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THE LEGACY OF JANE LARSON: THE POLITICS OF PRACTICALITY AND SURPRISE

*Martha M. Ertman**

ABSTRACT

Jane Larson’s work and life enriched my own and others. Her intellectual framework—applying legal economic ideas of consent to feminist theory, backed up by legal history—suggest surprisingly practical solutions to problems ranging from the injuries of adultery and prostitution to housing in border towns.

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INTRODUCTION

Coming of age in the 1980s, I cut my feminist teeth on the phrase “the personal is political,” then grew up to make a career out of writing about families, the most personal of political institutions. Today, I set aside a chapter from the book I am calling *Love & Contracts* to write a few words about how Jane Larson’s life and work has informed my teaching and writing about the personal and political question of how law should treat the families I call “Plan

B”—cohabitants, same-sex couples, and polygamists—as well as the people who perform what are still called “housewifely tasks” in all kinds of families. I have learned a lot of doctrine and theory from Jane’s work, and our conversations at conferences, and about also the value of practicality and surprise.

I might have measured that legacy in law review footnotes that cite Jane’s work, conference panels featuring it, dissertations informed by it, and books further building on her contributions.¹ But this essay rejects the quantitative in favor of the qualitative approach, accepting the invitation of *festschrift*, as a genre, to reflect in personal terms on the work and character of a respected colleague. Accordingly, in honor of Jane’s dedication to the personal implications of political arrangements, as well as the political implications of personal arrangements, this piece braids a bit of memoir with legal analysis. It starts with the personal, telling a few stories about how Jane, as a person, left her mark, and then extends to her professional legacy, charting her ideas’ influence on my current book project, *Love & Contracts*. The essay’s very brevity reflects its role as a punctuation mark among the many things that can and will be said about the legacy of Jane’s signature blend of practicality and surprise in her scholarship.

I. ONE WILD AND PRECIOUS LIFE

The poet Mary Oliver famously asks “tell me, what is it you plan to do with your one wild and precious life?”² This big question greets me each morning from a little white strip of paper curled around an old mustard jar filled with Cape Cod sand that sits over my kitchen sink. While washing dishes the night I heard that Jane passed away, I thought about her work and her all too-short life. What did Jane, an academic, a feminist, a lawyer, a friend and colleague to many, a mother, do with her one wild and precious—and short—life?

Most of what I know about Jane is from her writing. I had just graduated from Northwestern when Jane joined the faculty, so I never sat in her classroom taking notes. But once I got into academia, I scribbled plenty of notes in the margins of her law review articles about the tort of seduction, age of consent,

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1. A Westlaw search on January 18, 2013, reported 126 citations to Jane’s article, Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993) [hereinafter “*Women Understand So Little*”]. Scholars dubbed it “provocative” and “radical.” Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West’s Caring for Justice*, 24 LAW & SOC. INQUIRY 477, 507 n.33 (1999); Viviana A. Zelizer, *The Purchase of Intimacy*, 25 LAW & SOC. INQUIRY 817, 839 (2000).

2. Mary Oliver, *The Summer Day*, in NEW AND SELECTED POEMS (1992), available at <http://www.loc.gov/poetry/180/133.html>.

and Texas colonias,³ and put together an author-meets-reader session on the fabulously titled book *Hard Bargains* at the Law & Society Association Annual Meeting. Richard Posner participated in that panel along with feminists Joan Williams, Linda Hirshman, and Jane, a mark of how her work bridged feminism and legal economics. Like a duckling learning to swim by following an older one, I read her work to learn not only the substantive material she conveyed with such precision and insight, but also to figure out how I, too, might combine feminism with legal economics, track doctrinal progressions to the social, political, and economic contexts in which they occur, and ask questions about what the legal rules should be now. On the page, and in our conversations, I emulated Jane as I found my own scholarly voice, becoming as deeply influenced by her selection of scholarly topics as by her determination to research and write from the heart with the larger goal of making the world a little safer, and a bit more dignified, for all kinds of women and men.

On a more personal front, I watched with particular interest how she managed to match professional life with family life, and plied her with personal questions when she presented a paper, all dignity in her pregnancy, at the University of Denver, where I used to teach. The birth announcement, as I recall, just said “a love supreme,” with Simon’s picture and birthday. Later, when he had grown to be a toddler, I ran into Jane at a conference. When I asked about Simon, she told me about taking him to Italy for some academic gig. I asked how it was to travel and work with a baby around (wondering myself how I would do it, when the time came), and Jane reassured me, enthusing about how “Italians love babies,” and had picked him up on buses and fussed over him wherever they went. I can still see her eye sparkle, and hear her generous laugh, as she added that, two weeks after they got home, sitting on the kitchen floor, Simon had looked at the cat and said, “ciao, meow!”

I had not seen Jane much, these past years, since I too have become someone juggling professional tasks with personal ones of marriage and motherhood. But when I do go out of town to present a paper, I think of her when I remember to tuck a picture of my son into conference materials, looking forward to it fluttering out, as a picture of Simon did back in 2001, when I was sitting next to Jane at a commodification conference. “Oh,” she smiled, as if telling the story of how the picture got in there magnified the pleasure of looking at her son, “I always slip a picture of him in there, as a pleasant surprise, while I’m away.”

Sometimes, Jane’s example was harder to follow. She once told me about how annoying law student editors’ changes were, because, she said, “I wouldn’t have sent it in if it weren’t done!” Then, as now, I send in things that need

3. See Jane E. Larson, “*Even a Worm Will Turn at Last*”: Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1 (1997); “*Women Understand So Little*,” *supra* note 1; Peter M. Ward, Flavio de Souza, Cecilia Giusti & Jane E. Larson, El Titulo En La Mano: *The Impact of Titling Programs on Low-Income Housing in Texas Colonias*, 36 LAW & SOC. INQUIRY 1 (2011).

editing, each time wishing I said it perfectly the first time. When I am facing a tsunami of editors' comments and suggestions, I think of Jane.

But Jane's substantive work took a different approach to perfection. When she saw a problem that law might address—constrained consent in sexual relations, say, or poor immigrants' slap-dash housing—she proposed solutions that balanced practical considerations against abstract ideals of justice and equality. It often surprised me, since it contrasted with other feminist and critical legal theorists' focus on idealized conditions. Sitting down to write this essay—a break from writing my own book, which also embraces practicality over purity—I realize that Jane's combination of practicality and surprise has influenced my book just as much as her substantive analysis of love and bargaining.

A. *The Virtues of Practicality*

Not satisfied to let her law review articles fall into the genre of scholarship I sometimes call cranky criticism, Jane's work documented inequality and the state's response to—or collusion with—that inequality at various times in various places, and finished by proposing a fix that might actually work. Throughout, her efforts to puzzle out solutions to long-standing issues of inequality—of gender, race and class—resisted the temptation of letting the perfect become the enemy of the good.⁴ In a series of articles, she argued for the re-invigoration of the tort of seduction and other so-called “heart balm legislation,” a sensible approach to age-of-consent laws, and relaxed zoning regulations in the Texas colonias.⁵ Always acknowledging hierarchy and its injuries on the bottom half of a dyad (male/female, rich/poor, or native/immigrant), she took the chance of proposing real-world solutions that were sure to raise hackles across the political spectrum. No wonder Richard Posner said of *Hard Bargains*, “The authors' outspokenness and radical slant will make this a controversial book, but it is not orthodox or doctrinaire, and the forcefulness, clarity and skill with which the authors defend their position will challenge skeptics.”⁶

This combination—charting inequality then proposing solutions to it—invested Jane's work with a foundational optimism. Rather than throw up her hands at ages of abuse, or propose castles-in-the-air solutions, Jane brought a reformer's passion and practicality to each topic she tackled. As she and her co-author Linda Hirshman said of their proposal to de-criminalize prostitution in *Hard Bargains*, “[w]e take no position on what the ultimate best policy would be, but argue that a first step toward a more just system of law is to take prostitution out of the state of nature and into the ordinary world of civil law.”⁷

4. A phrase commonly attributed to Voltaire. See VOLTAIRE, LA BÉGUEULE: CONTE MORAL (Kissinger Legacy Reprints ed. 2010) (1772).

5. See *supra* note 3.

6. LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998) (Posner's quotation is located on the book's dust jacket).

7. *Id.* at 294.

B. The Tactical Benefit of Surprise

Jane Larson's work was surprising. She was among the first feminists to pick up legal economic tools to resolve long-standing problems.⁸ Instead of seeing old doctrinal tools like the tort of seduction, or remedies for adultery at divorce as rusty skeleton keys useful only to lock women into domesticity—and out of the public sphere—she invited us to see long-dormant remnants of nineteenth-century Separate Spheres divisions between masculinity and femininity as potentially empowering for many women. How resourceful—even efficient—to refashion a familiar theoretical tool like game theory and use it to fix problems of unequal bargaining power between men and women in their intimate relations. Another patch of common ground Jane shared with legal economics is the benefits of free contracting. Throughout, Jane's scholarship sought to make consent meaningful, seeking to give voice to too-often silenced women in the law of rape, prostitution, and adultery.

Regarding rape law, Jane Larson and Linda Hirshman proposed to flip the default rule to require proof of consent to evade liability, a 180-degree turn from the current rule which requires the state to prove a victim's non-consent. Requiring proof of “an affirmative ‘yes’ as the condition for intimate access between adults,” they argued would protect women's “right to bargain for the conditions of sexual access.”⁹ Their goal was mutuality—genuine consent—and the means was “forcing the stronger player to bargain with the weaker for an explicit consent.”¹⁰

Hard Bargains similarly sought to invest prostitutes with freedom of contract. Citing the “widespread police corruption and sexual abuse of prostitutes” caused by criminalizing prostitution, they proposed an alternative civil regime: “We propose instead to regulate sex commerce through existing labor laws, protecting prostitutes as workers and treating pimps and patrons as employers. Prostitution would be an illegal labor contract, subject to the civil

8. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); MARGARET BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997). Other pieces that join in Jane and others' attempts to fashion feminist takes legal economics include Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1245 (1998). Other feminists saw the benefits of using legal economic tools, but advocated a more cautious approach. See, e.g., Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); JOAN WILLIAMS, UNBENDING GENDER (1999). My own work in this vein includes: RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW & CULTURE (Martha M. Ertman & Joan Williams eds., 2005); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.- C.L. L. REV. 79 (2001); Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003).

9. HIRSHMAN & LARSON, *supra* note 6, at 270-71.

10. *Id.* at 271.

and administrative penalties already applicable to, for example, child or sweatshop labor.”¹¹ Instead of the current regime, which largely penalizes sellers of sex, usually poorer and more female than the buyers, *Hard Bargains*’ approach would penalize only the employer and not the worker. Indeed, the view of prostitutes as workers instead of morally suspect people underscores the power of contract, in both theory and practice, to give economically and socially marginalized people a measure of control, dignity, and proper payment for their work. In the world of *Hard Bargains*, prostitution would occupy a liminal space, decriminalized but still unlawful, in which “prostitutes could demand payment for work performed under an illegal contract, protest harsh working conditions, or unionize without suffering legal penalty, even though their employment would remain illegal.”¹² In 1996, the erotic dancers at San Francisco’s Lusty Lady club unionized, demonstrating the ways that this proposal could help real-world women to support their families with heads held high.¹³

Adultery, our third and final example of *Hard Bargains*’ surprisingly practical fixes to the law governing sexual relations between men and women, represents a turn to civil law. Of course, adultery was once criminalized, but unlike rape and prostitution, the state has gotten out of the business of enforcing spousal promises of fidelity. Even in civil divorce cases, most states do not recognize the costs of adultery to its victims in the division of property at divorce, nor as a freestanding claim for breach of promise. Jane Larson and Linda Hirshman would change that. Again, contract provides the lever to propel an injury from invisible to compensable. Because, they explain, “adultery involves ‘betrayal of a promise of fidelity,’ . . . [w]e propose to restore to marriage a non-negotiable duty of sexual exclusivity. . . . If concubinage is regulated, as we propose to do, people can choose from a graduated series of relational obligations, with marriage as the most comprehensive.”¹⁴

Larson and Hirshman detail the injuries that law would ordinarily recognize, such as loss to dignity and reputation, emotional and mental distress, exposure to sexually transmitted diseases, and deception about a man’s relationship to the children of the family. They justify a civil instead of criminal penalty because these injuries are to the person and not to society, proposing that spouses wronged by adultery can seek either a “‘bonus’ in the division of marital property upon divorce or death, or a tort action for money damages available either during the ongoing marriage or after divorce.”¹⁵ Separated couples have put so-called “bad-boy” clauses into reconciliation agreements, and celebrities have reputedly put them in prenuptial agreements (prenups).¹⁶

11. *Id.* at 289.

12. *Id.* at 289.

13. LIVE NUDE GIRLS UNITE! (First Run Films 2000).

14. HIRSHMAN & LARSON, *supra* note 6, at 284-85.

15. *Id.* at 285.

16. Michael Douglas and Catherine Zeta-Jones’ prenuptial agreement provides that she would get a bonus if he is caught cheating. *See For Love or Money*,

While the courts generally will not enforce even formal, bargained-for fidelity agreements, these agreements retain social power within the couple.¹⁷

II. THE NEXT GENERATION OF MARRIAGE-AS-CONTRACT FEMINIST SCHOLARSHIP

We are here to celebrate Jane Larson's legacy, the inheritance she left us as colleagues. While each of us is mortal, the ideas, our life's work, may continue after we are gone. Jane's ideas about bargaining and intimacy form a cornerstone of my own work. My book-in-progress, *Love & Contracts*, combines memoir and legal analysis, just as this essay does, because each genre conveys its own truths, emotional or cerebral. Accordingly, we pivot here from the personal to the professional, zooming in on how Jane's analysis informs the family law chapters of my book. A brief description of one chapter shows the continued vitality of her ideas transplanted into my argument for honoring the shopping, cooking, cleaning, carpooling, and helping with homework that keep a family operating.

A. *Exchanges in Plan A Families*

My book suggests that we see families come in two forms: Plan A and Plan B. The families I call "Plan A"—married, heterosexual, having kids conceived at home—are most common. "Plan B" comes into play when law, luck or biology block access to Plan A, requiring law and society to provide rules that govern cohabitation, same-sex relationships adoption, and reproductive technologies.

Both Plan A and Plan B, I argue, are supported by a web of contracts and mini-contracts that I call "deals." Contracts are legally binding, while deals are either too little, too vague, or against public policy, so courts don't enforce them. Plan B agreements are more obvious in Plan A families' contracts and deals, because Plan B families generally merit legal recognition only when people make explicit agreements about cohabitation, reproductive technologies.

Plan A agreements, in contrast, are harder to see because they are deeply embedded in both social norms and family law rules that mask the exchange elements of family life. My book argues that family law implicitly honors many exchanges that help people build our families—Plan A as well as Plan B—revealing that the heart of family is connection rather than the particular form that connection takes. Consistent with Jane Larson's work on agreements among intimates, I hope to nudge the law toward honoring the promises intimates make to each other, much as it would if they were dealing at arms' length.

Research from other disciplines helps explain how exchanges help form and maintain family connections. Economists like Gary Becker and socio-

CHICAGOTRIBUNE.COM (Aug. 2, 2004), http://articles.chicagotribune.com/2004-08-02/news/0408030054_1_prenuptial-agreement-eric-benet-halle-berry.

17. See *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494 (Cal. Ct. App. 2002); *In re Marriage of Mehren & Dargan*, 13 Cal. Rptr. 3d 522 (Cal. Ct. App. 2004).

biologists like E.O. Wilson and Richard Dawkins as well as feminist anthropologist Sarah Blaffer Hrdy, demonstrate the long history of family exchanges.¹⁸ Indeed, there is evidence that family exchanges helped humans become the walking, talking, writing, singing, abstract-thinking, internet-inventing creatures that we are. If evolutionary scholarship properly interprets prehistoric data, recognizing family exchanges cannot hurt families because pair exchanges form the very foundation of all human families.

According to E.O. Wilson, the first exchange, often called “pair bonding,” involved our ape-like forefathers swapping meat from the hunt for our hairy foremothers’ foraged roots and sexual exclusivity.¹⁹ Alongside other exchanges—like females swapping childcare duties—these allowed our ancestors to have four times more children. That population explosion gave us a huge advantage over other apes by handing natural selection a much bigger talent pool from which to cull the smartest, strongest, and most cooperative genes to pass on to the next generation.²⁰ If you recoil at the mention of socio-biology, as Jane Larson did in reviewing Richard Posner’s *Sex and Reason*,²¹ you can skip this material and find adequate support for my central arguments in the legal and historical analysis of pair-bond exchanges. But soldiering through pays off, because evolutionary biology has itself evolved in recent years, and provides compelling arguments that underline, instead of undermine, the value of women in families and society more generally.

This research matters because today, a million years after proto-humans began their pair-bond exchanges, most families, and family law, continue to be shaped by the pair-bonding exchange.²² Today more wives work outside of the home than ever before, and most husbands still have higher wages, so that women, on average, contribute only 28% of family income.²³ Yet, wives, on average, still do around 70% of what courts sometimes call “housewifely tasks” like shopping, cooking, cleaning, and making sure kids do their homework and

18. RICHARD DAWKINS, *THE SELFISH GENE* (new ed. 1989); E.O. WILSON, *ON HUMAN NATURE* (new ed. 2004); SARAH BLAFFER HRDY, *MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING* (2009) [hereinafter *MOTHERS AND OTHERS*]; SARAH BLAFFER HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* (1999) [hereinafter *MOTHER NATURE*].

19. WILSON, *supra* note 18, at 139.

20. See generally *MOTHERS AND OTHERS*, *supra* note 18 (discussing “cooperative breeding” and its psychological implications in the evolution line from apes to *Homo Sapiens*); *MOTHER NATURE*, *supra* note 18 (discussing maternal instincts and their effect in shaping the human species).

21. Jane E. Larson, *The New Home Economics*, 10 CONST. COMMENT. 443 (1993).

22. Many scholars have written about how family law increasingly acknowledges friendship bonds and allomothering exchanges. See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47 (2007); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008).

23. See KRISTIN SMITH, CARSEY INSTITUTE, *INCREASED RELIANCE ON WIVES AS BREADWINNERS DURING THE FIRST YEAR OF THE RECESSION 2* (2009), available at <http://www.carseyinstitute.unh.edu/publications/IB-Smith-Breadwinners09.pdf>.

get vaccinations.²⁴ While America's evolution from a manufacturing economy to one where most jobs are in service industries may cause many Plan A couples to switch roles, with husbands doing more grocery shopping and wives working longer hours, the fact remains that in most families one person focuses more on wage labor, and the other more on keeping house.²⁵ If evolutionary scholars are right that humans are the most flexible species on earth, it is hardly surprising that gender roles are changing. What remains stable, it seems, is a pair-bonding exchange, as long as one person contributes more financially and the other does more on the home front.

B. The Law As It Is

This larger pattern is reflected in family law's general rule requiring spouses to share property that either one earns. The idea is that marriage is like a partnership, with one person mainly contributing wages and the other focusing on grocery shopping, cooking, cleaning, and making sure Christmas cards get sent. The end result is a home and family that they share, and they generally split their family assets when they divorce. Since the 1970s, family law has made an exception to this property-sharing rule by allowing spouses to "contract out" of property-sharing.²⁶ That is entirely consistent with the contractual arguments in this book, but family law needs to go further.

Currently, too many courts apply a double standard that values the provider's contributions more than homemaking. Recognizing the exchanges built into the very foundation of Plan A families can help family law do a better job of valuing both sides of the pair-bond exchange. Three cases illustrate the general rule of property sharing mandated by the marriage-as-partnership model as well as family law's willingness to allow spouses to contract around that default rule. They progress from property sharing to prenuptial contracts that eliminate property sharing and privilege one half of the pair-bond exchange over the other. A fourth and final case picks up another strand of Jane Larson's work, highlighting how law could and should enforce promises of fidelity among spouses.

i. Case #1: General Rule of Property Sharing

Eunice and Miguel ("Mike") Flechas divorced after Eunice gave up her teaching job to move to Mississippi with Mike and become a full-time homemaker taking care of his child.²⁷ If they did not make any agreement about how to share their property, family law would divide it. But marrying in the

24. Amy Tennery, *More Women are in the Workforce – So Why are They Still Doing So Many Chores?*, TIME (June 28, 2012), <http://business.time.com/2012/06/28/more-women-are-in-the-workforce-so-why-are-we-still-doing-so-many-chores/>.

25. LIZA MUNDY, *THE RICHER SEX* (2012); HANNAH ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* (2012); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010).

26. *See, e.g.*, *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

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

1950s, with children from prior marriages, they agreed to keep Eunice's property—around \$500,000—separated from Mike's \$5 million net worth. But their prenup was silent about the \$1.6 million Mike earned while they were married. The judge allowed Eunice a share of that money because, the judge said, "marriage is considered a partnership . . . although [Eunice's] contributions of domestic services are not made directly to a retirement fund, they are nonetheless valid material contributions which indirectly contribute to any number of marital assets, thereby making such assets jointly acquired."²⁸ Since the prenup exception did not apply to money Mike earned during their marriage, the court reverted to the general partnership rule and divided that money and the property bought with it.

ii. Case #2: Exception: Prenuptial Agreements

Baseball great Barry Bonds managed to keep his \$43 million from a contract with the San Francisco Giants.²⁹ After Bonds married a Swede named Sun months after they met in a Montreal sports bar, the general rule would have required him to share under the assumption that they swapped financial support for housewifely tasks. But Bonds used a prenup, signed hours before their wedding, to "contract out" of the general rule and his half of the pair-bond exchange. This outcome is entirely consistent with the trend toward honoring contracts in family law, but it also ignores half of the pair-bond exchange. This chapter raises the question of how family law should treat a couple's pair-bond exchange when the provider contracts out of his half of the agreement.

iii. Case #3: The Price of Valuing only Half of the Pair-Bond Exchange

Michael and Hildegard Borelli's case underscores the injustice of giving providers the power to contract out of their side in the "gift" exchange between spouses but denying that power to caregivers.³⁰ Seventy-something businessman Michael Borelli took advantage of that double standard to free ride on his wife's labor and sacrifices. When doctors told Michael to move to a nursing home, he promised to alter his prenup with Hildegard if she would attend to all his needs 24/7. But he did not, leaving his property instead to a daughter from his prior marriage. California courts refused to enforce Michael's promise, essentially holding that Michael could contract out of his half of the pair-bond exchange but hers was an unalterable status because "a wife is obligated by the marriage contract to provide nursing type care to an ill husband."³¹

The cases thus far have shown how family could and should honor both halves of the pair-bond exchange between caregivers and financial providers. But spouses contract about fidelity as well. Jane Larson's work on the tort of seduction, age of consent rules, and especially the prospect of legally

28. *Id.* at 301-02.

29. *In re Marriage of Bonds*, 5 P.3d 813 (Cal. 2000).

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

31. *Id.* at 19.

recognizing the harms of adultery, underline the importance of that recognition, both for the people involved and for the expressive function of law. A final case, about a reconciliation agreement, shows the profound injustice of law's traditional refusal to recognize fidelity agreements as enforceable contracts.

iv. Case #4: Unfaithfulness to Fidelity Agreements

Donna and Michael Diosdado separated after his affair, then used a formal, attorney-drafted contract to reconcile.³² They agreed if either one cheated, the victim of that infidelity would get an extra \$50,000 of marital property upon divorce. The California court refused to enforce their reconciliation agreement, worrying that it would undermine no-fault divorce to let spouses put a price on the damage Miguel's cheating did to Donna and their marriage. Family law can do a better job of valuing both homemaking and fidelity, as the final section shows.

C. *The Law As It Should Be*

Taking inspiration from Jane Larson's concrete proposals for doctrinal reform, my book offers solutions to better value both homemaking and emotional promises like fidelity.

i. Three-Step Solution

Family law already follows the general rule (partnership-based property sharing), unless a prenuptial agreement (prenup) triggers the exception of one party hoarding most or all property acquired during the marriage. I propose we add a third step that would apply when a property-hoarding prenup contracts out of the provider's half of the pair-bond exchange. In that case, courts should discard the fiction that homemaking is a pure gift, and calculate the value of that spouse's days, months, and years of cooking, cleaning, carpooling, helping with homework, and doing the other work that makes a house a home. While some scholars advocate a return to pre-1970s law that limited the right to make prenups,³³ my approach honors providers like Miguel Flechas, Barry Bonds, and Michael Borelli's freedom to enter prenups to protect their property, but also compensates homemaking spouses when property-hoarding prenups would otherwise leave them high and dry after they spent years making sure that everyone else in the family was clean, fed, and cared for.

ii. Enforcing Reconciliation Agreements

Family law should similarly honor the freedom of contract of spouses who make formal reconciliation agreements trying to avoid divorce, rather than second-guess these couples' choice. Holding Miguel Diosdado to his promise to give up \$50,000 of marital property if he cheated again—because that

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

33. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65 (1999).

promise of fidelity induced Donna to take him back—would not re-inject fault into no-fault divorce rules as the court feared. Honoring those promises would merely hold people to promises that induce others' actions, just as Jane Larson would hold seducers to their promises under the tort of seduction. Consistent with Jane's assertions that law should recognize harms inflicted by intimates, my proposal would honor contractual promises to pay "liquidated damages" when it is hard to calculate the damage done by breach of a promise of fidelity. When Miguel Diosdado freely agreed to put a money value on the otherwise hard-to-calculate damage his cheating caused his wife and his family, he should be liable to her for breach just as he would in a business agreement.

My contractual proposals—honoring both sides of the pair bond exchange as well as promises of fidelity—should show consistent with Jane Larson's work, that a robust view of consent can honor the initial promises that got people into the family business in the first place.

CONCLUSION

Jane Larson left a legacy in letters, planting ideas that continue to sprout offshoots in my and others' scholarly writing. I never failed to be surprised by her work, and impressed at its breadth, or heartened by its willingness to propose practical solutions to hard problems. Those of us who spend our wild and precious professional and personal lives trying to puzzle out ways that law might operate better and more equitably will long miss her laugh, her thoughts, and her beautiful prose.