HRDY, *supra* note 62, at 140.

91. *Id.*

92. Only about 3% of mammals, and 9% of “roughly 10,000 species of birds” engage in cooperative breeding. *Id.* at 177.

93. *Id.*

94. *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).

human repertoire as the babies who could best charm caretakers to provide for and protect them survived to adulthood, passing on those genes and behavioral tricks on to their children.<sup>95</sup> Today, when we coo back and forth with babies we echo these ancient rituals.

Fathers help out, Hrdy acknowledges.<sup>96</sup> But across cultures, and across time within each culture, paternal contributions are too highly variable to have, alone, produced our huge population, given our uniquely expensive, long-dependent offspring. Some of the alloparent deals only can be done among females, like the common exchange between lactating mothers in which one breastfeeds the other's children if the mother is away for a while, in exchange for the return favor at another time, or babysitting support.<sup>97</sup> Like many family interactions, alloparenting can take the form of less literally tit-for-tat exchange, and also pure gift. Often, Hrdy explains, a cycle of seeming gifts look, over time, more like exchanges:

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.<sup>98</sup>

Sometimes the exchanges are more immediate. A teenage cousin helps a mother by babysitting, and, in turn, learns about childcare so she will know how to provide for a baby when her time comes. This shared care slowly made us who we are. Back and forth, over millennia, the ones who engaged in allomothering exchanges were more likely to survive, and pass their genes and behavioral know-how to the next generation. "Without alloparents," Hrdy says bluntly, "there never would have been a human species."<sup>99</sup>

Shelley Taylor similarly argues for natural selection favoring a tending instinct that, while present in both sexes, is particularly strong in females. She demonstrates that taking care of others is as natural and biologically based as eating, sleeping, or sex.<sup>100</sup> Taylor did not set out to study the tending instinct, but stumbled on its immense impact in her laboratory studies about the effect of stress

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95. *Id.*

96. *Id.* at 151.

97. *Id.* at 87, 180.

98. *Id.* at 6 (footnotes omitted).

99. *Id.* at 109.

100. SHELLEY E. TAYLOR, *THE TENDING INSTINCT: HOW NURTURING IS ESSENTIAL FOR WHO WE ARE AND HOW WE LIVE* 10 (2002).

on health.<sup>101</sup> She found that good tending reduces stress and its emotional, physical, and social toll.<sup>102</sup> Bad tending, in turn, like living with an alcoholic or in a dangerous neighborhood, increases stress, which in turn increases the incidence and severity of disease, even shortening life spans. Along the way, Taylor also came up with a new term. To enrich the “fight or flight” literature, she identified a second response to stress, which she calls “tend and befriend.”<sup>103</sup> Females, she explains, are neurochemically programmed to respond to stress by first looking around to see if any children need to be protected (the “tend” part), and then enlisting other adults to help respond to the danger (“befriend”).<sup>104</sup> Tending and befriending make a huge difference in both everyday life and emergencies.

Neither Hrdy nor Taylor argues that women and men are destined by biology to perform set scripts in which men hunt and women mind the hearth. These full professors could not have conducted their research at the University of California had they been chained to the kitchen table. But Hrdy and Taylor do document, and urge us to value, the huge impact of biological sex differences.

For example, women’s sex drives and breastfeeding are stimulated by an endogenous opiate called oxytocin, which makes people more trusting, more interested in nuzzling and protecting infants, and less irritable (all helpful when faced with a squalling infant at 2:00 A.M.).<sup>105</sup> Oxytocin also seems to trigger “tend and befriend” behavior. Taylor explains how estrogen, which women have a lot of, amplifies the effects of oxytocin.<sup>106</sup> While men also have oxytocin, and indeed at least one study shows elevated oxytocin levels in men at orgasm, they are less influenced by oxytocin because testosterone tamps down its effects.<sup>107</sup> These biological differences may explain part of why women do more tending. Even human fathers, rock stars though they are compared to other fathers in the animal

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101. *Id.* at 1-3.

102. *See generally id.* at 52-69 (providing several examples of nurturing that led to greater emotional, physical, and social health).

103. *Id.* at 20-22.

104. *Id.*

105. HELEN E. FISHER, ANATOMY OF LOVE: THE NATURAL HISTORY OF MONEGAMY, ADULTERY, AND DIVORCE 317 (1992); HRDY, *supra* note 62, at 169-71.

106. TAYLOR, *supra* note 100, at 28.

107. HRDY, *supra* note 62, at 170-71 (noting “couvade,” or reductions of testosterone in men who live with a pregnant woman or care for young children, but that these changes are much more dramatic in women); TAYLOR, *supra* note 100, at 28.

kingdom, 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.<sup>108</sup>

The tending deal works in tandem with the pair-bonding deals. Depending on income, parents either pay child care providers or rely on help from other mothers, grandmothers, older children, cousins, sisters, aunts, or others who may be related to the mother through her pair bond with the child's father.<sup>109</sup> All that care—for children and whole families—requires scaled-back wage labor. Men, on average, contribute more cash, and women, on average, contribute more care, though increasingly women earn more. 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.”<sup>110</sup> True, women represent 50% of the American workforce, but they work fewer hours for lower wages, so that they only bring home 28%, on average, of the family income.<sup>111</sup> This exchange, money for tending, seems to work well for both men and women.

Marriage improves health, happiness, and economic stability more than just about anything else. However, it is especially beneficial for men, partly because they benefit so greatly from tending by their wives. Men who marry, and stay married, have an over 90% chance of living past 65, while women's life expectancy is not affected by marriage.<sup>112</sup> As 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.<sup>113</sup>

Married men also, Taylor explains, “eat more nutritious meals . . . and are less likely to smoke[,] . . . drink heavily, or abuse illegal

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108. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 23, 82 (2010) (noting that fathers spend one-third to one-half of the time mothers do on kids' enrichment activities like piano lessons; fathers, on average, spend one hour with children for every three hours mothers spend). This data is among American families and may differ in other cultures.

109. HRDY, *supra* note 62, at 158.

110. WILLIAMS, *supra* note 108, at 26, 33.

111. *Id.*

112. TAYLOR, *supra* note 100, at 114.

113. *Id.* at 114-15.

drugs” than single men.<sup>114</sup> The primal deals, in short, are good for both men and women. Men deliver much-needed material support for women and children, and women, for their part provide extraordinarily valuable tending that increases longevity and makes daily life much easier for everyone in the family. Like any commercial contract, everyone involved both gives and gets something.

It is important to note that these comparisons of men and women average out in large populations, so that many women are providers for their family, while many men spend time tending. One hand-holding study demonstrates the value of tending by husbands. University of Virginia psychologist James Coan administered a mild shock to married women that caused low-level pain.<sup>115</sup> The researchers monitored the women’s brains using functional MRI imaging technology to measure how social support might reduce their experience of stress. Some of the women experienced the shock alone, others holding a stranger’s hand, and a third group held their husbands’ hands. The hand holders—both strangers and husbands—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.<sup>116</sup> Good care, an integral part of the pair bonding exchange, is a good deal. Together, the primal deals have the power to protect health, reduce distress, improve all kinds of relationships, and even lengthen life.

To summarize: evolutionary literature supports some of Illich’s claims, and refutes others. In particular: it supports his claims that gender, in many ways, constitutes a deep-seated aspect of our humanity that informs daily life and social organization. However, sociobiological research also undermines Illich’s claim that economic thinking and exchanges destroyed gender by replacing vibrant gendered households with sex-neutral economic partnerships.<sup>117</sup> Far from undermining gender, primal exchanges enabled the formation of gender, and gendered kinship patterns, among our distant ancestors. Only with the primal deals for pair bonding and alloparenting could human beings evolve to form Illich’s idealized pre-modern societies and our own post-industrial one. Exchange can hardly be called dehumanizing if it made hu-

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114. *Id.* at 115.

115. Tara Parker-Pope, *Is Marriage Good for your Health?*, N.Y. TIMES MAG., Apr. 18, 2010, at 46, 51, available at <http://www.nytimes.com/2010/04/18/magazine/18-marriage-t.html?pagewanted=all>.

116. *Id.*

117. ILLICH, *supra* note 1, at 74, 76, 168.

manity possible in the first place. Without primal deals there would be no gender, let alone gender complementarity, or recent press for the very gender neutrality that Illich abhors.

Family law rules tend to recognize the pair-bonding primal deal, but largely ignores alloparenting deals. Space constraints preclude exploring whether family law should enforce alloparenting agreements as “contracts,” that create familial right and duties, as some family law scholars recommend,<sup>118</sup> so the discussion here focuses on a select few family law cases to show how contemporary legal doctrine recognizes both sides of the pair-bonding deal unless the spouses enter a prenuptial contract that limits property sharing. Then, courts tend to let the richer spouse out of his side of the deal, but refuse to allow the poorer, care-taking, spouse to alter her duties under the deal. Family law should evolve to more fully value both feminine and masculine sides of the pair-bonding deal.

Linking Illich’s insights about shadow work with Hrdy’s and Taylor’s findings about the tending primal deal shows ways that family law could improve to honor both the feminine and masculine sides of the primal deals. While current law reflects a good measure of the “hierarchy and dependence”<sup>119</sup> that Illich condemns as products of gender neutrality, a fuller recognition of the role of exchange in family formation and functioning could alleviate a good bit of that hierarchy and dependence.

### III. FAMILY LAW (MOSTLY) HONORS THE PRIMAL DEAL

Today, family law mostly honors the pair-bonding primal deal by treating family property as belonging to both husband and wife upon divorce, regardless of who made the money used to acquire that property.<sup>120</sup> Here, I discuss one aspect of how family law currently recognizes the pair-bonding deal first by applying a general rule that treats earnings during a marriage as joint property, and second, by recognizing an exception to that general rule when modern-day wage-earning spouses contract out of their obligation to share the contemporary equivalents of rabbits brought home from the range. Finally, I suggest how family law could extend its recognition of the exchanges that lie at the heart of ordinary families by

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118. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 424-27, 443-44 (2008); see also Laura Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47 (2007); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 231 (2007).

119. *Id.* at 76 (emphasis omitted).

120. UNIF. MARRIAGE & DIVORCE ACT § 307 (1973).

also honoring the value of the feminine tending work done by primary homemakers when spouses enter a prenuptial agreement.

A. *Legal Rules Mostly Honor the Primal Deal*

The pair-bonding primal deal, in which men work outside the home more than women, and women work inside the home more than men, continues to shape many, if not most, ordinary families. According to Helen Fisher, these patterns are pretty stable across time and place.<sup>121</sup> Studies consistently show that while most people around the world find good complexions and cleanliness attractive, “men are attracted to young, good-looking, spunky women, while women are drawn to men with goods, property, or money,” whether they are rural Zulus, urban Brazilians, or Americans.<sup>122</sup> Along the same lines, a 1997 study by Jean Potuchek 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.<sup>123</sup> Apparently a good number of people put these beliefs into action, because women, on average, work fewer hours than men, and earn less than men for the hours they do work.<sup>124</sup> As Pulitzer Prize-winning *New York Times* columnist Maureen Dowd observes, the increased equality between men and women has not changed social conventions like women still expecting men to pay for dinner on a date.<sup>125</sup> Indeed, Dowd suggests that much as she likes men, she’s never married, because “smart men with demanding jobs would rather have old-fashioned wives, like their mums, than equals.”<sup>126</sup> Case law on marital contracting also suggests that Illich has prematurely announced gender’s death, and, moreover, that the solution to the inequities produced by both gender and gender-neutrality may be more, not less, legal recognition of the exchanges that create and shape family life.

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121. FISHER, *supra* note 105, at 47.

122. *Id.*

123. WILLIAMS, *supra* note 6, at 27.

124. *Id.*

125. MAUREEN DOWD, ARE MEN NECESSARY?: WHEN SEXES COLLIDE 37, 47 (2005).

126. *Id.* This simple pattern holds most true for white Americans. While African-American women selecting a mate care even more than their white counterparts about a man’s earning power, African-American men also value their would-be-wives’ economic stability. RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? 46-47 (2011).



## 1. Case Stories

The remainder of this Article uses four cases to illustrate the role of the primal deal in family law. Like all couples, the couples in these cases doubtless struck lots of informal contracts and deals, from apartment leases and joint credit cards to deals that one does the laundry and the other mows the lawn, but the cases got to court because the couples also made formal agreements to keep their property separate. The cases, as a group, reveal the background rule of property sharing that prenuptial contracts can alter, and also how much the core characteristic of the primal deal—exchange of food, care, and sex—remains central to family today. In the last few decades family law has allowed richer spouses—usually, but not always, husbands—to “contract out” of their duty to provide economic support, but not, strangely, allowed the poorer spouses—usually wives—to contract for recognition of their work providing meals, medical care, household maintenance, and child care. Illich does not mention prenuptial agreements in *Gender*, but, if he had, he likely would have decried courts allowing husbands to contract out of property sharing as yet another indictment of exchange-based views of family. In contrast, I see exchange as the solution more than the problem. If family law fully recognized the value of both sides of the pair-bonding primal deal, it would remunerate homemakers doing the feminine work of care-giving and foregoing the masculine work of maximizing their human capital in wage labor.

My proposal to more fully recognize the exchanges in families builds on the fact that contracting into a marriage means contracting into the pair-bonding primal deal of exchanging economic support for the emotional, physical, and social support of “housewifely duties.”<sup>127</sup> Family law recognizes this primal deal by mandating that divorcing couples share property—their house, say, or a retirement account—that either one acquired during the marriage, under the assumption that the person making money and the one taking care of cooking, cleaning, and caretaking both helped get those assets. But the contractual nature of relationships requires that people be able to change the deal, since contracts, unlike status relationships, are generally modifiable.

Thus, family law since the 1970s has allowed married couples to “contract out” of the primal deal through prenuptial agreements

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127. *Kowis v. Kowis*, 658 P.2d 1084, 1087 (Mont. 1983) (upholding division of marital property based on wife’s contribution for “housewifely duties”).

that provide, basically, “what’s yours is yours and what’s mine is mine.”<sup>128</sup> However, courts have not recognized that the spouses’ contracting out of the primal deal changes the nature of the marital contract. While the usual marriage deal transforms two people to an “us,” the contractual refusal to share property transforms that “us,” back into “me” and “you.” Most people do not enter premarital contracts, so most ordinary families remain an “us.” Accordingly, most of the time, family law treats valuable things that spouses give each other as gifts, exchanges of years of financial support, for years of grocery shopping, meal preparation, cleaning, and child raising. But in the relatively rare cases when the spouses contract out of the pair-bonding primal deal, the marriage becomes foundationally different, no longer as much of a pair bond. Rather than a two-way contract agreeing to share their wealth, it can be seen as what contract law calls an illusory promise.<sup>129</sup>

When a prenuptial agreement demotes the pair-bonding primal deal to an illusory promise, courts should disregard the fiction of mutual gifts when one side stops giving. Otherwise, the richer spouse gets a windfall. The increased marketization of family life that Illich deplors, such as markets for housecleaners, shoppers, cooks, tutors, babysitters, drivers, and social secretaries, would enable courts to calculate the value of a homemaker’s contributions to a wage-earner’s wealth, and award her money in that amount (possibly with interest). That change would both honor spouses’ freedom to contract—an essential freedom given the importance of voluntary, mutual exchanges in families and in society more generally—and also value both the feminine and masculine side of that primal deal.

The very gender neutrality that Illich condemns as bad for women could help them. Men, on average, have higher income and more wealth, and the contracts allow high wage-earners to shield that wealth away from the other spouse.<sup>130</sup> Consequently, husbands are more likely to suggest premarital contracts, and wives are more likely to resist enforcement of those contracts. In those cases, family law should recognize the primal deal—both sides of it—that forms the backdrop of the initial, or background, marital bargain.

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128. See e.g., *Banks v. Evans*, 64 S.W.3d 746 (Ark. 2002); *Rider v. Rider*, 669 N.E.2d 160 (Ind. 1996).

129. RESTATEMENT (SECOND) OF CONTRACTS §§ 2 cmt. e, 77 cmt. a (1981).

130. Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS 127, 127-28 (1993).

An 1889 Iowa case clearly articulated the rule treating the feminine side of the pair-bonding deal as a gift when it refused to enforce a contract for a Mr. Miller to pay his wife \$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.”<sup>131</sup> Mr. and Mrs. Miller also agreed that “past subjects and causes of dispute, disagreement and complaint” would be “absolutely ignored and buried.”<sup>132</sup> Apparently the Millers’ formal, written agreement was an attempt to stay married after Mr. Miller spent family finances on another woman. The court refused to enforce Mr. Miller’s promise to pay his wife for her homemaking, reasoning that her domestic labor was merely, in the court’s words, what “the law already required her to do.”<sup>133</sup> As we will see in Case #3, *Borelli v. Brusseau*,<sup>134</sup> this seemingly old-fashioned view remains good law in California today.

If we allow one person in a marriage to contract out of his obligations, then the old rule should not apply. A court should, thus, allow the richer spouse to keep his property as contractually agreed, but also offset that award with money for the homemaking spouse that reflects her time and effort grocery shopping, cooking, carpooling to and from school, and cleaning (just for starters). But before we get to the law as it should be, we must address the law as it is.

## 2. Case #1: Barry Bonds Hits a Home Run for Prenuptial agreements (But His Wife Loses Big Time)

The divorce of baseball superstar Barry Bonds typifies the legal rule that allows couples to enter prenuptial agreements. Granted, Bonds’ money and fame are highly atypical, evidenced by the fact that the trial judge had to recuse himself because of press reports that he had requested Barry’s autograph.<sup>135</sup> The aspect of the case, though, that matters for our discussion is its statement of the general rule that married couples can “contract out” of the pri-

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

132. *Id.* at 641.

133. *Id.* at 642. 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).

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

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

mal deal by explicitly saying that the one making the money gets to keep that money (and houses, cars, furniture, etc. bought with it).<sup>136</sup>

Historically, couples could not contractually adjust the terms of their marriage. A century ago, the law did not recognize contracts made by married women, but now courts assume that women are competent adults who should be bound by their contracts.<sup>137</sup> In the words of a Pennsylvania case enforcing a prenuptial contract that limited an unemployed nurse's share of property and alimony when she divorced her neurosurgeon husband, "[s]ociety has advanced . . . to the point where women are no longer regarded as the 'weaker' party in marriage, or in society generally," so that courts no longer presume "that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements."<sup>138</sup> Like any other contract, however, prenuptial contracts are not enforceable if they are involuntary (shown by factors like lack of independent legal advice, too limited time to consider the contract terms, and duress), it is a one-way deal, or the people's circumstances have changed drastically since they entered the agreement.<sup>139</sup>

By 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,<sup>140</sup> but when Barry and Sun met in Montreal in 1987, he was not yet a superstar. Both were twenty-three years old, and Barry was in his second year of playing for the Pittsburgh Pirates.<sup>141</sup> Neither one could have known that he would play for twenty-two years, setting records like most Major League Baseball home runs in a season (73) and over his career (762) and be

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136. *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783, 794-95 (Cal. Ct. App. 1999).

137. 1848 N.Y. LAWS 307, ch. 200 (Married Women's Property Act, used as a model by other states); NORMA BASCH, *FRAMING AMERICAN DIVORCE* (2001).

138. *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

139. *See, e.g., In re Estate of Hollett*, 834 A.2d 348, 349-54 (N.H. 2003) (prenup invalid due to disparity in parties' age, experience, and access to independent advice); *Bloomfield v. Bloomfield*, 764 N.E.2d 950, 953-54 (N.Y. 2001) (remand to determine if otherwise valid prenup was unconscionable); *Krejci v. Krejci*, 667 N.W.2d 780, 788-89 (Wis. Ct. App. 2003) (prenup unenforceable due to failure to provide for appreciation in value during marriage); UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2) (1983) (prenups unenforceable if unconscionable due to a party's lack of knowledge or disclosure).

140. Murray Chass, *Giants Make Investment: \$43 Million in Bonds*, N.Y. TIMES, Dec. 6, 1992, available at <http://www.nytimes.com/1992/12/06/sports/baseball-giants-make-investment-43-million-in-bonds.html>.

141. *Bonds*, 83 Cal. Rptr. 2d at 787.

named MVP seven times.<sup>142</sup> She was newly emigrated from Sweden, working in a sports bar and harboring ambitions of doing makeup for the stars.<sup>143</sup> Within months, they were living together, engaged, and planning to fly to Las Vegas for a small wedding.<sup>144</sup> The day before the wedding, Barry took Sun to his attorney's office on the drive to the airport.<sup>145</sup> There they signed an agreement that would fundamentally change their marriage by contracting out of Barry's legal obligations to share property. 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."<sup>146</sup> In plain English, as Barry testified at trial, this meant "what's mine is mine, what's yours is yours."<sup>147</sup> At the time, Sun had no property or income, and Barry took care of all her expenses.<sup>148</sup> Her job was being the baseball player's wife, providing emotional and social support to him and later, their two children. Whether or not Sun performed her side of the primal deal underlying many marriages,<sup>149</sup> the court let Barry evade his half of the primal deal.

The California Supreme Court ruled that Sun voluntarily signed the agreement.<sup>150</sup> Unlike the lower court, the Supreme Court refused to see Sun as a timid victim bullied into signing the prenuptial agreement, 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,

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142. *Barry Bonds Career Stats*, MAJOR LEAGUE BASEBALL [http://mlb.mlb.com/team/player.jsp?player\\_id=111188](http://mlb.mlb.com/team/player.jsp?player_id=111188) (last visited May 24, 2012).

143. Appellant's Opening Brief, *In re Marriage of Bonds*, 83 Cal. Rptr. 2d 783 (Cal. Ct. App. 1999) (Nos. A075328, A076586), 1997 WL 33562691.

144. *Id.*

145. *Bonds*, 83 Cal. Rptr. 2d at 788.

146. *Id.* at 817 n.1.

147. *Id.* at 817.

148. *Id.* at 788 (noting Barry's testimony that "Sun didn't have anything. I paid for everything) (internal quotation marks omitted).

149. Ken Hoover, *Ex-friend Describes Sun Bonds' Tantrums*, S.F. CHRONICLE, Dec. 21, 1995, at A-25, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1995/12/21/MN72411.DTL>; Eve Mitchell, *Ex-Wife Says Bonds Beat Her Repeatedly During Marriage*, S.F. EXAMINER, Dec. 7, 1995, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1995/12/07/NEWS7115.dtl>.

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

expressing the desire to take up a career and declaring to Barry that she “didn’t want his money.”<sup>151</sup>

The court does not tell us domestic details like how much time Sun spent grocery shopping, preparing meals, and caring for their children and the household. Indeed, given the Bonds’ income, they may have hired a lot of help, and Sun’s job may have been to spend time at the gym and spa looking good, and to accompany Barry on the road.<sup>152</sup> But most people running a household do their own grocery shopping, cooking, and other “housewifely tasks.” Our next spouses, Claire and Samuel Faiman, were such a couple, though they were unusual for marrying late in life, and divorcing even later. Their story shows how family law tends to ignore and devalue the tremendous contributions of keeping a household fed and watered (let alone healthy and safe), and also how legal doctrine could change to value that side of the pair-bonding deal.

### 3. Case #2: *Faiman v. Faiman*<sup>153</sup>: Autumn Marriage & Wintery Divorce

Claire and Samuel Faiman married when she was sixty-one, and he, ten years older.<sup>154</sup> Both were divorced, with children from their earlier marriages.<sup>155</sup> Because Samuel’s home and real estate business were in Connecticut, Claire had to leave her twenty-five-year job in a Scarsdale, New York synagogue, the house she had lived in for over three decades, and the community where she had raised her children.<sup>156</sup> While neither Claire nor Samuel was in the financial major leagues, his net worth (around \$2.2 million) was around ten times hers (around \$210,000, most of which was \$150,000 equity in her house).<sup>157</sup> Like many couples, their arrangement reflected the primal deal, though he was stingier and more controlling than most providers.

Samuel paid for most household expenses, giving Claire a weekly shopping allowance of \$150-\$300, but withholding it when they went on trips.<sup>158</sup> He kept control over the bank accounts, and

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151. *Id.* at 837.

152. *See id.* at 817.

153. *Faiman v. Faiman*, No. FA074028181, 2008 WL 5481382 (Conn. Super. Ct. Dec. 5, 2008).

154. *Id.* at \*1.

155. *Id.*

156. *Id.*

157. *Id.* at \*7.

158. *Id.* at \*2.

did not make her an owner of their home.<sup>159</sup> She paid for her personal expenses out of her modest social security payments.<sup>160</sup> Despite his tightfisted ways, Claire performed her part of the primal deal, shopping, cooking, and caring for Samuel through illnesses including a triple bypass surgery, colon cancer, and leukemia that required chemotherapy.<sup>161</sup> In addition to changing his bandages and colostomy bag, she also managed the household and business accounts when he could not, though he removed her name from the accounts as soon as he recovered.<sup>162</sup> Even during their divorce trial she served him breakfast, lunch, and dinner every day.<sup>163</sup> Though Samuel had many faults—the judge described him as “secretive and controlling,” rude, and even physically abusive, having both pushed Claire out of bed with his foot and spat in her face—he at least was honest, testifying at trial that she was a “dutiful wife who kept a nice home.”<sup>164</sup>

You cannot help but wonder why she put up with him. She did consider leaving when, two years into the marriage, he went to visit an old girlfriend in New Hampshire, leaving a note on the refrigerator saying he would be back the next day.<sup>165</sup> Claire stayed because, she explained to the court, she “loved him very much and did not want a divorce.”<sup>166</sup> Though she did not say so on the record, she also may have stayed because she had given away the Scarsdale house to her son—losing her only significant asset—and because Samuel had demanded a prenuptial contract three days before their wedding.<sup>167</sup>

Six weeks before the ceremony, Samuel said he wanted a prenuptial agreement, and produced a one-page “yellowed” legal sheet.<sup>168</sup> Claire talked to an attorney, and the couple went to the library to look at prenuptial agreement forms. Samuel wanted to read them over, and later decided he did not need a prenuptial contract. But then, three days before the wedding, he changed his mind.<sup>169</sup> He called Claire in New York, where she was still working

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159. *Id.* at \*3.

160. *Id.* at \*2.

161. *Id.* at \*1.

162. *Id.* at \*4.

163. *Id.*

164. *Id.* at \*3-4.

165. *Id.* at \*3.

166. *Id.*

167. *Id.* at \*5.

168. *Id.* at \*4.

169. *Id.* at \*5.

for the synagogue, and told her she had to come to Connecticut because they had “some papers to sign.”<sup>170</sup> She got the permission of her rabbi—also her employer—to leave work early, and drove an hour and a half to his house. He was waiting for her in the driveway, and drove the two of them to his lawyer’s office. There she met Samuel’s lawyer and the lawyer he had gotten for her, and saw the prenuptial agreement for the first time. She was “all shook up,” she testified, and surprised because she thought the papers would be about Samuel giving her \$100,000 so she would not have problems with his children after he died.<sup>171</sup> Instead, the agreement said that he would keep all the money and property to himself. The attorney who met with her for fifteen or thirty minutes testified that she “seemed surprised at what was being discussed.”<sup>172</sup> Even Samuel’s attorney said that the whole meeting was “rushed.”<sup>173</sup> Samuel told her “no agreement, no wedding.”<sup>174</sup> Claire did not sign the agreement right away. Instead, she took it home and signed it the next day without ever reading it.<sup>175</sup>

When Claire and Samuel finally did divorce in 2008, they had been married twenty years.<sup>176</sup> She was 81 and he was 91, but still strong enough to try to fight off her claim to any wealth acquired during their marriage. The question at trial was whether to enforce the prenuptial agreement that waived Claire’s right to alimony or any property held in Samuel’s name.<sup>177</sup> That meant nearly all the property, because he had made sure that just about everything was his, and his alone. The court ruled in Claire’s favor, and refused to enforce the premarital agreement.<sup>178</sup> Claire received \$450,000 in alimony.<sup>179</sup> Alimony is usually paid in installments, but the court apparently suspected Samuel would resist paying, so it ordered him to pay her \$75,000 immediately, and the rest in installments.

Who gets the money or property matters the most to the people involved, of course, but for the rest of us, especially lawyers, judges, and future litigants, the rationale for the ruling is most important. In *Faiman v. Faiman*, the judge reasoned that Claire re-

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170. *Id.*

171. *Id.*

172. *Id.* at \*6.

173. *Id.* at \*5.

174. *Id.* at \*6, \*9.

175. *Id.* at \*5.

176. *Id.* at \*1.

177. *Id.* at \*6.

178. *Id.* at \*10.

179. *Id.* at \*11.



ceived alimony from Samuel because her signature was not fully voluntary.<sup>180</sup> She did not have time to review the agreement, Samuel's lawyer drafted the agreement and picked Claire's lawyer, and no one told her what she was giving up. The lawyers did not explain to her about background legal rules that would entitle her to share in Samuel's property, to ask for alimony, and to determine just how much Samuel had.

The court's reliance on voluntariness to invalidate the Faimans' prenuptial contract missed the point. It does not help people in Claire's position who do have time to review the prenuptial agreement, and independent counsel, and still find they married people who took everything and gave nothing. The solution need not be a return to the old rule that did not allow spouses to tailor the terms of their financial relationship, much as Illich might like to return to a golden age in which he imagines family relationships were untainted by exchange. Instead, courts could take a middle ground that both honors spouses' freedom of contract—recognizing that hyper earners like Barry Bonds should be able to shield some of their assets—and still keep them from taking undue advantage of their spouses who contribute, if not half, at least something, to that high income by keeping the refrigerator stocked, beds made, laundry done, and kitchen clean, not to mention kids fed, and reasonably clean, healthy, and well-behaved. The current state of the law creates, in economic lingo that Illich would likely suggest applies to all economic thought, a moral hazard, allowing richer spouses to use prenuptial agreements to take unfair advantage of their poorer spouses. The richer ones like Barry Bonds and Samuel Faiman can accept, perhaps even demand, their spouses' time and effort cooking, cleaning, raising children, providing nursing care, and maintaining a household, without giving anything in return.

Applying this rationale might lead to a different outcome in cases like *Faiman* and *Bonds*. If courts look at what each spouse did under the pair-bonding deal as well as the terms written into a premarital agreement, they would get a fuller picture of what spouses exchanged, and what, therefore, they owe one another when they divorce. We do not know if Sun Bonds ably managed an army of paid assistants to cook and clean, looked good herself, managed the press, and travelled with Barry during baseball season. She may, instead, have been difficult, drunk, or dirty much of the time. A trial court could consider these facts, just as it currently

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180. *Id.* at \*9-10.

examines the voluntariness of a signature based on the time, place, and duration of a meeting, a person's ability to hire an independent lawyer, or whether language barriers or pregnancy hamper free consent. It need not dissect every moment of daily life. Instead, just as a court determines where a child will live based on who is the child's primary caretaker—looking to who cooks, drives to and from school, bathes, helps with homework, disciplines, etc.—courts could consider broad-brush evidence about who shopped, cleaned, and kept track of when the kids were due for vaccinations and dental appointments. Family law could create rebuttable presumptions that when one spouse works fewer hours, at a lower-paying job, she is likely doing more of the domestic chores that benefit a whole household.

B. *Improving Family Law by Fully Recognizing Exchange at the Heart of the Pair-Bonding Primal Deal*

*Faiman v. Faiman* illustrates how family law might recognize a new defense to enforcing a premarital agreement, which I will call “breach of the pair-bonding deal.” It could both recognize the exchange built into the very fabric of ordinary marriage, and give parties freedom of contract consistent with the central role of exchange in families. The defense could include three steps:

*Step One:* The court could evaluate whether the prenuptial contract was voluntary and any other arguments that would defeat enforcement (uncertain terms, for example, or the lack of a signature). If a defense like voluntariness defeats enforcement, the court need not go further, and would simply apply the background family law sharing rules. But if no other defenses apply, then the court could consider whether one party breached the primal deal.

*Step Two:* The court could compare the marriage to the typical pair bond deal to determine whether it was breached. Here, the evidence suggests that Claire held up her end of the pair bond deal, but Samuel did not. She cared for him, morning, noon, and night, and barely got a thank-you in return. The prenuptial agreement formalized that one-sidedness by allowing Samuel to contract out of his end of the primal deal. Claire, consequently, did not get the financial sharing that presumably was at least part of the reason she performed all those housewifely duties.<sup>181</sup> Accordingly, their marriage was no longer a pair-bond deal, but instead an illusory promise. Courts should disregard the legal fiction that housewifely tasks

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181. See RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71 (1981).

are gifts, because Samuel got everything and Claire got nothing. In other words, the prenuptial agreement transformed the relationship from “us” to two individuals. Thus, family law should award Claire an amount approximating the value of two decades of 24/7 domestic support.

*Step Three:* The court could apply contract doctrine or other areas of law to put a value on the domestic services that a richer spouse would otherwise get for free. While the prenuptial agreement would bar Claire from the full equitable share she would get under family law, she could still get reimbursed for what Samuel would have had to pay for round-the clock, seven-days-a-week, shopping, cooking, cleaning, laundry, and home health care while he was ill, perhaps under a theory of restitution (preventing his ill-gotten gain). If he also promised to give her, say, the house when he died, in exchange for that beyond-the-call-of-duty work emptying his colostomy bag herself instead of hiring an aide to do it, then a court should enforce that promise.

Current family law wrongly devalues these life-enriching, and even life-saving, tasks by invoking the legal fiction that reciprocal exchanges under the pair-bonding deal are only gifts. A California case shows how unfair that fiction can be to spouses who perform the feminine side of the pair-bonding deal.

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

According to a good number of family law scholars, *Borelli v. Brusseau*<sup>182</sup> is wrongly decided.<sup>183</sup> Viewing the case within the framework of the pair-bonding primal deal explains why, and also how family law can correct the mistake in future cases. As the rule currently stands, Michael Borelli got out of his promise to share his wealth, but Hildegard Borelli was held to her end of the pair-bond deal, which required her to personally empty Michael’s bedpans.<sup>184</sup>

Seventy-something-year-old San Francisco businessman Michael Borelli married Hildegard Borelli in 1980, when she was 39.<sup>185</sup> His finances were closer to Samuel Faiman than to Barry Bonds, as he owned a successful meat company and other proper-

182. *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 19 (Cal. Ct. App. 1993).

183. Adrienne Davis, *Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 219-20 (2003); Silbaugh, *supra* note 6, at 32-33; Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249, 257-62 (1999).

184. *Borelli*, 16 Cal.Rptr.2d at 20.

185. *Id.* at 17.

ties. The day before their wedding, Michael and Hildegard signed a premarital agreement that apparently reserved most of his property (worth around \$1.5 million) for his daughter from a prior marriage.<sup>186</sup> Unlike Sun Bonds and Claire Faiman, Hildegard did not challenge the validity of this prenuptial contract. Instead, she sought to enforce an oral agreement they made later to modify it.<sup>187</sup> That oral agreement brought their arrangement back toward the pair-bond deal and California community property rules. Yet the California courts refused to allow Hildegard to alter her obligation of emotional and physical care, and enforced only Michael's contracting out of his half of the primal deal.<sup>188</sup>

Like Samuel Faiman, Michael fell ill within a few years of getting married, suffering heart problems and a stroke. By 1988, Michael's doctors recommended that he live in a rest home given his need for round-the-clock nursing care. Understandably, he preferred to live at home, even though it required modifying the house to account for his limited mobility. Maybe he realized that his reduced marital obligations under their prenuptial agreement would justify Hildegard in feeling less obliged under the feminine half of the pair bond deal. In any case, Michael offered to alter the prenuptial contract by changing his will to give Hildegard some of his property (valued at around \$500,000, including money for her daughter's education) if she would disregard the doctors' advice and provide the nursing care herself, at their home.<sup>189</sup>

Hildegard performed her part of their deal, personally providing round-the-clock nursing care for Michael until his death the following year.<sup>190</sup> But Michael did not. While the California courts have allowed richer spouses like Michael Borelli and Barry Bonds to contract out of the masculine side of the pair bond deal, they refused to let Hildegard similarly alter her feminine obligations of care under the primal deal.

To reach its conclusion, the court had to ignore that Michael himself had slipped out of his half of the pair-bond deal. Instead, the court wagged its finger at Hildegard for trying to get something for doing what marriage itself requires, asserting that "a wife is obligated by the marriage contract to provide nursing type care to an ill

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186. 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).

187. *Borelli*, 16 Cal.Rptr.2d at 20.

188. *Id.* at 17-18.

189. *Id.* at 17-18.

190. *Id.* at 18.

husband.”<sup>191</sup> Echoing the century-old language of the Iowa Supreme Court quoted above,<sup>192</sup> the court in *Borelli* concluded that a husband’s agreement to compensate a wife undermines the public policy of wives caring for husbands.<sup>193</sup> Hildegard, as the poorer 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 invoked a sentimental justification for 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.<sup>194</sup>

The court’s contempt for Hildegard’s conduct as “unseemly” and “sickbed bargaining”<sup>195</sup> seems strange in light of 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,”<sup>196</sup> the court effectively declared that spouses cannot contract out of their feminine obligations of tending support but can contract out of their masculine obligations of financial support. It could only reach this conclusion by willfully ignoring the fact that Michael himself had already, at the very outset of their marriage, contracted out of his own (financial) support obligations to Hildegard. Far from sex neutrality, or gender neutrality, this outcome applies a double standard to masculine and feminine duties under the pair bond deal. It is hard to see here how Illich’s ideal of gender asymmetry protects women, when this gender-asymmetrical rule so harmed Hildegard Borelli.

A strong dissenting opinion took the majority opinion in *Borelli* to task for its double standard, highlighting the fact that Michael already opted out of his own obligations of marital support.<sup>197</sup> Pointing out that the majority opinion’s reliance on old, pre-World War II cases reflected its archaic assumptions about mar-

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191. *Id.* at 19.

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

193. *Borelli*, 16 Cal. Rptr. 2d at 19.

194. *Id.* at 20 (citations omitted).

195. *Id.*

196. *Id.*

197. *Id.* at 23.

riage, Justice Poché asserted that “modern attitudes toward marriage have changed,”<sup>198</sup> in that many married women work outside the home, and many husbands do “domestic chores that make a house a home.”<sup>199</sup> Given that California recognizes spouses’ rights to contract with one another, and the changing roles of men and women in marriage and society more generally, he reasoned, spouses’ duties to provide medical care for one another should not be taken to impose a state-mandated duty to *personally* provide that nursing care.<sup>200</sup> Writing when Bill Clinton was president, the dissent warned of grave consequences of not enforcing Michael and Hildegard’s agreement. To not enforce, it cautioned, meant that “if Mrs. Clinton becomes ill, President Clinton must drop everything and personally care for her.”<sup>201</sup> Today, 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. That cannot possibly be the right outcome.

Instead, Hildegard should be able to argue that her promise to care for Michael personally was a contract, supported by consideration in the form of Michael promising to contract back into the pair bond deal by providing for her and her daughter financially when he died. As long as she can prove the fact of their agreement (which was apparently oral), and it was voluntary, courts should enforce it. In other words, courts should treat both sides of the pair-bond exchange as contractual—legally enforceable—instead of treating just the masculine side of the exchange as a contractual, and the feminine side as a mere deal that courts will not honor.

While a change in legal doctrine to treat masculine and feminine sides of the pair bond deal the same way would mostly benefit women, it could also benefit some men, as illustrated by the next case.

## 2. Case #4: What’s Good for the Goose is Good for the Gander

The cases we have discussed, *Bonds*, *Faiman*, and *Borelli*, all involve richer men and relatively poorer women. But sometimes the woman is the richer spouse. As Illich rightly observes, gender is

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198. *Id.* at 24 (Poché, J., dissenting).

199. *Id.* at 23.

200. *Id.* at 24 (Poché, J., dissenting).

201. *Id.*

not tied to people's genitals, but instead to the work they do within a system of vernacular gender.<sup>202</sup> Accordingly, family law should treat the feminine side of the pair-bond deal the same whether it is performed by a man or by a woman. As the following case shows, both sides of the primal deal—financial support and emotional/domestic support—can be done by either men or women, and the only equality in family law rules here is that courts devalue “feminine” work done by men as much as they devalue its performance by women.

Seattle law firm partner Carla DewBerry was the one who benefitted from her oral prenuptial agreement with Emanuel George.<sup>203</sup> At the time of their agreement, he was a music industry executive and she was completing her education. Worried that she might become a financial drain on him, he agreed to marry only if she agreed to remain employed, not get fat, have a home to return to if the marriage failed, and treat all property and income as separate, instead of family, property.<sup>204</sup> Carla agreed. Throughout their fourteen-year marriage, even after the birth of their children, they never jointly owned a house.<sup>205</sup> Carla owned the house, and Emmanuel would pay a set amount each month for living expenses like utilities. (Emmanuel owned houses in Texas and California that he had bought before their marriage.) They assiduously maintained their financial independence, keeping separate bank accounts, and naming their children, rather than one another, as beneficiaries on retirement accounts. By the time they separated in 2000, Carla was a successful lawyer earning more than \$1 million a year, and Emmanuel had just switched from driving a UPS truck to training to become a longshoreman.<sup>206</sup> The Washington courts enforced their contract to keep all property separate, allowing Carla to keep \$2.3 million, and leaving Emanuel with \$600,000 and salary of less than \$48,000 a year.<sup>207</sup> The court justified its ruling by stating the general rule of enforcing prenuptial agreements: “[t]here is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit.”<sup>208</sup>

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202. ILLICH, *supra* note 1, 74, 80-81.

203. DewBerry v. George, 62 P.3d 525, 526 (Wash. App. Div. 2003), *cert. denied*, 77 P.3d 651 (Wash. 2003).

204. *Id.*

205. *Id.* at 527.

206. *Id.* at 527-28.

207. *Id.* at 527.

208. *Id.* at 531.

These cases, *Bonds*, *Faiman*, *Borelli*, and *DewBerry*, together, show the intimate exchanges in families. Marriage bound the spouses, elevating the pair bond deal to a contract that the law enforces through alimony and property sharing rules. In all four cases, the spouses chose to contract out of the pair bond deal, but courts only enforced contracting out of the masculine side of the deal. Courts indulged in the legal fiction that the feminine side of the deal is only a gift to mask the value of those housewifely tasks, effectively ruling that the valuable homemaking work that keeps families running is actually, according to family law, worthless.

The problem in these cases is not gender neutrality, as Illich might claim. The injustice is that courts tend to treat only half of the pair bond obligation as a contract—legally enforceable—and the other half as a mere deal. The cases also show how right Illich was in asserting the depth of humanity's tie to gender. Very few cases involve rich women like Carla DewBerry keeping property to themselves. Moreover, the near-ubiquity of spouses exchanging masculine and feminine work shows how both exchange and gender lie at the very heart of families. Exchange, in other words, facilitates gender complementarity in ordinary families, a far cry from Illich's claim that exchange is a newcomer to the family scene. A feminist solution to the problem of courts devaluing the feminine side of the pair bond deal is to have them honor both sides of the exchange, not indulge in the fiction that exchanges are not occurring at all. Illich mistakenly asserts that symmetry and exchange demote women to second-class citizenship. Instead, fully recognizing the value of both the feminine and masculine sides of the pair bond deal could elevate the value of tending work, and thus of women generally, since women are much more likely to perform that work. To use Illich's colorful phrase about the usually thankless work of homemakers, "shadow work," family law recognition of the value of that work could bring it out of the shadows, illuminating its tremendous value to children, men, and women.<sup>209</sup>

## CONCLUSION

Illich, in his zest to valorize pre-capitalist subsistence-level cultures, overlooks the exchange that makes all families—pre-capital-

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209. Tending work often extends beyond the nuclear family. For example, most of work done caring for elderly relatives is done by women. TED FISHMAN, *SHOCK OF GRAY* 96 (2010). Many of those in-family caretakers are daughters in law, nieces, grandchildren and others outside the immediate nuclear family.



ist, capitalist, post-industrial capitalist—form and last. Far from eroding our humanity, exchanges made our humanity possible. One primal deal is the pair bond between men and women, and another is the alloparenting bond between mothers and others—usually other females—who help them care for children. Yet family law recognizes only part of the pair-bond deal. When a couple marries, they contract into property sharing and tending contracts, which, to some extent, courts enforce, under the theory that both people contributed to its acquisition: one through paid labor, and the other through the care work that keeps a household going. However, courts also allow richer spouses to contract out of the masculine side of the deal—by refusing to share property—but do not allow poorer spouses to adjust their tending obligations under the pair bond deal.

Modern marriage, therefore, is grounded in a highly gendered exchange, the very opposite of Illich's contention that it is a "genderless economic partnership between a wage laborer and a shadow worker."<sup>210</sup> Family law falls short by recognizing too little exchange within families, not too much. It should, in particular, expand its recognition of the pair-bond deal to value the feminine side of this exchange. If richer spouses, usually men like Barry Bonds and Michael Borelli, but sometimes women like Carla DewBerry, contract out of their obligations to remunerate their homemaking spouses for making "feminine" contributions under the primal deal, then courts should recognize that those premarital contracts transform a marriage from a pair bond, an "us," to two separate individuals. Once courts see the way that prenuptial contracts can destroy reciprocity, they can award homemaking spouses the value of the tending work they did, from making children's lunches to sickbed care. Family law's current failure to recognize both sides of the pair bond exchange penalizes feminine behaviors, the very injustice that Illich wrote his book to address.

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210. ILLICH, *supra* note 1, at 168.