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## Rules of Engagement

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# Rules of Engagement

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In 1997, millionaire John Lattanzio sued model Ines Misan for the return of half a million dollars in gifts he had given her, allegedly in the hope that she would marry him. The scandal died down when they settled, Misan keeping gifts worth \$210,000 and returning an engagement ring worth \$290,000.<sup>1</sup> The settlement probably replicated what a court would have done,<sup>2</sup> which raises the question: Why does the law treat engagement rings differently from other gifts? The answer is rooted in a history in which courts generally entertained litigation over broken engagements. As legislatures slowly abolished actions for breach of promise to marry in the early and middle decades of this century, on the grounds that such actions were inconsistent with modern understandings of love and marriage, one potential fact pattern for successful plaintiffs emerged: the case in which a man sues a woman for the return of his engagement gifts.

The history and logic of this body of law—the rules of engagement—invite examination. Most discussions of the role of the law in regulating marital relations assume that the law begins its control at the time of the marriage ceremony. The state prescribes who can marry, and how; the state also determines the terms upon which marriages can be dissolved. The assumption is that the law's effects on premarital behavior are indirect consequences of this post-ceremonial regulation.<sup>3</sup> Most analyses of family law do not recognize the direct regulation of premarital behavior as a part of the no-fault regime that has grown up around marriage.

This failure to examine premarital law has prevented commentators from evaluating the ideas about property embedded in the current premarital legal regime, particularly the gendered consequences of that regime. It has also encouraged legal analysts to consider questions of the definition of property and the nature of promises to marry as settled and irrelevant to other areas of the law. This inattention is a mistake. It should be no surprise that

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1. See Andy Geller, *Mogul Gets His Rock Back but Model Keeps Rest of "Candy,"* N.Y. POST, Dec 17, 1997, at 4.

2. See N.Y. CIV. RIGHTS LAW § 80-b (McKinney 1992); *Equal Time* (CNBC television broadcast, Dec 17, 1997), transcript available in LEXIS, News Library, Curnws File.

3. For example, a man may decide not to marry at all because an easily terminable marriage would put more burdens on him than a nonmarital relationship, without conferring sufficient emotional or material benefits to justify the costs. See, e.g., Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994) (discussing the possible effects of divorce law on premarital decisions).

contradictions and gendered inequities lurk in unexamined areas of family law. There is, in fact, a well-developed body of premarital law that regulates what happens when a promised marriage fails to occur. Its scope used to be quite broad indeed—allowing recovery for all manner of consequences from a failure to marry—but has in recent decades become sharply limited. Now, it mainly requires the return of tangible property transferred from one prospective spouse to the other. In practice, this means the return of engagement rings to their male donors.

The general neglect of premarital relations stands in sharp contrast to the careful attention scholars have paid to other moments in the marital relationship.<sup>4</sup> Even as scholars and legal reformers have become increasingly aware that marriage does not end instantaneously—recognizing, for example, that despite the “clean break” policies of no-fault divorce law, there are many lingering effects of a broken marriage<sup>5</sup>—they have continued to act as if marriages were created out of thin air, all obligations instantaneously in place.<sup>6</sup>

The idea of pure, romantic, nonmaterialistic love became so powerful over the course of the twentieth century that courts could no longer fully analyze the ways in which the economics of marriages and planned marriages were linked to the emotions surrounding them. This shift in understanding worked against many women’s material interests, as once-common and oft-successful female plaintiffs<sup>7</sup> disappeared from the case reporters, replaced by theretofore virtually unknown, and suddenly successful, male plaintiffs.<sup>8</sup>

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4. See, e.g., Symposium, *Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2119 (1994) (discussing the law’s effects on behavior during and after marriage).

5. See, e.g., Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance To Call It Property*, 17 WOMEN’S RTS. L. REP. 109, 130-35 (1996) (criticizing the “clean break” theory); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 84-88 (1991) (same); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303 (1994) (same).

6. Family law scholars have recognized that even with no-fault, there is a range of possible property division regimes. Current debates in family law take no-fault as their starting point, whether to refine the concept or to criticize it, but even those who accept the concept may not agree on what it should entail. Some critics argue that marriage-specific investments in childcare and homemaking should be compensated as lost economic opportunities when the marriage ends. See, e.g., Perry, *supra* note 5, at 84-88. Such proposals accept no-fault, but they define what is to be distributed at divorce differently from the early no-fault regimes. In premarital family law, by contrast, no-fault has been assumed to counsel only one method of property division—mandatory return of engagement gifts—without further discussion of possible no-fault alternatives. See *infra* Subsection II.A.2.

The study of premarital law is also illuminating for two other reasons. First, the legal regulation of premarital relationships rarely involves children, whose independent interests can complicate the analysis of what would otherwise be a purely voluntary relationship between two adults. Second, when there has been no marriage, there is no property acquired during the marriage to distribute, and complex questions of valuation and contribution are therefore absent. These factors might seem to make the law of broken engagements simple because only fairly uncomplicated relationships need to be addressed. Yet this apparent simplicity does not aid the resolution of premarital claims as much as one might believe. The legal standards applied to premarital cases still rest on complex judgments about the meaning of “no-fault” and the legitimate expectations with which people enter into intimate relationships.

7. See Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1, 4-11 (1989) (discussing the standard use of the breach-of-promise action by women).

8. See *infra* Part II.

Part I of this Note gives a history of the law of broken engagements and describes the movement that began in the 1930s to reform that “heartbalm” law. Reformers, who argued that trying to measure lost love with money was ridiculous, impossible, and wrongful, successfully persuaded many state legislatures and high courts to abandon the earlier law of broken engagements.

Part II examines a set of cases that arose after reform, in which disappointed male suitors attempted to get engagement gifts back from their ex-fiancées. Courts at first applied the fault-based principles of earlier law, along with the fault judgments of the reformers, who feared gold-digging women. As no-fault principles gained prominence in other areas of marital law, courts began to apply no-fault to broken engagements as well and held that gifts must be returned. Part II then demonstrates that the doctrinal reasons elaborated for the current state of the law are inconsistent with the “antiheartbalm” laws’ insistence on the noncommodifiability of love and marriage.

Part III takes up the particularly gendered effects of current doctrine, which requires the return of engagement gifts while allowing no redress for pre-wedding expenses borne mainly by women. This part discusses one potential response to such inequities, a reliance-based theory that would award relief when one party has made expenditures in reasonable anticipation of an impending marriage. A reliance cause of action, however, would reintroduce a fair amount of fault reasoning into premarital law, unless it too was made subject to bright-line rules that could make the application of reliance principles differ from actual couples’ expectations.

Part IV concludes with some observations about the complexity of family law reform. Both fault and no-fault visions of family law have powerfully appealing elements, and no one answer may ever be satisfying. Some scholars have suggested that further reform of family law statutes may have only a minimal effect so long as courts continue to have discretion in defining the contours of fault and the level of damages.<sup>9</sup> If this is so, it is vital to understand what judges believe and what arguments they find persuasive, so that any proposed statutory reform will actually be implemented and not overwhelmed by interstitial judicial interpretation. Engagement gift jurisprudence shows what courts believe to be their role in regulating fault and distributing property in romantic relationships.

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9. See, e.g., Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 777 (1996); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1119-20 (1989); cf. Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2531 (1994) (suggesting that judges have a deep-seated need to consider fault).

## I. THE HISTORY OF THE REGULATION OF THE PREMARITAL RELATIONSHIP

The modern rules of engagement arose from a complicated legal regime that has undergone major changes in the past century. Those changes resulted from legal reformers' conviction that the law was being abused in cases of feigned lost love and from their related belief that love and law were incompatible. The reformers' ideas about romance and appropriate female behavior made a legal withdrawal from the regulation of failed courtships seem appropriate and even imperative. The reformers' gradual success, both legislatively and judicially, then shaped the remaining rules of engagement.

In early American law, women could recover damages when men promised marriage and then reneged; the action was known simply as "breach of promise."<sup>10</sup> Early breach-of-promise cases were mainly about responding to the financial harms of a broken engagement, but the action was reconceptualized over time as one centering around emotional wounds.<sup>11</sup> By the beginning of the twentieth century, recoverable damages included the loss of the benefits a woman would have received from marriage, her loss of a chance to marry someone else, and the emotional harm she suffered from the broken engagement, giving rise to the popular name for the resultant lawsuits—heartbalm suits.<sup>12</sup> The jurists who rewrote the justification for breach of promise thought that they were saving it, because a focus on the economic benefits of marriage seemed unenlightened and outdated. But the switch to an emotional justification eventually doomed the action, as courts and legislatures became uncomfortable with awarding money for emotional harms. From the 1930s through the 1950s, a wave of antiheartbalm proposals swept the United States. Responding to charges that heartbalm actions enabled designing women to blackmail worthy men, legislators in many states passed statutes eliminating breach-of-promise and related actions.<sup>13</sup>

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10. See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 33-38 (1985); cf. GINGER S. FROST, PROMISES BROKEN: COURTSHIP, CLASS, AND GENDER IN VICTORIAN ENGLAND 80-97 (1995) (describing the similar nature of English law during the 19th century).

11. See GROSSBERG, *supra* note 10, at 35-37.

12. See, e.g., *Hahn v. Bettingen*, 83 N.W. 467, 467 (Minn. 1900). Related actions included the torts of seduction, criminal conversation (adultery), and alienation of affections. See Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 986-96 (1935); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996).

13. In 1935, Indiana became the first state to enact the reform proposals. See Act of Mar. 11, 1935, ch. 208, 1935 Ind. Acts 1009 (codified as amended at IND. CODE ANN. § 34-4-4-1 (Michie 1986)). Within a year, six more states had joined Indiana, and by 1945 the total was 11. See M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. J. 33, 65 & nn.237-39 (1987). Antiheartbalm laws were proposed, but failed, in 15 other states during this period. See *id.* at 65 n.240. After the first wave of statutes was passed, heartbalm actions appear to have declined dramatically, even in states without antiheartbalm laws. Though it is difficult to ascertain the reason for this decline, it suggests that the same social transformation that made the antiheartbalm proponents' account of love and marriage appealing to legislatures made women less likely to bring suit in the first place. Juries' sympathy for the suits evidently declined as well, perhaps reflecting similar social changes. See Annotation, *Excessiveness or Inadequacy of Damages for Alienation of Affections, Criminal Conversation, or Seduction*, 36 A.L.R.2d 548, 548-49

Some of the reformers understood themselves as feminists, committed to the equality of men and women, and others did not. Both groups, however, made similar arguments against heartbalm suits, focusing on the potential for blackmail by scheming women.<sup>14</sup> Feminists also expressed concern that the actions ensconced marriage as the epitome of a woman's existence and encouraged women to use men for economic benefits rather than to meet them on equal terms.<sup>15</sup> Reformers might also have been motivated by a related decline in the significance of "seduction," as a woman's apparent or actual loss of virginity was no longer enough to "ruin" her; such a woman was increasingly able to find a job and even a man who would still accept her.<sup>16</sup> When an unmarried woman's loss of virginity became less devastating, the justification for the actions was less compelling.

The blackmail argument reflected a belief that heartbalm actions attracted undue attention, embarrassing both courts and the parties; men would settle baseless lawsuits, the argument ran, rather than contest the demeaning allegations involved.<sup>17</sup> The actions were denounced as freaks of the common

(1954). At times during the ensuing decades, various states legislatively or judicially curtailed their heartbalm actions. See, e.g., *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981) (abolishing alienation of affections); *Wyman v. Wallace*, 615 P.2d 452 (Wash. 1980) (same). For examples of the kind of criticism that led to the reform, see Robert C. Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474 (1929); Feinsinger, *supra* note 12; and Edwin W. Hadley, *Breach of Promise To Marry*, 2 NOTRE DAME LAW. 190 (1927).

14. See, e.g., Act of June 11, 1945, ch. 23,138, pmbi., 1945 Fla. Laws 1342, 1342 (stating that heartbalm actions had been "subjected to grave abuses . . . by unscrupulous persons for their unjust enrichment"); Act of July 8, 1947, § 1, 1947 Ill. Laws 1181, 1181 (codified at 740 ILL. COMP. STAT. 15/1 (West 1997)) ("[The breach-of-promise suit] has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable in such actions . . ."); Act of Mar. 11, 1935, 1935 Ind. Acts at 1009 (abolishing heartbalm actions "to promote public morals"); Act of May 4, 1945, ch. 1010, § 1, 1945 Md. Laws 1759, 1760 (reciting the same language as the Illinois statute); W.J. Brockelbank, *The Nature of the Promise To Marry—A Study in Comparative Law* (pt. 1), 41 ILL. L. REV. 1, 14-15 & n.71 (1946) (noting that similar statements existed in New Jersey, Colorado, Nevada, New York, and Wyoming antiheartbalm laws); Brown, *supra* note 13, at 492; Feinsinger, *supra* note 12, at 984-85, 988; Hadley, *supra* note 13, at 193-94; Note, *Legislative Abolition of Certain Actions Designed To Protect the Family Relation*, 30 ILL. L. REV. 764, 773 n.59 (1935) ("For years these actions have been used to extract large sums of money without proper justification. They have been a fruitful source of coercion, extortion and blackmail." (quoting New York Governor Herbert H. Lehman's 1935 speech upon signing antiheartbalm legislation)).

15. See, e.g., HARRIET SPILLER DAGGETT, *LEGAL ESSAYS ON FAMILY LAW* 39 (1935); see also Coombs, *supra* note 7, at 12-13 (discussing the views of feminist reformers). So much did feminist reformers agree with nonfeminists who also attacked the heartbalm actions that they failed to make possible criticisms that would have been particularly sensitive to women's concerns. For example, feminists did not focus their criticisms on the action for alienation of affections, which made someone who advised a wife to leave an abusive husband liable. See *Modisett v. McPike*, 74 Mo. 636, 646-47 (1881); Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 487 (1934).

16. See Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," 93 COLUM. L. REV. 374, 379, 397-99 (1993) (discussing changes in sexual morality that meant "fallen" women were no longer completely excluded from respectable society).

17. See Feinsinger, *supra* note 12, at 1009 ("[The] connotation of sexual misbehavior . . . [leads to] disproportionate publicity. One result . . . is to encourage unfounded claims, and another is to induce innocent defendants to enter into extra-judicial settlements."); Harter F. Wright, Note, *The Action for Breach of the Marriage Promise*, 10 VA. L. REV. 361, 361 (1924) ("This spectacle of having unfortunate love affairs publicly aired in the courts . . . is . . . highly detrimental to the sacred relation it regards so lightly, and should therefore be consigned to innocuous desuetude along with other barbarous

law, containing unjustified and illogical mixtures of tort and contract: Though the action was based on a contract-like promise, tort damages were available, no proof of an agreement to marry was required beyond the female plaintiff's word, and witnesses who in other cases would have been declared incompetent and biased were allowed to testify.<sup>18</sup> These deviations from established categories occurred precisely because courtship was private, conducted differently from standard business deals, further supporting the reformers' claim that courts should avoid such cases entirely.<sup>19</sup> Damages, it was also said, could not be precisely measured in such cases.<sup>20</sup> The hybrid nature of heartbalm actions and the blackmail they invited were particularly offensive because only women, in practice, could bring such suits.<sup>21</sup> Finally, reformers argued that heartbalm torts reflected a misunderstanding of marriage, which was a relationship incapable of measurement in monetary terms.<sup>22</sup> This last claim, the "anticommodification" argument, became increasingly important as the antiheartbalm laws were interpreted by courts.<sup>23</sup>

The problem, as reformers saw it, was that women were extorting money by pretending to be bereft. According to the reformers, many of the alleged promises that formed a basis for suit were never made; perhaps the plaintiff in a heartbalm suit had participated in a sexual relationship with the defendant, but a wealthy, respectable man would never marry the kind of woman who would engage in (or admit to) such a relationship.<sup>24</sup> It was simple to conclude that a heartbalm plaintiff's wrong went beyond the lie, to her attempt to link money with love.<sup>25</sup> Rejecting heartbalm actions preserved a sphere of intimate

amusements . . .").

18. See GROSSBERG, *supra* note 10, at 33-37; Brown, *supra* note 13, at 474-90; Feinsinger, *supra* note 12, at 981, 983-84; Note, *supra* note 14, at 768; Legislation, *Abolition of Actions for Breach of Promise, Alienation of Affections, Criminal Conversation and Seduction*, 5 BROOK. L. REV. 196, 198-99 (1936). But see GROSSBERG, *supra* note 10, at 56-58 (noting that the unusual evidentiary rules for breach-of-promise suits had been largely made to conform with other actions in the late 19th century, well before the legislative reforms).

19. See Brown, *supra* note 13, at 478.

20. See, e.g., *Morey v. Keller*, 85 N.W.2d 57, 60 (S.D. 1957); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 403 (1935) ("The awards made by juries are large, and, even after these have been reviewed by the courts, the judgments are often seemingly disproportionate to amounts given for more substantial claims, such as bodily injuries.").

21. See, e.g., Brown, *supra* note 13, at 491 (arguing that breach-of-promise suits amounted to "gross discrimination, entirely out of harmony with our modern ideas of the equality of the sexes"); Note, *supra* note 14, at 768 & n.27 (noting the practical unavailability of the action to men).

22. See *infra* notes 24-37 and accompanying text.

23. Feminist theorists have examined the gendered norms at work in the reformers' blackmail arguments, see, e.g., Coombs, *supra* note 7; Sinclair, *supra* note 13; VanderVelde, *supra* note 12, but have not specifically interrogated the rhetoric and logic of anticommodification.

24. See Coombs, *supra* note 7, at 16 (noting that the heartbalm suits that were widely reported usually involved men of wealth and women of much lower social class, so that "[m]any readers would no doubt believe that a man of wealth and breeding never intended nor agreed to marry a woman from the other side of the tracks").

25. Anticommodification also appealed to a more general discomfort with awarding damages for harms that seemed difficult to translate into monetary terms. See Brown, *supra* note 13, at 493; see also Lisa M. Ruda, Note, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197, 202-04 (1993) (describing arguments that juries exercise unbridled discretion

human relations free from the intrusion of commodification and an insulting market valuation of love. As the reformers understood it, marriage had once been an almost entirely economic relationship. As women became more free to choose their own life plans, marriage increasingly became an affective relationship. Eliminating the economic aspect of the legal regulation of marriage would modernize this area of the law. Any remaining economic incidents of courtship, such as engagement gifts, were purely symbolic, removed from the realm of the market because they had been transferred on account of love.

The reformers deployed these arguments to advocate change. The woman who introduced Indiana's heartbalm legislation, for example, argued that "[t]here is no cash value on misconduct and I submit to you that love and respect and affection are not transferable, negotiable commodities—certainly not recoverable in a court of law."<sup>26</sup> A feminist author endorsed the proposition that breach of promise inappropriately "'put a contract to marry on the same footing as a bargain for a horse or a bale of hay.'"<sup>27</sup> Treating a marriage like a contract made it "'soul-less'" by subjecting lovers to contractual compulsion.<sup>28</sup> In the popular press, the arguments were the same.<sup>29</sup> One author sharply distinguished the sphere of the market from the sphere of the family: "Instead of mutual distrust and suspicion [in the market], the attitude [in engagement] is one of mutual trust and confidence, each glorified in the eyes of the other. Instead of the underlying motive of selfishness there is an impulse of self-sacrifice."<sup>30</sup>

Instead of justifying greater legal protection, the heightened trust in the private sphere was evidence that no legal intervention was needed. The implicit vision was of a firewall between personal, disinterested love relations and the selfish market. What was normal in one area was anathema in the other.<sup>31</sup>

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over noneconomic damages and can too easily be swayed by sympathetic plaintiffs or eloquent lawyers). One contemporary commentator stated that the anticommodification argument was not serious because "the logical extension of that argument would lead to other highly favored rights and remedies," such as compensation for pain and suffering. Frederick L. Kane, *Heart Balm and Public Policy*, 5 *FORDHAM L. REV.* 63, 66 (1936). He identified the fear of blackmail "rackets" as the nearly sole cause of the antiheartbalm measures' success. *Id.*

26. *Aching Hearts Are Itching Palms, Says Woman Legislator as Men Gallantly Pass "Love Bill,"* INDIANAPOLIS NEWS, Feb. 1, 1935, at 1 (quoting Roberta West Nicholson's speech in defense of her bill); see also *Moulin v. Monteleone*, 115 So. 447, 457 (La. 1927) (finding that monetary compensation for a wife's adultery would be "revolting"); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 103, at 697 (2d ed. 1955) ("[I]t is impossible to compensate for such damage with what has derisively been called 'heart balm;' . . . people of any decent instincts do not bring an action which merely adds to the family disgrace . . .").

27. Dorothy Dunbar Bromley, *Breach of Promise—Why?*, *WOMAN CITIZEN*, Sept. 1927, at 8, 40 (quoting a legal encyclopedia).

28. *Id.* (quoting Charles J. MacColla).

29. See, e.g., Anthony M. Turano, *Breach of Promise: Still a Racket*, 1934 *AM. MERCURY* 40, 46.

30. Wright, *supra* note 17, at 368.

31. Cf. Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 *J. AM. HIST.* 9 (1988) (discussing the prevalence and power of the separate spheres metaphor); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-*



Love, then, was justly exchanged only for love; giving love to get material security defrauded and abused the deluded object of a woman's attentions.<sup>32</sup>

The reformers argued that love was noncommodifiable and unmarketable: It could be given, but it could not be exchanged as part of a contract.<sup>33</sup> "[L]ove lost has no value, and . . . trafficking in love is a system of banditry."<sup>34</sup> Nebraska state Senator Chambers, defending his antiheartbalm bill, declared that "[w]e romantic men . . . believe love is something which should be the last of all things to sell at a price on the open market."<sup>35</sup> The fact that businessmen—the ideal rational actors—were subject to heartbalm suits because they foolishly wrote down their sweet nothings demonstrated that applying legal rules to affairs of the heart was ridiculous.<sup>36</sup> Love was not and could not be managed like a market transaction.<sup>37</sup>

The reformers also believed that public exposure of love affairs degraded the involved parties. Airing soiled linen in public was evidence of a plaintiff's immorality, not just her misapprehension of what had happened: "[T]he very bringing of an action to recover golden balm for wounded affections is of itself proof that the wound has already healed . . ."<sup>38</sup> The reformers' argument about female plaintiffs' characters was related to the view of marriage as noncommodifiable. Because love should not be conflated with money, women who were satisfied by monetary judgments did not deserve their happiness. Potential plaintiffs were put in a double bind. If they kept their sorrows private, they suffered real harm and received no redress. If they made the issue

1930, 82 GEO. L.J. 2127, 2201-03 (1994) (describing a similar process of the construction of separate spheres).

32. Cf. Coombs, *supra* note 7, at 12-13 (discussing criticism of women who lured men into relationships for financial security).

33. See MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 18-20 (1996).

34. *The Outlawry of Heart-Balm Suits*, LITERARY DIG., Apr. 13, 1935, at 22, 22.

35. *Sheiks and Breaches in Nebraska*, N.Y. TIMES, Jan. 18, 1927, at 24.

36. See Delancey Knox, *The High Cost of Loving*, 61 FORUM 736, 738-46 (1919).

37. One way of expressing this argument was to claim that an engagement was not a true contract because the parties to it did not perceive it as such: "Ask any presently engaged couple whether either would sue the other in case of a breach and they will repudiate the suggestion." Wright, *supra* note 17, at 367.

38. *Id.* at 377; see also DAGGETT, *supra* note 15, at 47 ("[T]he type who seeks the 'heart balm' of a disappearing suitor's money, does not mind the laughter which alone would keep possibly deserving litigants forever out of court."); MCCORMICK, *supra* note 20, at 405 ("[E]ven in cases based upon truth, the effect is a commercialization of sentiment. . . . A husband who is without affection or loyalty is well lost . . . . The remedy will never help the sensitive and refined woman, for she will never thus parade in public her wounds of the heart."); Brown, *supra* note 13, at 492 ("If the heart of the plaintiff is really broken it is impossible to conceive of sordid cash repairing the breach, although it must be confessed that it does have a strikingly remedial effect upon the rather unreal kind of broken heart which this sort of plaintiff seems to experience."); Hadley, *supra* note 13, at 194 ("[A] woman filed suit against a Chicago man (wealthy, of course), alleging that his breach of promise had so damaged her feelings as to physically prostrate her; yet her feelings were not so delicate as to prevent her from posing on her bed of pain for photographers . . . ."); *Love v. Extortion*, TIME, Feb. 18, 1935, at 16 (quoting Indiana state Representative Nicholson's claim that "a suit to recover money as damages for the broken romance cannot soothe a woman if love was genuine"); Turano, *supra* note 29, at 45 (arguing that "intelligent" women would never sue because they preferred to preserve their "personal dignity").

“public” by bringing suit, however, they still received no redress, because the allegation itself proved the alleged harm false.<sup>39</sup>

None of this is to argue that the reformers were insincere or in any way acted in bad faith. Instead, they did not perceive a certain set of injuries as real or important. When a woman *publicly* claimed to have suffered a wounded heart, she could not really have suffered enough to justify any redress. The reformers offered an account of love and marriage that sharply distinguished those concepts from any economic considerations and declared that proper women would never stoop to consider the material consequences of a broken engagement and would certainly not publicize their broken hearts. The reformers’ noneconomic theory of premarital relations, however, was incomplete; later developments showed that it could not provide a fully satisfactory regime.

## II. ENGAGEMENT GIFTS: THE NEW BATTLEGROUND

### A. *The Initial Response to Reform*

After antiheartbalm statutes were passed, courts had to define their boundaries. The anticommodificationists sought a sphere free from market values. A broken marriage promise could cause only emotional harm, they argued, and there was no way to value that harm. When a harm sprang, not from the loss of a particular person’s love, however, but from gifts in anticipation of marriage, courts could find that antiheartbalm principles were not implicated.<sup>40</sup> Engagement rings in particular have spurred much litigation, in part because they are the most common engagement gifts. In addition, there is more or less a consensus that rings are usually given only because of the engagement, unlike other gifts such as cars or fur coats, which could also be understood as birthday or holiday presents.<sup>41</sup>

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39. In the context of pornography, Catharine MacKinnon has made a similar point: Images of women’s abuse can be used to disprove accusations of abuse. The publicity of the images “proves” that the woman agreed to have the pictures made. See CATHARINE A. MACKINNON, *ONLY WORDS* 4-5 (1993). One does not have to agree with MacKinnon’s position on pornography to agree that calling the harm in heartbalm “self-generated” operates quite effectively to remove the law from regulating a sphere of human activity. Out of concern for its own dignity, and to prevent itself from being abused by adventuresses, the law refuses to recognize certain harms.

40. See, e.g., *Norman v. Burks*, 209 P.2d 815, 817 (Cal. Dist. Ct. App. 1949); *Gill v. Shively*, 320 So. 2d 415, 416-17 (Fla. Dist. Ct. App. 1975); *Vann v. Vehrs*, 633 N.E.2d 102, 104 (Ill. App. Ct. 1994); *De Cicco v. Barker*, 159 N.E.2d 534, 535 (Mass. 1959); *Gikas v. Nicholis*, 71 A.2d 785, 786 (N.H. 1950); *Beberman v. Segal*, 69 A.2d 587, 587 (N.J. Super. Ct. Law Div. 1949); *Wilson v. Dabo*, 461 N.E.2d 8, 9-10 (Ohio Ct. App. 1983). The *Vann* court explained: “[N]othing in the language of the Act indicates that it should be extended to cover actions to recover engagement rings or other gifts made on the condition of marriage, where the marriage did not occur.” *Vann*, 633 N.E.2d at 104.

41. Cf. *supra* text accompanying note 1 (discussing a settlement in one case in which the female defendant returned a ring and kept other gifts). Engagement rings became common symbols of impending marriage in the early decades of the 20th century, at about the same time as heartbalm reform gained momentum. See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 206 (1990) (“The

Lawsuits brought after the reform period still concerned broken engagements, but most of these cases differed in several important respects from paradigmatic breach-of-promise cases. Breach of promise was not just about love, but also about lost economic chances, and often the damages included compensation for loss of virginity or for pregnancy from premarital sex. These consequential and expectation damages were based on the effect of the broken engagement on the plaintiff's social standing or her chances to marry another—in other words, her relations with the rest of the world. The new cases avoided these damages because antiheartbalm statutes precluded them. Instead, recovery was limited to the value of property transferred between the affianced couple.<sup>42</sup>

The reforms might have been understood as a societal decision to get out of the business of regulating engagements entirely. Instead, judicial intervention was confined to a small category of engagement battles—cases involving engagement gifts. The legal theories involved in these cases were just as confused and unconventional as the legal theories of heartbalm actions. The theories invoked—conditional gift, restitution, and unjust enrichment<sup>43</sup>—are concepts that straddle tort and contract, just as the heartbalm actions had combined different causes of action. It may be recalled that one of the main legal complaints about heartbalm actions was their *sui generis*, hybrid nature—the way in which they combined elements from tort and contract law, subject only to courts' definitions of their own powers to reach a just result;<sup>44</sup> the development of the law of engagement gifts in similarly mixed fashion suggests that the much-attacked form of heartbalm actions was less important to reformers than the perceived unworthiness of the plaintiffs who brought the suits.

Three modes of reasoning in post-reform litigation can be identified. Because heartbalm reform extended over many decades and varied greatly among different states, it is impossible to separate these modes into completely distinct periods. Nonetheless, there are evident trends. In the first years after antiheartbalm legislation was passed, former fiancées were required to return property when they broke engagements, as courts attempted to deter mercenary women. In later years, this justification conflicted with the changing ideology

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[diamond] industry enjoyed a phenomenal success during the period following 1935, and by 1965, 80 percent of all brides chose diamond engagement rings . . . ."); cf. VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 99-101 (1994) (describing courtship rituals of the period). Rings were not just symbols; they were tangible economic commitments, and they gained significance as the other economic incidents of marriage were in flux. Cf. Siegel, *supra* note 31, *passim* (discussing the changing economic implications of marriage for men and women in the late 19th and early 20th centuries).

42. See, e.g., *Brown v. Thomas*, 379 N.W.2d 868, 869 (Wis. Ct. App. 1985) ("[B]ecause the legislature intended to abolish only suits alleging emotional harm caused by the breach of contract to marry, the trial court erred in concluding that [the plaintiff] had no cause of action for recovery of the engagement ring.").

43. See Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1786-87 (1985) (describing theories of recovery).

44. See *supra* text accompanying note 18.

of family law, which began to insist that human relationships were too complex to label in terms of fault. Courts thus began to use no-fault language while still requiring the return of the ring. More recently, one particular way of reasoning about no-fault in broken engagements has gained prominence: the theory that a ring is given conditioned on marriage and that it has to be returned if the marriage fails to materialize. The progression from fault to no-fault and thence to conditional gift accounts for some of the distinctive peculiarities of post-reform cases. The following two subsections discuss the first two developments. Section II.B will then discuss the increasingly dominant theory of conditional gift in greater detail.

### 1. *Deterring Temptresses*

Heartbalm reformers occasionally argued that because engagements were provisional in the modern world courts should not judge why they ended.<sup>45</sup> But condemnation of blackmailers loomed larger in reform rhetoric, and it was to this justification that many legal analysts initially turned when they confronted suits potentially in tension with antiheartbalm laws.

Most courts were willing to protect male plaintiffs from the sirens who misled them. In the 1957 Pennsylvania case of *Pavlicic v. Vogtsberger*,<sup>46</sup> for example, the plaintiff was a man three times older than the defendant who sued her for the return of gifts he had given her in anticipation of marriage. The court refused to let the antiheartbalm act “perpetuate one of the very vices the Act was designed to prevent”—“the perpetration of fraud by adventurers and adventuresses in the realm of heartland.”<sup>47</sup> To bar the plaintiff’s action, the court argued, “would be to place a premium on trickery, cunning, and duplicitous dealing.”<sup>48</sup> The court found that the antiheartbalm law was designed to protect “innocent defendants” who could be ruined by accusations from “tarnished plaintiffs,” but that the young, female defendant had set “a snare” with her false promise of marriage.<sup>49</sup> Thus, the court concluded, the law could not have been intended to protect her.<sup>50</sup> The court defended its moral judgment by explaining that the plaintiff was not asking for troublesome

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45. See, e.g., Bromley, *supra* note 27, at 9; see also Larson, *supra* note 16, at 397-99 (discussing the changing attitudes that made multiple sexual and romantic partners more acceptable).

46. 136 A.2d 127 (Pa. 1957).

47. *Id.* at 130.

48. *Id.*; see also Norman v. Burks, 209 P.2d 815 (Cal. Dist. Ct. App. 1949) (finding that the donee held the donor’s gifts in trust); Gikas v. Nicholis, 71 A.2d 785, 786 (N.H. 1950) (finding that allowing the donee to keep the ring after she broke the engagement would allow unjust enrichment); Tuck v. Tuck, 200 N.E.2d 554, 557 (N.Y. 1964) (“A statute designed to prevent fraud should not unnecessarily be extended by construction to assist in the perpetration of a fraud.”).

49. *Pavlicic*, 136 A.2d at 130-31.

50. See *id.*

types of damages, such as his loss of an expected increase in social standing upon marriage.<sup>51</sup>

New York courts, however, initially took a different tack, holding that because the legislature had barred all actions founded on the ending of an engagement, women did not have to return gifts given to them in contemplation of marriage—even when they had themselves broken their engagements.<sup>52</sup> This construction elicited harsh criticism from legal observers: “The weapon of the ‘gold digger’ under the old law was the action for breach of promise. Now, every deceiver . . . has a new weapon. It is the promise to marry.”<sup>53</sup> The deceitful women who had been the object of heartbalm reform remained dangerous if, instead of instituting a lawsuit, they could coax trinkets from their hapless swains. Awarding recovery to male plaintiffs, these critics argued, would preserve the noncommodified sphere of intimate relationships by preventing seductresses from treating marriage or engagement as a way to make a living. In holding that the new law barred such suits, they argued, New York courts vitiated the spirit of antiheartbalm reform.

An interesting feature of the fault argument for returning premarital gifts is that it subtly shifted the justification for antiheartbalm laws in a paternalistic direction. The laws were no longer understood to protect wholly innocent men who had not promised anything to mercenary women; instead, they were construed to protect men who had foolishly, but willingly, made actual promises to marry and who then gave gifts in reliance on a woman’s deceitful promise. Blackmail and extortion disappeared,<sup>54</sup> leaving trickery and desire-induced gullibility as the only rationales for the rule. Whereas prereform cases had presumed that women were vulnerable to a naturally dominating male influence,<sup>55</sup> the emerging line of engagement gift cases were premised on the view that women could misuse their power over love-blinded men.<sup>56</sup> There

51. See *id.* at 131; see also *Piccininni v. Hajus*, 429 A.2d 886, 888 (Conn. 1980) (noting that the male defendant was not asking for damages based on “a broken heart or a mortified spirit”).

52. See *Josephson v. Dry Dock Sav. Inst.*, 56 N.E.2d 96 (N.Y. 1944) (holding that the New York heartbalm act banned any suits to recover real or personal property in connection with a breach of promise to marry); *Andie v. Kaplan*, 288 N.Y. 685, 686 (1942) (same).

53. W.J. Brockelbank, *The Nature of a Promise To Marry—A Study in Comparative Law* (pt. 2), 41 ILL. L. REV. 199, 207-08 (1946); see also *Goldstein v. Rosenthal*, 288 N.Y.S.2d 503, 505 (Civ. Ct. 1968) (“Instead of suing for breach of promise, a resourceful young woman would simply persuade her swain to shower her with gifts in anticipation of a marriage which she herself would then reject. In trying to remedy an old abuse, the courts seemingly permitted a new one.”); STATE OF N.Y. LAW REVISION COMM’N, REPORT OF THE LAW REVISION COMMISSION FOR 1947, No. 65, at 229-30 (1948) (arguing that rings and other property transferred in anticipation of marriage should be returned to the donor if the marriage did not occur); Robert Markewich, *Take Back Your Ring, Sir!*, B. BULL. (N.Y. County), Mar. 1949, at 23 (same); George Reiss, Note, *The Heart Balm Act and Ante-Nuptial Gifts*, 13 BROOK. L. REV. 174, 182 (1947) (same); Duane Anderson, Case Comment, *Domestic Relations: Engagement Rings and the “Anti-Heart-Balm” Statute*, 3 U. FLA. L. REV. 377, 379 (1950) (same).

54. See STATE OF N.Y. LAW REVISION COMM’N, *supra* note 53, at 244 (arguing that blackmail through false allegations of transfers of wealth was unlikely).

55. See, e.g., *Baber v. Caples*, 138 P. 472, 476 (Or. 1914) (citing authorities).

56. See *Goldstein*, 288 N.Y.S.2d at 505; cf. *Knox*, *supra* note 36, at 738-47 (discussing instances of love-stricken men).

was a related shift in the presumed goal of a promise-breaker's deceit: Duplicitous men attempting to get sex were replaced as the targets of premarital law by duplicitous women attempting to get material goods.

The majority view in the states that considered the issue favored a fault-based analysis. An engagement ring had to be returned, this view held, unless the donor himself broke the engagement.<sup>57</sup> Fault mattered, but the only notion of fault that was relevant was the breaking of the engagement. Indeed, even if a woman had broken the engagement because of her fiancé's violence, she was found to be at fault.<sup>58</sup>

This limited conception of fault was unstable because it ignored behavior that almost anyone would consider relevant in determining true fault. *Harris v. Davis*,<sup>59</sup> decided by the Illinois Appellate Court in 1986, provides an example. The defendant was at a tavern when the plaintiff, her then-fiancé, came in. When she told him that she did not want to see him again, he began to choke her until he was physically removed from her. According to her testimony, she had intended to return the ring. After being choked, however, she threw the ring into a field.<sup>60</sup> In a suit for the value of the ring, the court of appeals held for the plaintiff, stating that "where an engagement is terminated because of the *fault* of the woman, the man is ordinarily entitled to the return of gifts made in contemplation of the marriage."<sup>61</sup>

When, as in *Harris*, the fault determination did not take into account the reason for termination of the engagement, but only looked to the person who announced its termination, uncomfortable results of this sort were inevitable.<sup>62</sup> Compared to this awkward, half-blind fault regime, a no-fault rule that always

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57. See, e.g., *Spinnell v. Quigley*, 785 P.2d 1149, 1150-51 (Wash. Ct. App. 1990) (collecting many cases from past decades). The RESTATEMENT OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS (1937) also endorsed a fault-based recovery rule: If the donee wrongfully broke her promise, the donor could not recover money, but he could recover a ring, heirloom, or similar thing "intimately connected with the marriage." *Id.* § 58 cmt. c; see also *Stanger v. Epler*, 115 A.2d 197 (Pa. 1955) (denying a plaintiff's claim for one-half interest in a bank account established before marriage and distinguishing the case from others in which engagement rings had to be returned as conditional gifts) This rather detailed rule took fault into account, reflecting a belief that the "real" value of certain kinds of property could not be measured in market terms. Neil Williams points out that "[p]rohibiting the return of the ring [when the donor breaks his promise] evinces the courts' uneasiness with a wholesale abandonment of the fault ideal." Neil G. Williams, *What To Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1032-33 (1995).

58. See, e.g., *Harris v. Davis*, 487 N.E.2d 1204, 1205-06 (Ill. App. Ct. 1986); *Vigil v. Haber*, 888 P.2d 455, 457 (N.M. 1994); *Chester v. Ferri*, No. 4088, 1993 Phila. Cty. Rptr. LEXIS 60, at \*16-18 (Pa. C.P. Ct. Nov. 23, 1993).

59. 487 N.E.2d 1204 (Ill. App. Ct. 1986).

60. See *id.* at 1205.

61. *Id.* (emphasis added).

62. Courts enforcing general contract law have dealt with this issue under the doctrine of anticipatory breach. One problem with fault rules is that parties can manipulate who is at fault, particularly when legal fault requires some formal act. In nonengagement relationships, parties may jockey with each other, attempting to find an excuse for ending the relationship. See Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 105-07 (1998) Intuitively, such game-playing seems even easier in engagements than in standard contracts, so principles of anticipatory breach may not be satisfactory. I am indebted to Carol Rose for drawing this analogy.

required the return of a ring seemed to be an improvement: Though plaintiffs like Cecil Harris would still win, courts' conclusions would not be based on the view that such men were *wronged* when the women they abused left them.<sup>63</sup>

## 2. *The Rise of No-Fault Principles*

These instabilities, among other problems, pushed many courts in the direction of a more aggressive no-fault regime. Over time, the argument that failed relationships usually involved fallible people, not blameworthy deceivers, became increasingly persuasive. The reformers' anticommodification principles proved corrosive to the idea of fault, as the powerful language of love made it difficult to talk about material goods exchanged as part of a romantic relationship in standard judicial terms. Breaking an engagement that would have led to an unhappy marriage was the morally right thing to do, so how could it be an instance of fault?<sup>64</sup> The inevitable conclusion was that courts should avoid impossible and intrusive fault determinations entirely and base all their decisions about once-intimate relationships on no-fault principles.

As the argument about "gold diggers" lost its force, the claim that courts should not try to determine fault could have led courts to abandon the regulation of broken engagements entirely. That direction would have allowed donees (usually women) to keep engagement gifts, at least where no fraud or bad faith was involved. Instead, courts already accustomed to requiring that women return property began to shift to a regime in which mandatory return was the norm. The New York legislature meanwhile amended the state law in 1965 to allow actions for the return of property transferred because of a promise of marriage.<sup>65</sup> The amendment took more than twenty years after the antiheartbalm law to pass, succeeding a few years before no-fault divorce laws began to sweep the nation.<sup>66</sup> After the change, New York courts found a "strong presumption of law that any gifts made during an engagement period

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63. The fault rule was unstable in another way. Antiheartbalm laws made the agreement to marry a contract revocable at will (though principles of restitution and unjust enrichment sometimes allowed the parties to be put in their prior position if revocation occurred). See *Brown v. Thomas*, 379 N.W.2d 868, 873 (Wis. Ct. App. 1985). The reformers had argued that there is nothing morally wrong with breaking an engagement to avoid an unhappy marriage and, therefore, that there should be no legal consequences from doing so. If breaking an engagement is not a wrong generally, there is no reason that it should be a wrong for purposes of awarding the engagement ring.

64. See, e.g., *Wright*, *supra* note 17, at 369-70 (arguing that an engagement should allow the parties to make certain of their compatibility before marriage and that there should thus be no constraint on dissolving engagements).

65. See 1965 N.Y. Laws 333 § 2 (codified as amended at N.Y. CIV. RIGHTS LAW § 80-b (McKinney 1992)). A similar provision had been vetoed in 1947. See *Goldstein v. Rosenthal*, 288 N.Y.S.2d 503, 506 (Civ. Ct. 1968). Like New York, California and Louisiana explicitly permit recovery of engagement gifts as an exception to antiheartbalm principles. See CAL. CIV. CODE § 1590 (West 1982); LA. CIV. CODE ANN. art. 1740 (West 1987).

66. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 81 (1988).

are given solely in consideration of marriage, and are recoverable if the marriage does not materialize.”<sup>67</sup> The rule was defended on the ground that it upheld “the overwhelming public policy against public trials of heart-wounding tribulations of formerly engaged parties.”<sup>68</sup> Fault determinations, done properly, required courts to hear and judge the parties’ stories, but antiheartbalm reformers had rejected the public recitation of private wrongs because they believed that it would entangle courts in the mysteries of the human heart. As one court put it, if a plaintiff’s fault in ending an engagement were relevant in an engagement gift case, “[t]he result would be to encourage every disappointed donee to resist the return of engagement gifts . . . , thereby promoting dramatic courtroom accusations and counter-accusations of fault.”<sup>69</sup>

Since the 1970s, no-fault has come to dominate the decided cases.<sup>70</sup> As a result, disappointed gift-givers now have access to the courts, but they do not have to prove that they are justified in seeking the return of their gifts—the best of both worlds. Why did no-fault lead to a policy of judicial interference rather than nonintervention?<sup>71</sup> A history of fault determinations made judicial resolution of engagement gift cases seem appropriate even as the grounds of decision changed.

Courts have tried to explain why they should still be involved in deciding engagement gift cases. Many have argued that the tangible nature of the alleged loss to the plaintiff distinguishes ring-return cases from heartbalm suits.<sup>72</sup> Yet antiheartbalm laws do not bar all cases in which damages involve

67. *Friedman v. Geller*, 368 N.Y.S.2d 980, 981 (Civ. Ct. 1975).

68. *Id.* at 982; *accord Gaden v. Gaden*, 323 N.Y.S.2d 955, 962 (1971) (“In truth, in most broken engagements there is no real fault as such—one or both of the parties merely changes his mind about the desirability of the other as a marriage partner.”); *Brown*, 379 N.W.2d at 873 (“[T]he answer to the multiple question ‘who broke off the engagement, when, and was he/she justified?’ is often lost in the murky depths of contradictory, acrimonious, and largely irrelevant testimony by disappointed couples, their relatives and friends.”).

69. *Gaden*, 323 N.Y.S.2d at 962. The *Gaden* court explained that, particularly in an age of no-fault divorce, placing blame for the end of an engagement was inappropriate. *See id.*; *see also Aronow v. Silver*, 538 A.2d 851, 853 (N.J. Super. Ct. Ch. Div. 1987) (finding the fault rule sexist and archaic in the engagement context because fault could not be ascertained).

70. *See Heiman v. Parrish*, 942 P.2d 631, 635-38 (Kan. 1997) (surveying cases); *Vigil v. Haber*, 888 P.2d 455, 457 (N.M. 1994) (same); Elaine Marie Tomko, Annotation, *Rights in Respect of Engagement and Courtship Presents When Marriage Does Not ensue*, 44 A.L.R.5th 1, 68-78 (1997) (discussing recent cases in New Jersey, New York, and Ohio that reversed previous fault rules and adopted no-fault rules). Because not all states have had recent cases on the question, fault states still outnumber no-fault states.

71. The 1969 argument of the English Law Commission (whose mandate was to recommend reforms to outdated laws) for a mandatory ring-return rule based on no-fault principles rested on similar grounds. As Ginger Frost writes:

[T]he Law Commission insisted that all gifts conditional on the marriage be returned, no matter who had jilted whom. . . . They justified this provision by arguing that if the courts began questioning who was at fault, they would simply be reviving breach-of-promise cases in another form. Of course, they could easily have avoided this difficulty by saying that all gifts were absolute, thus always awarding the engagement ring to the woman. This, however, was not even suggested.

FROST, *supra* note 10, at 174.

72. *See, e.g., Norman v. Burks*, 209 P.2d 815, 817 (Cal. Ct. App. 1949); *Piccininni v. Hajus*, 429 A.2d 886, 888 (Conn. 1980); *Morris v. McNab*, 135 A.2d 657, 661 (N.J. 1957); *Pavlicic v. Vogtsberger*, 136



social consequences or compensation for emotional harm. A bigamous marriage, for example, can lead to tort damages for the deceived party.<sup>73</sup> Similarly, many no-fault courts recognize an exception when one of the parties was married to someone else at the time of the promise;<sup>74</sup> adulterers, unlike everyone else, transfer property at their own risk.

Other courts have defended the no-fault result on the ground that the primary evil of heartbalm actions was the lure of excessive damages, so limiting recovery to quantifiable pecuniary loss is unobjectionable.<sup>75</sup> But this requires a narrow reading of statutes that, from the fierce language of their preambles and their application in other situations, were clearly intended to sweep quite broadly to ban any action for breach of promise to marry.<sup>76</sup> (In New York, for example, a bill that would have limited heartbalm suits to recovery for money actually spent in contemplation of marriage was rejected in favor of a more broadly worded ban.)<sup>77</sup> This defense also ignores the force of the original anticommodification rhetoric. If money cannot buy the love of a decent person, it is not clear why the court should accept that money *did* buy love, or was a part of a romantic bargain, even if there is no possibility of

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A.2d 127, 131 (Pa. 1957); Note, *supra* note 43, at 1779-80; cf. *De Cicco v. Barker*, 159 N.E.2d 534, 535 (Mass. 1959) (distinguishing the broad language of the court's earlier interpretation of state law to allow a suit to recover an engagement ring); *Bryan v. Lincoln*, 285 S.E.2d 152, 153 (W. Va. 1981) (distinguishing an antiheartbalm law in a case involving the return of a gift of money for use in purchasing marital real estate).

73. See *Morris*, 135 A.2d at 661; *Lampus v. Lampus*, 660 A.2d 1308, 1311-12 (Pa. 1995); see also *Perthus v. Paul*, 58 S.E.2d 190, 192 (Ga. Ct. App. 1950) (allowing a fraud claim when the defendant falsely stated that she was free to marry). Though a preexisting marriage literally means that the defendant in such cases failed to marry the plaintiff and the damages stem from that failure, the extra immorality involved places bigamy outside the scope of antiheartbalm laws. See *Tuck v. Tuck*, 200 N.E.2d 554, 556 (N.Y. 1964) (contrasting the woman who "knows full well that she is entering into an immoral and meretricious relationship" in a standard breach-of-promise case with "the good faith supposed change of status on the part of the woman deceived"); *Snyder v. Snyder*, 14 N.Y.S.2d 815, 816 (Sup. Ct. 1939) ("An action to recover damages because of a consummated bigamous marriage is not one which is subject to abuse or manipulation by unscrupulous persons. It is neither within the letter nor the intent of the law."). Perhaps the reason heartbalm statutes do not cover the situation of a bigamous marriage is that the plaintiff *really* was harmed by the fraud, whereas women who sleep with their supposed fiancés before marriage are not harmed because they consented to the sex. Gone are the arguments that sex and love cannot be valued with money. Instead, the sympathetic plaintiff is allowed recovery from the rascally defendant.

74. See, e.g., *Hooven v. Quintana*, 618 P.2d 702, 703 (Colo. Ct. App. 1980); *Lowe v. Quinn*, 267 N.E.2d 251, 252 (N.Y. 1971); *Armitage v. Hogan*, 171 P.2d 830, 837 (Wash. 1946).

75. See sources cited *supra* note 72.

76. See, e.g., *Boyd v. Boyd*, 39 Cal. Rptr. 400, 405 (Ct. App. 1964) (refusing to grant relief even in "hardship" cases of tangible loss and holding that the antiheartbalm statute must be applied broadly); *Waddell v. Briggs*, 381 A.2d 1132, 1135 (Me. 1978) (holding that the antiheartbalm statute reflects a strong legislative policy that should not be circumvented by allowing claims in tort instead of contract). In *Brown v. Thomas*, 379 N.W.2d 868 (Wis. Ct. App. 1985), the court had to decide how to apply the state's antiheartbalm statute, which contained an explicit exception for property transferred on the basis of a party's fraudulent misrepresentation of his or her intention to marry. See WIS. STAT. ANN. § 768.06 (West 1981). The court found that the exceptions to the statute where an engagement ring was involved were not limited to cases of fraud because the intent of the statute was simply to eliminate causes of action for emotional harm from breach of promise. See *Brown*, 379 N.W.2d at 869. Of course, if this interpretation is true, then the exception for fraud is unnecessary, because all tangible property is recoverable by statute.

77. See *Assembly Without Debate Bans 'Balm' Suits and Speeds Measure to Governor Lehman*, N.Y. TIMES, Mar. 21, 1935, at 12.

abuse of the action. The legacy of fault—itsself based on a desire to discourage misbehaving women—thus affected the content of the no-fault rule in ways not reflected by the formal justifications of the doctrine.

In the absence of unjust enrichment or inequities crying out for restitution, both of which are difficult to find when courts must shy away from fault determinations, courts must explain why the machinery of justice should be mobilized to reverse a transfer of property. As the specter of the adventuress retreats further into an unfamiliar past, and the contrary idea that one person is never the sole cause of a relationship's end gains currency, courts now rely most heavily on a particular vision of no-fault, grounded in the law of conditional gift.

### B. *The Dominance of Conditional Gift Theory*

Conditional gift theory holds that a gift given subject to a condition, which usually must be explicit, can be recovered when the donee fails to fulfill that condition.<sup>78</sup> Where engagement gifts—mostly rings—are concerned, courts have been willing to imply the condition of marriage.<sup>79</sup> Conditional gift theory alone, however, is insufficiently detailed to justify the recent results in engagement ring cases. A conditional gift could be returned either on a fault or a no-fault basis, and the courts' choice of conditional gift as the theory most compatible with no-fault principles invites further analysis.

#### 1. *Possible Theories of Conditional Gift*

Conditional gifts cannot in general be revoked when the donor changes his mind, as long as the donee has taken steps to perform the condition.<sup>80</sup> This would seem to imply a fault-based analysis, letting the woman keep the ring when she did not break the engagement. Even were the theory to require complete performance, however, there are two possible ways to define the condition to be performed: Either the condition is the donee's willingness to marry,<sup>81</sup> or it is the marriage itself.<sup>82</sup> Thus, denominating a ring a

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78. See 38 AM. JUR. 2D *Gifts* § 81 (1996).

79. See, e.g., *Fierro v. Hoel*, 465 N.W.2d 669, 671 (Iowa Ct. App. 1990); *Herman v. Parmsh*, 942 P.2d 631, 633-35 (Kan. 1997); *Brown*, 379 N.W.2d at 872.

80. See, e.g., *McClure v. McClure*, 870 S.W.2d 358, 361 (Tex. App. 1994, no writ), 38 AM JUR. 2D *Gifts* § 81.

81. See *Coconis v. Christakis*, 435 N.E.2d 100, 102 (Ohio County Ct. 1981) (finding the condition was not marriage, but the donee's refraining from committing an act preventing marriage). The *Coconis* court held a defendant did not have to continue preparing for a wedding if she could reasonably perceive the plaintiff's lack of interest, as continuing to prepare would cause financial and emotional harm. The court stated that the gift of an engagement ring is a special occasion in which the perceptions of the event by the parties and the community make the application of the quid-pro-quo principles of everyday business transactions in the commercial market less than fully determinative of the issues which arise if the marriage contemplated thereby does not result.

*Id.*

82. See *Lindh v. Surman*, 702 A.2d 560, 561 (Pa. Super. Ct. 1997).

conditional gift does not specify under what conditions it must be returned. As one court recently noted, the increasingly dominant rule regarding engagement rings simply differs from that controlling other conditional gifts: Rather than following the more common practice of defining the necessary condition as the donee's willingness to comply with the donor's wishes, courts in the engagement context define the condition as the actual occurrence of the marriage.<sup>83</sup> Indeed, the proposed *Restatement (Second) of Restitution*<sup>84</sup> treats broken engagements as exceptional cases, deserving a special rule,<sup>85</sup> just as the first *Restatement* did.<sup>86</sup>

The existence of a law of conditional gifts thus cannot simply be invoked to explain the ring-return rule, since that law is itself shaped to cover the engagement situation. When courts in ring cases declare that they must modify the law of conditional gifts to reflect the difficulties of determining fault,<sup>87</sup> the initial reason for invoking conditional gift theory—the idea that the intent of the parties was best expressed by the concept of a gift conditioned on marriage—becomes suspect. In the second-best world of no-fault, letting losses fall where they lie might come closer to the intent of the parties than a mandatory rule of return.

## 2. *The Gift in Context: What Are the Parties' Expectations?*

Conditional gift theory in no-fault courts relies on a contestable determination of the parties' presumed intent. The problem that courts face is that people may not expect that the rules of engagement are no-fault, and so it may be necessary to choose between enforcing expectations and avoiding difficult, intrusive examinations of the disintegration of relationships. Not everyone agrees that engagement rings are implicitly conditioned on marriage. Many people apparently hold to a fault-based morality, or even to a belief that engagement gifts belong to donees absent special circumstances.<sup>88</sup> If

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83. See *id.* at 564. It is perhaps significant that only in recent years has conditional gift theory played such a large part in justifying the return of the ring that its logic has been seriously interrogated by litigants; before, it was undertheorized because other ideas, such as the need to deter mercenary women, were more important to courts.

84. RESTATEMENT (SECOND) OF RESTITUTION (Tentative Draft No. 1, 1983).

85. See *id.* § 6(2) cmt. c (describing "a residual class of cases in which neither mistake nor wrongdoing figures in a way that would in itself explain a duty to account for a benefit"); *id.* § 6(2) cmt. c, illus. 7 (using a broken engagement as an example of the residual rule).

86. The first *Restatement of Restitution* held that if an engagement ring were truly a conditional gift, the ring should be returned on a no-fault basis. See RESTATEMENT OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 58 cmt. b (1936). This assumes, without defending, the proposition that the appropriate condition is marriage rather than willingness to marry.

87. See, e.g., *Patterson v. Blanton*, 672 N.E.2d 208, 212 (Ohio Ct. App. 1996) (finding that the difficulty of determining fault compelled it to adhere to a bright-line rule of mandatory return of engagement rings as conditional gifts).

88. A recent survey by *Cosmopolitan* suggests that many women and men take moral stands on the issue that are compatible with their material interests: Seventy-six percent of men surveyed said that a woman should return the ring if a man breaks the engagement, while only 18% of women agreed. See *If*

expectations vary, courts may be misdescribing the actual state of the world when they find a no-fault conditional gift implicit in any engagement.<sup>89</sup>

What do women who receive engagement rings expect? Margaret Brinig has offered an economic explanation for current customs. She argues that the abolition of breach-of-promise actions led women to seek other signs of commitment from men before consenting to premarital intercourse.<sup>90</sup> Brinig notes that the utility of the ring as collateral depends on whether the woman gets to keep it if the engagement ends, though she seems to assume that the dominant legal regime is fault-based.<sup>91</sup> Perhaps a general intuition that women needed some security against men who promised, seduced, and then abandoned them led women to look for symbols such as rings. But courts certainly did not acknowledge that they were enforcing a fault rule for this reason. Moreover, the very social transformations that led to antiheartbalm reform made it inappropriate to speak so crassly about tokens of love, and so the usual justifications for the ring (and the rules of etiquette governing its return) focus on the symbolism involved.

The socially contested nature of the ring can be demonstrated by a sampling of views on the subject. The expectation at the time of heartbalm reform seems to have been that a woman would keep the ring, at least when she did not break the engagement.<sup>92</sup> Some modern sources argue that women

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*He Calls Off the Wedding, Should She Give Back the Ring?*, COSMOPOLITAN, Sept. 1997, at 76, 76; see also Gigi Barnes, *Diamonds Aren't Forever*, MADEMOISELLE, Sept. 1995, at 30, 30 ("My logic was simple: Screw around after the invitations have been printed, and you forfeit the jewelry."); *Should She Have Been Allowed To Keep the Ring?*, N.Y. POST, Dec. 17, 1997, at 4 (quoting three women and one man who believed that a woman should keep the ring after a broken engagement and two men who disagreed).

89. See Robert William Gribben, Note, *Quasi-Contract*, 29 CORNELL L.Q. 401, 402 (1944) (attacking the plausibility of the idea that the ring is understood as consideration); Case Note, *Domestic Relations*, 38 FORDHAM L. REV. 359, 360 (1969) (same); *CNN Burden of Proof: Discussion About the Rules of Engagement* (CNN television broadcast, Aug. 1, 1997) (sampling attitudes and suggesting that most people do not clearly contemplate conditional gift theory or any other theory about the ring at the time of engagement), transcript available in LEXIS, News Library, CNN File; cf. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (noting that engaged couples uniformly estimate that their marriages will succeed, even knowing the general odds of divorce in America).

90. See Brinig, *supra* note 41, at 212. Engagement rings were initially presented to men as well as women. See ELLEN K. ROTHMAN, *HANDS AND HEARTS: A HISTORY OF COURTSHIP IN AMERICA* 161-62 (1984) (discussing practices in the mid-19th century). Over time the practice came to be one-sided, and the vast majority of engaged women now receive them. See *id.* at 310; Brinig, *supra* note 41, at 206.

91. See Brinig, *supra* note 41, at 209 n.13, 213. Brinig might say that the current shift to an absolute ring-return rule reflects a decline in the value of a woman's consent to premarital intercourse; she argues that the decline in the marriage rate can be explained in this way. See *id.* at 212. Yet the reason Brinig offers for the popular rise of the engagement ring is inconsistent even with the earlier fault rules. If the woman's loss of virginity is to be compensated, she should always keep the ring. The fault rule itself represented a new relationship between love and property in which the jilted lover could retain or reclaim the material symbol of the lost love. Sexual relations, loss of status or future prospects, and other consequences of a broken engagement have been eliminated from consideration. See *supra* text accompanying note 42.

92. See JAMES REMINGTON MCCARTHY, *RINGS THROUGH THE AGES: AN INFORMAL HISTORY* 160-61 (1945); Bromley, *supra* note 27, at 9 ("[I]t must be remembered that custom allows [a woman] to keep the engagement ring and all other gifts, which will presumably be worth as much in cash as the amount she has spent on linens and frocks, bridal veil and white satin.").

are under no obligation to return rings in most circumstances. Along these lines, a recent *Washingtonian* survey of wedding consultants and vendors, for example, produced the claim that, “[h]eirlooms excepted, the ring belongs to the bride.”<sup>93</sup> English law presumes an engagement ring to be an absolute gift to a woman—unlike other engagement gifts, which are conditional and must be returned at the dissolution of an engagement regardless of fault.<sup>94</sup> According to one author, Parliament adopted this rule “so as to preserve the right of the wronged woman to throw the ring into the river rather than return it to her former fiancé.”<sup>95</sup> Discussing the lawsuit between Ines Misan and John Lattanzio,<sup>96</sup> a *New York Post* columnist wrote, “The ordinary rules of commerce—and believe me, these kinds of matches amount to exchanges of goods for services—simply do not apply. . . . In love as in business, you pay your money, you take your chances. The difference is, in business you can ask for a refund.”<sup>97</sup> The divide separating love and money, in this writer’s view, is so strong as to prevent any claim that one legally ought to follow the other—even when everyone understands that money motivated the particular relationship at issue.

Authorities on etiquette and acceptable behavior have also ruled on the subject. The advice columnist Abigail Van Buren (“Dear Abby”) holds to a mandatory ring-return rule, while her equally well-syndicated sister Ann Landers disagrees, preferring a fault regime.<sup>98</sup> The highbrow columnist Judith Martin (“Miss Manners”), meanwhile, holds that an engagement ring is a symbol, and thus argues that a fiancée should return it after a breakup.<sup>99</sup> Miss Manners has an important caveat, making her a true anticommodificationist: “[S]he would still be treating it symbolically if she ran over it with her van, melted it down, or threw it off a mountain.”<sup>100</sup> As this sampling of views indicates, the assumption that rings are gifts conditioned on marriage is

93. Courtney Rubin, *Calling It All Off*, WASHINGTONIAN, Jan. 1997, at 181.

94. See Law Reform (Miscellaneous Provisions) Act 1970, ch. 33, ¶ 3, § 2.

95. Stephen Cretney, Statutes, *Law Reform (Miscellaneous Provisions) Act 1970*, 33 MOD. L. REV. 534, 536 (1970).

96. See *supra* text accompanying note 1.

97. Andrea Peyser, *These Clueless Tycoons Need a Lesson in Love*, N.Y. POST, Dec. 17, 1997, at 4.

98. See Thomas Zambito, *Man Sues Ex-Fiancée To Get Ring Back: What Do Advice Columnists Say?*, RECORD (N.J.), Aug. 28, 1996, at N1.

99. See *id.*; see also Judith Martin, *Engagement Rings: Carat and Stick*, WASH. POST, Mar. 15, 1998, at F8 (suggesting that courts should not have to be involved in returning rings because “there has always been an etiquette rule on the books requiring that the ring must be returned when the engagement is—for whatever reason—defunct”). For the “dignity of the wounded,” Miss Manners urges women not to resist returning rings so that they do not “furnish proof that they are so grasping that the symbolism of an engagement ring has entirely escaped them, and they see nothing but its monetary value.” Martin, *supra*. She mentions, but does not address, the problem of money wasted on wedding preparations. See *id.*

100. Judith Martin, *Finding a Way To Stop Passengers from Taking Control*, CHI. TRIB., Jan. 25, 1996, at 11; cf. Barnes, *supra* note 88, at 30 (“I did, for a short time, consider turning [the ring] into a bullet.”). By contrast, conditional gift plaintiffs and courts do not hold that the symbolism of a ring allows a defendant to treat it purely as a symbol; it is also valuable property. See *infra* note 108 and accompanying text.

inconsistent with some reasonably prevalent beliefs; thus, courts are making more of a choice than they acknowledge when they adopt mandatory ring-return rules based on conditional gift theory.

The rules for rings in marriages that do occur and then dissolve further highlight the artificial, formalistic definition of “expectations” courts use in ring cases. When the marriage ceremony ends, the law declares that a woman has done her part with respect to the ring and can keep it forever.<sup>101</sup> A ring donor’s expectation could be presumed to extend to the *continuation* of the marriage—there is no inherent reason that, for example, a short and tempestuous marriage should change the legal status of a gift. But when a plaintiff made this argument about his four-month marriage, the court rejected it summarily: “[He] offered no evidence that the ring was given upon an express condition that the marriage would last for a certain period . . . . Some might argue that only a rogue would so contend.”<sup>102</sup> Breaking an engagement and demanding the ring back is not, by contrast, legally roguish, which suggests that this moral judgment ultimately fits the law of engagement gifts rather poorly. A holding that the mere formal ceremony is the condition on which the gift is based seems at least as untrue to the spirit of the gift as the idea that the ring is an outright gift.<sup>103</sup> As one judge wrote in a dissent, the no-fault conditional gift rule makes engagement rings “no longer freely given expressions of love and affection, . . . [but] trophies that must be earned.”<sup>104</sup> Through its definition of the condition behind conditional gifts, the law shapes the very social realities its rules are supposed to reflect.<sup>105</sup>

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101. Courts adjudicating divorce cases usually find that engagement rings become a woman’s separate property upon marriage and are therefore not included in the assets to be divided upon divorce. *Compare Weiss v. Weiss*, 543 A.2d 1062, 1066 (N.J. Super. Ct. App. Div. 1988) (holding that a house bought in anticipation of marriage becomes marital property and must be divided upon divorce), with *Winer v. Winer*, 575 A.2d 518, 528 (N.J. Super. Ct. App. Div. 1990) (distinguishing *Weiss* on the grounds that an engagement ring is traditionally a conditional gift to a woman and becomes separate property upon marriage), *Parker v. Lewis*, No. CN90-6132, 1991 Del. Fam. Ct. LEXIS 42, at \*15 (Fam. Ct. June 19, 1991) (holding that an engagement ring is separate personal property and that the husband should not be allowed to be an “Indian giver”), and *Lipton v. Lipton*, 514 N.Y.S.2d 158, 160 (Sup. Ct. 1986) (reaching the same result). Although property acquired after the moment of marriage is usually marital property, divorce courts label engagement rings absolute gifts, retroactive to the moment of the gift, to evade that rule. See *Lipton*, 514 N.Y.S.2d at 159 (holding that an engagement ring is “absolute in form when given” though conditional and thus defeasible upon failure of the condition).

102. *Smith v. Smith*, 797 S.W.2d 879, 881 (Mo. Ct. App. 1990).

103. See Beverly Bartlett, *Is an Engagement Ring Just a Down Payment on a Bride?*, Gannett News Serv., Aug. 9, 1997 (“[T]o suggest that a man is making a down payment on a wife by buying an engagement ring is just insulting. . . . The notion that it’s on loan until she comes through with an ‘I do’ is pretty unseemly.”), available in LEXIS, News Library, Cumws File; see also *CNN Burden of Proof: Discussion About the Rules of Engagement*, *supra* note 89 (containing arguments that conditional gift theory makes marriage into an unappealing business proposal).

104. *Lindh v. Surman*, 702 A.2d 560, 564 (Pa. Super. Ct. 1997) (Schiller, J., dissenting).

105. Cf. *Siegel*, *supra* note 31, at 2207 (making the same argument about marital status law generally).

### 3. *Conditions and Bargains*

The courts' conditional gift theory holds that a transfer of property can be founded on a promise of marriage. The theory accepts that people can make legally enforceable and monetarily measurable deals about marriage and thus involves courts in personal relationships in a way that cuts against the ideals of heartbalm reformers. The theory recognizes, however implicitly, that marriage intertwines material and emotional relations, just as the ring functions as a symbol of the material support husbands are supposed to give wives.<sup>106</sup> Indeed, perhaps the fact that the promise embodied in the ring is *implicit* helps courts decide that the condition on the gift has to be enforced; the bargain does not seem quite so gross and inconsistent with romantic ideals of marriage when it is contained in a symbol.

Anticommodification logic could easily be applied to criticize the ring-return rules. The difficulty is that while the law supposedly has disconnected love and property, standard expectations about engagement rings link the two; the law cannot extirpate all vestiges of commodification from its rules and also follow couples' expectations. Most people seem to believe that a man must give a woman a ring to create a "real" engagement, while a woman has no such reciprocal obligation.<sup>107</sup> It seems to follow that a (male) donor's promise is "worth" something different from a (female) donee's reciprocal promise.<sup>108</sup> Even if that value cannot be precisely measured, it can be

106. See BETH L. BAILEY, FROM FRONT PORCH TO BACK SEAT: COURTSHIP IN TWENTIETH CENTURY AMERICA 75 (1988) (discussing attitudes in the 1950s and 1960s that linked a woman's material success to her success in the marriage market and that equated engagement, not with finding a loving man, but with receiving an expensive ring); *id.* at 162 n.86 ("Engagement rings, which [*Life*] described as 'courtship's greatest prize,' symbolized the material goods that came with marriage." (quoting Ernest Havemann, *Modern Courtship: The Great Illusion*, LIFE, Sept. 15, 1961, at 114, 128 (photo caption))).

107. See ROTHMAN, *supra* note 90, at 310; Brinig, *supra* note 41, at 206; Lois Smith Brady, *Rock Me: A Girl and Her Ring*, MADEMOISELLE, Mar. 1990, at 177, 177 ("The minute you get engaged these days . . . everyone asks 'Where's the ring? Where's the diamond?' If you don't have one, they look at you like you're lying about the engagement.") (quoting a 27-year-old woman); *Christian Engagement Rings*, COMMONWEAL, Oct. 21, 1949, at 38, 38 (discussing couples' desire for expensive rings, the larger the better, to manifest love). Engagement rings seem to evoke an almost fetishistic reaction from some people. See Renée Bacher, *The Ring Cycle*, N.Y. TIMES, Aug. 13, 1989, § 6 (Magazine), at 20 ("It was as if some spiritual presence emanated from the stone. It beckoned to me, enveloped me, and awakened a feeling I never thought I was capable of."); Brady, *supra*, at 177, 244 (discussing the attention paid to ring size by ring-wearers and observers alike).

108. Cf. Gayl v. Shader (*In re Shader*), 90 B.R. 85, 90 (Bankr. D. Del. 1988) ("Ken received value for the ring—Lucie married him."). *But cf.* Pollock v. Simon, 205 F. 1005, 1006 (E.D. Pa. 1913) ("The defendant gave no consideration [to her fiancé]; the usual reciprocal promises to marry had previously been exchanged, and the transaction was therefore purely voluntary."); Heiman v. Parrish, 942 P.2d 631, 639 (Kan. 1997) (Marquardt, J., dissenting) ("If the parties have exchanged mutual promises, the consideration for the woman's promise to marry is the man's promise to marry. Under this analysis, the ring is transferred without consideration and is a gift.").

Relevant evidence about common understandings of the ring's meaning comes from the plaintiffs in ring cases themselves. They have not asked for injunctive relief; instead, they desire to be made whole by the return of the ring or a sum of money equivalent to the ring's market value. The ring may have been perceived as a symbol originally, but its objective monetary value becomes critical when the engagement ends. For a few of many possible examples, see *Harris v. Davis*, 487 N.E.2d 1204 (Ill. App. Ct. 1986);

scaled—his promise is worth less by the value of the ring.<sup>109</sup> When courts recognize this social expectation, they implicitly hold that property and a promise on one side are equivalent to a promise on the other.

Conditional gift theory apparently holds that the exchange of marriage promises is a separate transaction from the giving of the ring, which is conditioned on (but not exchanged for) marriage.<sup>110</sup> Yet, the gift becomes irrevocable upon marriage, and the idea that the marriage and the engagement ring involve two separate transactions cannot explain why they are by custom yoked together (unlike other conditional gifts).<sup>111</sup> This suggests that marriage and property are still being linked in ways that antiheartbalm reformers and laws tried to eradicate.

In general, people make conditional gifts because they do not want to part with their property unless the donees do something for them. Perhaps, then, there is a theoretical difference between a conditional gift and a standard bargain, but in practice the condition involved in the engagement context collapses into consideration—rings are an inducement to marriage, as well as to premarital sexual activity, because women who wear them generally feel obligated (or entitled) to get married.<sup>112</sup> The condition can be considered an

*Friedman v. Geller*, 368 N.Y.S.2d 980 (Civ. Ct. 1975); and *Lyle v. Durham*, 473 N.E.2d 1216 (Ohio Ct. App. 1984). See also Vince Cook & Jack Leyhane, *Wedding Etiquette Miss Manners Never Considered*, CHI. DAILY L. BULL., June 3, 1996, at 6 (noting that men occasionally make claims to their insurance companies for rings kept by ex-fiancées). I have not discovered any case in which the plaintiff insisted on the return of the ring as opposed to its monetary value. In *Schiller v. Miller*, 621 So. 2d 481 (Fla. Dist. Ct. App. 1993), the court upheld a temporary restraining order enjoining the defendant from selling jewelry pending resolution of the plaintiff's claim for its return because the court found that the items were difficult to value and that a sale at that particular time would not reflect a fair market price. See *id.* at 482. The court did not suggest, however, that it would not award money damages if they could be fairly determined.

109. Perhaps because a woman generally has less that is of material worth to give than a man, the value of her intangible promise is relatively greater, comprising as it does a greater part of what she has to give.

110. See *Vigil v. Haber*, 888 P.2d 455, 457 (N.M. 1994).

111. There is one parallel to be drawn from common legal practice. A delay between the sale contract and the closing is almost universal in real estate transactions. There, the main function of a delay between the agreement and the consummation is to allow the buyer to get a mortgage, but the buyer can also check on the condition of the property, the title, and so on. Disputes similar to those in premarital law arise when a sale falls through and one party contests the other's claim to the "earnest money" paid in anticipation of closing the sale. Disagreements over who did what to whom and whether one party was justified in its actions given what the other had already done are common in litigation over earnest money. See, e.g., *Denson v. Stack*, 997 F.2d 1356 (11th Cir. 1993); *Kaiser v. Wright*, 629 P.2d 581 (Colo. 1981); *Gross v. Pydynkowski*, 927 P.2d 630 (Or. Ct. App. 1996).

112. See *Schultz v. Duitz*, 69 S.W.2d 27, 30 (Ky. 1934) ("[I]n modern ages [the engagement ring] has developed into more than a mere custom or symbol, and has become part of the real consideration of the contract."). Courts are unwilling to recognize formal bargains of this sort; for example, they have repeatedly held that marital services cannot be consideration between spouses because such services must be given for love if they are to be given at all. See *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993); *Youngberg v. Holstrom*, 108 N.W.2d 498, 502 (Iowa 1961); *Oates v. Oates*, 33 S.E.2d 457, 460 (W. Va. 1945); see also *Siegel*, *supra* note 31, at 2185-91 (discussing these and other cases). Even if the parties did intend that the ring serve as consideration, the law could refuse to enforce that intention, as courts refuse to award damages for breach of explicit contracts regarding love and intimate services. See, e.g., *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Ct. App. 1986); *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987); *Watkins v. Nugen*, 45 S.E. 262 (Ga. 1903); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. Ct. App. 1983); *Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. Ct. App. 1981); *In re Estate of Steffes*, 290 N.W.2d 697 (Wis.



implicit bargain. Consideration, after all, is tangible evidence of an enforceable contract; it shows that a person has reason to rely on another's promise.<sup>113</sup> A ring, similarly, is tangible evidence of engagement; at least sometimes it is reasonable to rely on the donee to marry the donor.

But this connection between valuable property and an impending marriage is an uneasy one. The driving ideology of antiheartbalm statutes was that promises to marry cannot be measured on a scale of value.<sup>114</sup> The very concept that an "exchange" occurs between lovers implicitly accepts a marketplace model in which love is something to be traded, even if its value remains subjective and unmonetized.

One New York court illustrated the tension between noncommodification and legal compulsion to return the ring when, in the course of holding that an engagement ring or its value must be returned to the donor when the engagement is broken, it quoted a popular song: "'She took it off her finger, now it doesn't mean a thing.'"<sup>115</sup> According to the court, the ring was worthless when the affection for which it was exchanged vanished, because it was a symbol. Yet, in the next few sentences of its opinion the court held otherwise, finding that the ring *did* mean several thousand dollars in damages.

As the New York case suggests, courts have invoked the unique symbolic status of the ring to distinguish it from other property and to separate it from the realm of contract law.<sup>116</sup> Symbolism, however, has always been an important part of contract law; even a peppercorn suffices as consideration, because it is the symbolic transfer, not the actual value of the thing transferred, that announces the formation of the contract.<sup>117</sup> As one plaintiff's lawyer commented, "The whole problem people have [with this issue] is talking about the symbol of the ring . . . . But when you're talking about a \$20,000 ring you

1980); *see also* Siegel, *supra* note 31, at 2181-96 (discussing these and other cases). This could easily be the case with engagement rings, as New York's early interpretation of its antiheartbalm law shows. *See supra* text accompanying note 52. The idea that the ring could be consideration for marriage directly contravenes antiheartbalm statutes inasmuch as the legislatures have declared that agreements to marry are not contracts; the ring is, as it were, consideration in the air.

113. As Karl Llewellyn put it:

Formal acts of the known type . . . signify openly definitive intent to change the existing situation—and to be relied on. . . . [In the case of] the delivery and acceptance of the unambiguous token (engagement ring . . .) or the ambiguous token[,] . . . whether sanctions other than legal be invoked in addition or not, and whether or not the form accomplishes additional purposes . . . , the common purpose of the form is clear. The overt sign of utter intent to assume obligation has been given. The other party has reason to rely.

Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 711-12 (1931) (footnote omitted).

114. *See supra* notes 24-37 and accompanying text; *cf.* Ellman, *supra* note 9, at 788 (discussing the similar views of modern no-fault theorists).

115. Goldstein v. Rosenthal, 288 N.Y.S.2d 503, 507 (Civ. Ct. 1968).

116. *See id.*; *see also* McIntire v. Raukhorst, 585 N.E.2d 456, 457-58 (Ohio Ct. App. 1989).

117. *See* FRIEDRICH KESSLER ET AL., *CONTRACTS* 706-23 (3d ed. 1986) (collecting and discussing authorities on the symbolism of consideration).

don't just say 'you can keep this as a souvenir.'"<sup>118</sup> The deep connections between symbolism and materialism are also suggested by the longstanding practice of engaged couples' choosing a ring together, openly discussing price and quality; the romantic stereotype of a man surprising his girlfriend with a ring whose symbolism counts more than its market value is mostly a myth.<sup>119</sup> The ring is a powerful symbol in large part because people do care about market value.

One conclusion that can be drawn from the complex history of premarital law is that anticommodification does not do all the work that heartbalm proponents claimed for it.<sup>120</sup> If lovers merely exchanged love for love, we would expect a different analysis to apply to gifts of property. The physical gifts would be additional, no-strings-attached gifts. If love were a different kind of thing entirely from marketable commodities, there would be no way that "strings" could link love to property. The emotion and the material goods would simply exist on different planes. When the love ended, therefore, there would be no way to revoke the gifts; the gifts were not attached to the love nor conditioned on its continuation.

### III. GENDER AND THE LOGIC OF NO-FAULT

The rules of engagement apparently lack a firm grounding in logic or strict statutory construction. Courts have endorsed a particular version of engaged couples' expectations about gifts, but they have not made explicit the reasons for that choice. To understand the shape of the law, it is necessary to look beyond logic, and beyond engagement rings, to premarital law's gendered effects. Premarital law is inextricably bound up in ideas about gender and appropriate courting behavior. As Part I explained, the reformers targeted bad women. Even when stereotypes of scheming lower-class vixens were no longer invoked and courts began to doubt the efficacy of using fault to analyze broken engagements, however, bias against women remained.

This gendered disadvantage is a consequence of both the historical path from fault to no-fault and the particular concepts of property and gift embraced by the courts. Remnants of fault reasoning led courts to award rings to jilted

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118. Danielle N. Rodier, *Ex-Fiancé Will Get Engagement Ring Back*, PA. L. WKLY., Oct. 24, 1997, at 14 (alteration in original).

119. See Brady, *supra* note 107, at 244 ("Young couples today really do their engagement-ring homework. They come in and ask for a VVS2, Rappaport Report gem with G to H color." (quoting a jeweler)); W. Waters Schwab, *Hearts and Diamonds*, AM. MAG., July 1948, at 22, 22-23 ("[M]ore than half of the starry-eyed customers who bought [rings] shopped for the ring together. . . . [A]ccording to the 10,000 jewelers with whom I'm associated, even when the man does come in alone for the ring he has been pretty well briefed by the girl.").

120. Cf. *Willey v. Springs*, 840 F. Supp. 1259, 1262 (N.D. Ill. 1994) (noting that antiheartbalm laws may have been spurred more "to protect potential [male] defendants from overzealous spurned [female] lovers" than by "changing societal views of engagement and marriage"), *rev'd on other grounds*, 47 F.3d 1475 (7th Cir. 1995).

fiancés; from there, the logic of extending the rule to jilters seemed inescapable. Simultaneously, the incommensurability of love and money has been invoked to prevent certain kinds of injuries suffered mainly by women from being recognized in court.<sup>121</sup> Social realities have meant that the majority of successful post-reform plaintiffs, unlike the plaintiffs in prereform cases, have been male.<sup>122</sup> Because the de facto sex bias in heartbalm suits was and is still invoked as a reason for their illegitimacy,<sup>123</sup> this converse bias in modern cases should not go without notice. The gendered results of modern doctrine also suggest that the legacy of the legislative and judicial assault on manipulative women is still, despite formally gender-neutral reasoning, deeply present in the law.

### A. *The Gendered Consequences of Symbolism*

Engagement rings, like other courtship gifts, express materially the intimate bond between two people.<sup>124</sup> Similarly, a wedding, whether lavish or simple, is another public expression of love, and one that also costs money. By convention, brides and their families make most of the pre-wedding expenditures other than the cost of the ring.<sup>125</sup> Under a regime (whether

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121. See Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816 (1990) (arguing that the apparent gender neutrality of tort rules elevating physical security and property above emotional security and relationships burdens women more than men); cf. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing how injuries to women are made legally invisible by casting them as emotional rather than material). This is not unrelated to the general presumption that emotional harm, unlike physical harm, is more a matter of a victim's idiosyncratic susceptibility than a tortfeasor's fault. See Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 174-75 (1992).

122. The mandatory ring-return rule achieves in practice results similar to the traditional rule in cases in which husbands and wives sued for injuries to spouses: Husbands could recover, because their wives provided services that were measurable in monetary terms; wives, however, could not, because husbands did not stoop to servicing wives, and wives of injured or deceased men were merely deprived of their company and affections. See Chamallas & Kerber, *supra* note 121, at 817-18; Ruda, *supra* note 25, at 209-10.

123. See, e.g., *Aronow v. Silver*, 538 A.2d 851, 853 (N.J. Super. Ct. Ch. Div. 1987).

124. See CHERYL MERSER, HONORABLE INTENTIONS: THE MANNERS OF COURTSHIP IN THE '80S, at 20-23 (1983) (discussing the apparently strong need of people in love for visible symbols of that love).

125. See Karen Martin, *Wedding Bills: So Who Pays for What?* (visited Mar. 25, 1998) <<http://www.khoo.com/dc-wedding/article10.htm>>. This custom appears to be in some flux—recent surveys suggest that the bride and groom increasingly pay, while the groom's parents are still unlikely to contribute. See Laura Koos-Feder, *Wedding Season Ushers in Family Conflict*, INVESTOR'S BUS. DAILY, May 19, 1997, at A1; *Survey Reveals Brides' Wedding Gift Preferences*, PR Newswire, Dec. 13, 1994, available in LEXIS, News Library, Arcnws File. Brides (and their families) seem to contribute more, even when both sides pay for parts of the wedding, though the evidence is not entirely clear. See Katherine Atwell-Herbert, *Consultant Creates Dream Weddings*, ARIZ. REPUBLIC, Jan. 4, 1998, at 4; *Survey Reveals Brides' Wedding Gift Preferences*, *supra*. Engaged women routinely seek advice on who should pay the expenses, and often receive the answer that tradition should not be followed and that both families should pay. Nonetheless, there seems to be an underlying expectation that brides' families are primarily responsible for expenses if they can afford the burden. See, e.g., Jessica Blackman Freedman & Alison Blackman Dunham, *The Wedding Belles: Principles* (visited Mar. 25, 1998) <<http://www.blissezine.com/bel971101.htm>>; Deb McCoy, *Frequently Asked Questions on Wedding Expenses* (visited Mar. 25, 1998) <<http://www.weddingpages.com/expert/faqexp.html>>.

fault-based or not) that recognizes only conditional gifts as exceptions to antiheartbalm statutes, courts provide compensation for rings' material worth but not for the monetary value of wedding preparations.

The modern readings of heartbalm laws therefore bar plaintiffs from recovering the monetary expenditures women are likely to make while requiring women to return engagement gifts,<sup>126</sup> even though feminist heartbalm reformers expected that the ring would continue to operate as liquidated damages in cases of actual broken engagements.<sup>127</sup> Is there really something special about the ring that justifies legal intervention? Viviana Zelizer, a sociologist who has studied the various meanings of money in the late nineteenth and early twentieth centuries, suggests that women's money was usually collectivized and considered family money, while men's money was considered their own.<sup>128</sup> The money a wife made was trivialized, somehow less fundamentally "money" than a husband's wages.<sup>129</sup> If this understanding also applied to preparations for marriage, the return of the ring without recovery for other expenses in preparation for a wedding makes more sense. But the motivation for this constellation of rules is not clearly founded on anticommodification principles.

Zelizer also suggests that money, though it is supposed to be completely fungible and homogenous, actually comes in different varieties: Some kinds of money are reserved for particular functions—for example, many prostitutes use government welfare grants to pay bills, but treat their illicit earnings as "dirty money" to be spent in a splurge.<sup>130</sup> Other valuable objects may also have very specific uses that determine their proper disposition. If an engagement

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If a woman's parents, as is traditional, pay for the wedding, is a rule that denies them any compensation really *gendered*? Gender ideology certainly influenced courts' decisions about what kinds of losses are compensable even if fathers and mothers of brides are equally disadvantaged by the rule, just as the related practice of giving dowries is gendered (and constitutes a source of gender discrimination) though parents—fathers, even—are the ones who formally bear the cost of a dowry. In fact, harm to men as well as women is a feature of many (arguably all) gender inequalities. Women have sons, fathers, husbands, and the like who suffer both emotionally and financially from discrimination against their female intimates.

126. See Williams, *supra* note 57, at 1037, 1067. Williams analyzes the problem from an economic perspective, concluding that the gendered effects of the rule vary according to when the promise is broken. He cites research indicating that the average wedding costs \$15,000, *see id.* at 1037 & n.132, and that the average engagement ring costs \$3000, *see id.* at 1037 n.133. If the engagement is broken early on, allowing the woman to keep the ring overcompensates her for her reliance interests, but if it is broken later, keeping the ring will undercompensate her. *See id.* at 1067; *see also* Heiman v. Parrish, 942 P.2d 631, 640 (Kan. 1997) (Marquardt, J., dissenting) (decrying the no-fault result's abolition of liquidated damages for a woman).

127. See Bromley, *supra* note 27, at 9.

128. See ZELIZER, *supra* note 41, at 59-60; *cf. id.* at 68 ("[D]espite the prevalent assumption that her money is for personal frills while his money is communal property, in fact the wife's extra income is more likely than her husband's to be spent for family needs than on her personal needs.").

129. *See id.* at 65-66.

130. *See id.* at 3; *see also id.* at 18-19, 25 (discussing how people earmark money for different purposes, often determined by the contexts in which the money was received).

ring is used to seal a bargain as a down payment might,<sup>131</sup> ring-returning doctrines might enforce the socially correct use of the ring. If it is not part of a continuing relationship, the woman who possesses it does so improperly.<sup>132</sup> Thus, one writer titled his attack on New York courts' failure to require the return of the ring *Take Back Your Ring, Sir!*<sup>133</sup>—evoking the very feminine propriety lacking when men had to bring suit.

Some courts state that return of the ring is required to avoid penalizing the donor for preventing an unhappy marriage.<sup>134</sup> This position assumes, first, that not getting the ring back is a consideration expected to bear on a reasonable man's mind, contrary to the antiheartbalm claim that sincere lovers would not consider money. It assumes, second, that nonintervention is a penalty; that is, it presupposes a baseline in which the state will intervene in personal relationships, though heartbalm reform was supposed to get the state out of that business. The rule also ignores the opposite problem: Might it not deter a woman from ending a bad engagement? If she is less wealthy than her fiancé, as many women are, then the engagement ring will constitute a greater percentage of her wealth than it will her fiancé's. The declining marginal utility of wealth means that a mandatory rule of return will more readily deter a woman from ending a bad engagement than it will ease a man's decision to do so, because she will forfeit relatively more than he will regain.<sup>135</sup>

These considerations make the gendered reasoning underlying the current state of premarital law more apparent. The standard expectations about rings can be contrasted to the standard expectations about wedding preparations. When the two rules are juxtaposed, the inequities in the current regime become more apparent.

### B. *The Ban on Recovering Pre-Wedding Expenses*

While a man can, in many states, regain his ring whenever an engagement ends, a woman cannot recover expenses for a wedding she has painstakingly arranged; not only may she be abandoned at the altar in front of friends and family, she (and her family) will have to pay for the costs of the nonexistent celebration. Lawsuits for recovery of expenses not directed to the defendant,

131. See *id.* at 20-21 (explaining that certain objects can serve as informal monies); *cf.* *De Cicco v. Barker*, 159 N.E.2d 534, 535 (Mass. 1959) (adopting the theory that the ring is a unique symbol of the pledge to marry); *McIntire v. Raukhorst*, 585 N.E.2d 456, 458 (Ohio Ct. App. 1989) (same).

132. See ZELIZER, *supra* note 41, at 78 (positing that "gifts . . . assume the long-term duration of a relationship"). Zelizer also notes that, according to etiquette advisors, gift-giving in engagements had to be carefully monitored, to prevent any implication that a woman was trading sexual services for expensive gifts, as a prostitute might. See *id.* at 99-101 (citing EMILY POST, *ETIQUETTE* 311 (1922)).

133. Markewich, *supra* note 53.

134. See, e.g., *Aronow v. Silver*, 538 A.2d 851, 853-54 (N.J. Super. Ct. Ch. Div. 1987); *McIntire*, 585 N.E.2d at 457; *Lyle v. Durham*, 473 N.E.2d 1216, 1218 (Ohio Ct. App. 1984).

135. Cf. *Lindh v. Surman*, 702 A.2d 560, 565 & n.4 (Pa. Super. Ct. 1997) (Schiller, J., dissenting) (arguing that the no-fault rule may create an incentive for men to break engagements).

but made in preparation for marriage (for example, travel to a fiancé's residence or a wedding dress), though simple to measure in monetary terms, have generally been held to be prohibited by antiheartbalm laws.<sup>136</sup> The rule against recovery of pre-wedding expenses seems odd; if the justification for the antiheartbalm laws was that harms of the heart could not be proven or measured, and in any event only a hardhearted plaintiff would pursue such a claim, the availability of certain proof as to damages would seem to evade that central justification. Blackmail, too, would seem less likely if the plaintiff were limited to recovering her own expenditures.

Neil Williams, responding to the apparent differences between suits for recovery of pre-wedding expenses and paradigmatic heartbalm cases, suggests that the theory of promissory estoppel should be used to award recovery where plaintiffs have spent large amounts preparing for a wedding that is cancelled.<sup>137</sup> Promissory estoppel (or reliance) theories do not require a bargain or contract between the parties because they are designed for situations in which one party reasonably made herself vulnerable based on the other party's actions. Williams explains that under promissory estoppel, "a promisor is alerted to the seriousness with which a promise should be taken by the

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136. See, e.g., *A.B. v. C.D.*, 36 F. Supp. 85 (E.D. Pa. 1940), *aff'd*, 123 F.2d 1017 (3d Cir. 1941); *Boyd v. Boyd*, 39 Cal. Rptr. 400 (Ct. App. 1964); *Piccininni v. Hajus*, 429 A.2d 886 (Conn. 1980); *Thorpe v. Collins*, 263 S.E.2d 115 (Ga. 1980); *Waddell v. Briggs*, 381 A.2d 1132 (Me. 1978); *Thibault v. Lalumiere*, 60 N.E.2d 349, 351 (Mass. 1945); *Aronow*, 538 A.2d at 856; *Sulkowski v. Szewczyk*, 6 N.Y.S.2d 97 (App. Div. 1938); *Bruno v. Guerra*, 549 N.Y.S.2d 925 (Sup. Ct. 1990); *Snider v. Keenan*, No. 92-J-39, 1994 Ohio App. LEXIS 535, at \*1-3 (Ct. App. Feb. 11, 1994); *Self v. Haddix*, No. 9844, 1987 Ohio App. LEXIS 7324, at \*1-3 (Ct. App. June 2, 1987); *Ferraro v. Singh*, 495 A.2d 946, 947-49 (Pa. Super. Ct. 1985). *But see* *Langley v. Schumacker*, 297 P.2d 977 (Cal. 1956) (allowing a fraud action where the plaintiff claimed that the defendant induced her to quit her job to marry him and then refused to get married); *Pertuis v. Paul*, 58 S.E.2d 190 (Ga. Ct. App. 1950) (allowing a fraud action where the plaintiff quit his job and moved based on the defendant's false claim that she was free to marry); *Jackson v. Brown*, 904 P.2d 685, 687 (Utah 1995) (suggesting that a reliance theory might allow recovery of pre-wedding expenses where the defendant deceitfully concealed his marital status during the engagement); cf. *Renshaw v. Renshaw*, No. 0538427, 1997 Conn. Super. LEXIS 724 (Super. Ct. Mar. 21, 1997) (holding, in a divorce action, the defendant husband responsible for part of the wedding expenses incurred by the plaintiff wife before the marriage).

137. See Williams, *supra* note 57; see also D. Joseph Hurson, Case Note, 53 WASH. L. REV. 751, 755-56 (1978) (suggesting a regime allowing recovery of consequential and reliance damages only). Susie Steinbach, in her study of English breach-of-promise cases, has found that juries routinely took such preparations into account:

Juries almost always awarded higher damages to women when their wedding day was planned and/or imminent. Presumably this reasoning had two parts: first, that preparations for a wedding celebration indicated the seriousness of the relationship, and second, that the canceling of a wedding added to the public humiliation the woman suffered (and increased the likelihood that questions would be raised about her character). In addition, a nearer wedding date probably meant that expensive preparations on the bride's behalf would have been made. If the date had been set, the bridesmaids chosen, the dress made, the bride-cake ordered, any or all of these things increased the damages and were of course stressed by the plaintiff's counsel. (Conversely, if these arrangements had not been made, the defense counsel would emphasize this as evidence that the courtship was not far advanced in an attempt to lower the damages awarded.)

Susie L. Steinbach, *Promises, Promises: Not Marrying in England 1780-1920*, at 145-46 (1996) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library).

degree to which it is likely to induce substantial reliance. . . . [P]romises to marry are inherently likely to induce significant steps of reliance."<sup>138</sup> This is an attractive idea, because it goes beyond the relations between a once-engaged couple to look at how one party may have been made worse off by expecting to marry, even when she had not transferred property directly to the other. Promissory estoppel would not allow recovery for harms such as loss of social standing or the expected benefits of a spouse's wealth, only for expenses like catering and a wedding dress.<sup>139</sup>

Unfortunately, Williams does not discuss in sufficient detail how his proposal would interact with the current regime of premarital law. Would promissory estoppel be no-fault, operating such that formerly engaged couples would split pre-wedding expenses no matter who broke the engagement? Williams seems to imagine that the promise-breaker would pay the entire sum,<sup>140</sup> but that would require courts to determine who broke the engagement and why. (If courts only ask who, then a man who breaks an engagement after discovering his fiancée in bed with his best man would still have to pay for the wedding.)<sup>141</sup> As he notes, the theory of promissory estoppel "openly invit[es] courts to take into account all relevant fairness and policy considerations in determining whether their decisions advance the interests of justice under the circumstances in which particular promises are made."<sup>142</sup>

In other words, Williams appears to be proposing a fault regime. He argues, for instance, that the person who breaches is in a better position to avoid the loss because he could have waited to promise until he was more certain about the commitment.<sup>143</sup> (Or he could at least have broken the engagement before much money was spent on the wedding.) Yet this proposition assumes that nothing changes as the parties get closer to the marriage date—a contextual judgment, and one that may be belied by particular circumstances. One party's concealed or latent mental or physical defects, for example, historically could excuse a breach of promise.<sup>144</sup> It would seem reasonable that a person who concealed a drug habit, children from a prior relationship, or other inconvenient personal information should not be able to rely on her fiancé to remain steadfast when such information is

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138. Williams, *supra* note 57, at 1061 (footnotes omitted); see also Llewellyn, *supra* note 113, at 711-12 (discussing the importance of symbolism in contract formation).

139. Williams suggests that emotional distress damages would generally not be recoverable because keeping the promise would lead to an at-least-as-traumatic bad marriage. See Williams, *supra* note 57, at 1055.

140. See *id.* at 1019, 1047.

141. Cf. *supra* text accompanying notes 58-61 (discussing cases in which physical abuse led women to break engagements).

142. Williams, *supra* note 57, at 1044; see also Cathy C. Hadden, Note, *Interspousal Gifts: Separate or Marital Property?*, 32 U. LOUISVILLE J. FAM. L. 635, 656 (1994) (arguing that courts have generally looked to fairness rather than bright-line rules in awarding interspousal gifts upon divorce).

143. See Williams, *supra* note 57, at 1064.

144. See *Willey v. Springs*, 840 F. Supp. 1259, 1266 (N.D. Ill. 1994) (discussing justifications for breach of promise), *rev'd on other grounds*, 47 F.3d 1475 (7th Cir. 1995).

revealed. Other issues of what constitutes “reasonable” reliance on a promise to marry could also make judicial resolution difficult. What if the engagement was obviously shaky from the start? Is spending money to prepare for the wedding then per se unreasonable? What if one party, or a party’s family, demands a lavish spectacle, over the other party’s protests? Should the more indifferent party be relieved from paying expenses he or she never endorsed? It is even possible that parties assume the risk of a broken engagement these days because social mores allow engagements to be broken easily.

It was for these sorts of reasons that England and two Canadian territories rejected proposals resembling Williams’s when they reformed their breach-of-promise laws to eliminate heartbalm actions. The English Law Commission, for example, believed that any recovery based on reliance would have to be limited to expenditures that were “reasonable in all the circumstances.”<sup>145</sup> Losses, on this plan, would be shared equally as a general rule, but not where equal sharing would be “inequitable”—as where one member of the engaged couple was much poorer than the other or where overlooking a party’s conduct would lead to untenable results.<sup>146</sup> The flexibility, or ambiguity, of these principles, however, led the Commission to advocate barring any suits between formerly engaged couples except suits to recover money spent on direct gifts to one another.<sup>147</sup> Similarly, the Law Reform Commissions of British Columbia and Manitoba rejected allocating losses between the parties because courts would have had to untangle financial dealings that might extend over years.<sup>148</sup> The Law Reform Commission of British Columbia asked:

[I]f A claimed \$100 for wedding invitations which could no longer be used, should B be able to set off the cost of airfare for a trip to visit A’s parents which would not have been taken if the parties were not engaged? What if B also managed to get in some skiing on the trip?<sup>149</sup>

These questions about expectations are resolved in the engagement gift context by bright-line rules that do not necessarily reflect the parties’ actual

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145. LAW COMM’N, BREACH OF PROMISE OF MARRIAGE 9 (1969).

146. *Id.* at 10.

147. *See id.* at 10-11, 14. The Commission also felt that such a change in the law would cause more cases to be brought into court and would be unacceptable to the public because it would require courts to pry into the details of broken engagements. *See id.* at 11. It is interesting that the Commission found adjusting property transferred between the parties “of greater importance” than allowing recovery for wedding preparation expenses, *id.* at 14, because the objections it raised earlier—that testimony in such cases would be conflicting and would force courts to examine the intimate details of relationships, that a “community property” regime for engaged couples should be avoided, and that valuing contributions would be difficult, *see id.* at 10-11—seem equally applicable to cases involving property given by one lover to another. If anything, such cases could present more difficulties, as courts would have to distinguish absolute gifts such as Christmas presents from gifts in contemplation of marriage.

148. *See* LAW REFORM COMM’N OF B.C., REPORT ON BREACH OF PROMISE OF MARRIAGE 25 (1983); MANITOBA LAW REFORM COMM’N, REPORT ON BREACH OF PROMISE TO MARRY 23-24 (1984).

149. LAW REFORM COMM’N OF B.C., *supra* note 148, at 25.



expectations. In making premarital law, courts must confront the tension between accommodating complex, context-sensitive expectations and maintaining clear rules. If no-fault is to be the rule for men's gifts to women, it should also be the rule for the reliance-based expenditures for which women are by custom responsible. In the current application of conditional gift theory to engagement rings, courts formally refer to the parties' expectations while presuming the content of those expectations. Similarly, the law could presume expectations about pre-wedding expenses rather than trying to find them in each case. Courts could institute a no-fault rule making both parties equally liable for money expended in reliance on a promise to marry.<sup>150</sup> Questions about actual reasonableness and actual reliance could be avoided in order to keep courts from the messy business of fault. Courts could presume, for example, that people benefit from taking trips even if those trips only happened because of an engagement, but that useless wedding invitations and forfeited catering deposits represent pure loss that should be shared.

Antiheartbalm laws rejected particular kinds of commodification that seemed uniquely offensive, but did not separate marriage from commerce as decisively as reformers' rhetoric implied. Some kinds of property are imbued with love but nonetheless subject to judicial regulation. Moreover, gender has affected the line between situations in which transfers seem clearly to offend anticommodification norms and those in which other court-ordered transfers are unproblematic. The current interpretation of antiheartbalm laws is inequitable because it makes women vulnerable to economic loss at the end of an engagement even when men break their promises. Addressing that vulnerability would have a price: It would require courts to make difficult decisions about reasonable expectations in engagements. Nonetheless, it would be possible to apply a reliance theory, based on standardized presumptions, to cases for the recovery of pre-wedding expenses. The necessary presumptions could be applied like the presumptions in engagement ring cases, avoiding troublesome individualized fault determinations by refusing to heed claims about particular parties' actual expectations.<sup>151</sup>

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150. One author has suggested a version of this no-fault reliance regime:

An extension of no-fault and quasi-contractual principles to this area would treat the couple as a partnership, equally bearing the economic burden of their unsuccessful endeavor. In allocating the expense of aborted wedding plans, gifts given during the engagement period between the parties could be claimed as a setoff, provided that the arrangement is mutually agreeable.

Hurson, *supra* note 137, at 760-61 (footnote omitted).

151. Another possible no-fault regime would presume that an engagement ring constituted liquidated damages and would require a man to prove that retaining the ring would overcompensate his ex-fiancée. See *Heiman v. Parrish*, 942 P.2d 631, 640 (Kan. 1997) (Marquardt, J., dissenting); Barnes, *supra* note 88, at 30 ("I figured that if you tallied up all those lost deposits . . . and threw in my therapy bills, he still owed me several grand.").

## IV. THE CONTINUING RELEVANCE OF PREMARITAL CLAIMS

Today, antiheartbalm actions are often discussed as relics of a long-ago past, when women were property and people married for pragmatic, economic reasons.<sup>152</sup> As one court wrote in 1977, though upholding an action for money spent preparing for marriage and anguish from the breach: “[M]arriages today generally are not considered property transactions . . . . A person generally does not choose a marriage partner on the basis of financial and social gain; hence, the plaintiff should not be compensated for losing an expectation which he or she did not have in the first place.”<sup>153</sup> In the court’s view, the “complex experience called being in love”<sup>154</sup> does not currently include a desire for financial security. The court probably overstated its case; people do marry for love, but both polls<sup>155</sup> and impressionistic accounts<sup>156</sup> suggest that money remains important as well. To argue that women should not be able to take into account the economic costs of a broken engagement, or that the emotional symbolism of a ring removes it from the realm of economic value, ignores the ways in which intimate relations remain also economic relationships. When anticommodification rhetoric became the dominant language used to describe love, courts and commentators lost the ability to explore the subtler connections between love and material necessity.

The complicated connections between love and money in intimate life are also entangled in other debates over fault versus no-fault family law regimes. Today, some states are considering a return to fault-based divorce, heeding arguments that no-fault divorce encourages people to discount the importance of the marital bond; these attempts recall the premises of the old heartbalm

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152. See, e.g., Wright, *supra* note 17, at 365 (“Another fact doubtless influencing the old common law judges was that at that time most marriages had a money value based on the wealth of the parties.”).

153. *Stanard v. Bolin*, 565 P.2d 94, 97 (Wash. 1977); see also *Hanover v. Ruch*, 809 S.W.2d 893, 894 (Tenn. 1991) (abolishing criminal conversation “because the action is founded upon a property-based theory which has no place in contemporary society”).

154. *Stanard*, 565 P.2d at 97 (quoting HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 2 (1968)).

155. The Virginia Slims American Women’s Poll, conducted in 1974, 1979, and 1985, consistently showed that a substantial minority of men and women cited economic reasons as among the two or three most important reasons for marrying. See Public Opinion Online, 1989, Accession Number 0126354 (reporting that, in 1985, “economic security” was chosen by 8% of men and 14% of women, and “because you can share responsibilities, income, etc., and have an easier, more comfortable life” was chosen by 23% of men and 25% of women), available in LEXIS, Market Library, Rpoll File; Public Opinion Online, 1989, Accession Number 0118777 (reporting that, in 1979, “economic security” was chosen by 7% of men and 17% of women, and “shar[ing] responsibilities, income, etc.” was chosen by 22% of men and women), available in LEXIS, Market Library, Rpoll File; Public Opinion Online, 1991, Accession Number 0155471 (reporting that, in 1974, “economic security” was chosen by 7% of men and 14% of women, and “shar[ing] responsibilities, income, etc.” was chosen by 21% of men and 23% of women), available in LEXIS, Market Library, Rpoll File.

156. See, e.g., Susan Squire, *The Ideal Husband: What Does a Woman Want in a Partner?*, HARPER’S BAZAAR, June 1997, at 152, 152-53 (reporting that many women still desire husbands who are economically successful and who make more money than their wives); cf. Robert Wright, *Our Cheating Hearts*, TIME, Aug. 15, 1994, at 45, 50 (discussing evolutionary psychology research suggesting that humans seek mates with high socioeconomic standing).

actions, which were based on the idea that marriage was a sacred covenant not to be entered into or left lightly.<sup>157</sup> The fault-based rationale for awarding damages for breach of promise or post-divorce support suggests that money, though not commensurable with love and fidelity, is the only metric available to measure the harm done when intimate relationships are betrayed.<sup>158</sup> Indeed, it is common for victims, even of physical torts, to litigate to express their sense of outrage as well as for money.<sup>159</sup> Modern courts sustaining heartbalm actions have pointed to damages given for other intangible harms to demonstrate that courts are capable of awarding money for things that are, in some sense, priceless.<sup>160</sup> Where regulation before the fact is impossible, without money there is no redress at all. Even if money is not the same thing as lost love, it is at least a powerful symbol—much like an engagement ring.

The anticommodification view, however, retains its force when deployed in defense of no-fault regimes. Thus, *Playboy* rails against heartbalm suits for embracing “the idea that sex, even in *romantic* relationships, is commerce. . . . It’s hard to imagine exactly how a jury could attach a fair dollar value to the hurt of the jilted party.”<sup>161</sup> Critics still invoke the risk of blackmail, despite the cultural changes that have made allegations of sexual misbehavior less threatening to a reputation.<sup>162</sup> Antiheartbalm reformers, it may be recalled, argued that women whose wounds could be healed by money were of

157. See Terry Carter, ‘*She Done Me Wrong*,’ A.B.A. J., Oct. 1997, at 24, 24 (linking the resurgence of heartbalm actions to the recent adoption of “covenant marriage” in Louisiana); *CNN Crossfire: Panel Discusses Punishment in Divorce Cases and Who’s To Blame* (CNN television broadcast, Aug. 7, 1997) (statement of Patrick Buchanan) (same), transcript available in LEXIS, News Library, CNN File (Transcript No. 97080700V20); see also *Bearbower v. Merry*, 266 N.W.2d 128, 134 (Iowa 1978) (arguing that the statutory waiting period for divorce indicated a legislative desire to protect marriage, which justified the retention of the action for alienation of affections).

158. See, e.g., RADIN, *supra* note 33, at 184-85; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 82 MICH. L. REV. 779, 820 (1994).

159. See Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39, 50-51 (1994).

160. See, e.g., *Bearbower*, 266 N.W.2d at 133.

161. Ted C. Fishman, *The Law & Love: When Brokenhearted Lovers Hire Attorneys*, PLAYBOY, Aug. 1994, at 46, 46 (emphasis added). Fishman predicts that “the suits will combine the worst aspects of rape and divorce trials.” *Id.*; see also *Ban the Balm*, CHAPEL HILL HERALD, Oct. 12, 1994, at 4 (“The main problem with heart-balm suits is that they try to put a dollar figure on relationships.”). As Radin points out, the incommensurability of suffering with dollars “is evidently worth big bucks to defendants.” RADIN, *supra* note 33, at 196.

162. See, e.g., *Cannon v. Miller*, 322 S.E.2d 780, 800 (N.C. Ct. App. 1984) (“[T]here is no reason to believe the problem [of people using heartbalm actions to commit blackmail] is any less prevalent today.”); Cindi Andrews, *Love’s Legal Loss*, NEWS & REC. (Greensboro, N.C.), Aug. 16, 1997, at A1 (“The existence of these causes of action provides the most effective and most commonly used tool of blackmail in any divorce . . . .” (quoting University of North Carolina law professor Sally Sharp)); Carter, *supra* note 157, at 24 (“The case opens the door to collusion or fraud. . . . [A] wife and her ex-husband could set up a wealthy woman and sue.”). But see *Bearbower*, 266 N.W.2d at 133-34 (“There is a palpable inconsistency between [the blackmail] argument and the frequent implication the remedy should be struck down because social mores now condone such extramarital activity. If so, there should be no hazard to a potential defendant’s reputation, nor, for that matter, any danger of excessive jury verdicts.”); *Norton v. Macfarlane*, 818 P.2d 8, 12 (Utah 1991) (“To a large extent, the basis for abuse has diminished as the Victorian attitudes toward sex have diminished and yielded to a much more frank and open attitude, as is evident from sexually explicit material regularly published . . . .”).

questionable character and could not have suffered real damage.<sup>163</sup> Today, people use the language of therapy to the same effect: Heartbalm actions hurt plaintiffs by preventing them from “moving on” and allowing them to avoid responsibility for the relationship.<sup>164</sup> Nadine Strossen of the American Civil Liberties Union, for example, echoes the reformers when she states, “[I]f [a plaintiff’s] broken heart can be solved by some dollars [then] I have doubts about the credibility of the claim.”<sup>165</sup> This modern reformulation still locates fault in the plaintiff’s use of the law rather than in the relationship’s failure.

The underlying problem with both fault and no-fault regimes is that judging human behavior in intimate relations is often difficult, even if it sometimes seems morally necessary. Fault regimes tend to blame some parties for things that society no longer finds reprehensible and to create new, blameworthy practices in which litigants can take advantage of the system. No-fault regimes, on the other hand, exclude even the most awful behavior from consideration, so that physical abuse—even attempted murder—does not affect property division upon divorce,<sup>166</sup> a conclusion that seems perverse. People have a persistent need to make fault judgments, a need that is particularly powerful when a court is forced to decide how property should be divided.<sup>167</sup>

American family law too easily assumes that there is a sharp divide between family and strangers.<sup>168</sup> Carol Rose criticizes family law analysis that opposes the family to strangers encountered in the marketplace, arguing that markets are not generally composed of total strangers and that families involve many market-like negotiations; these caricatures have hindered realistic analysis of family relations, she argues, often to the detriment of women.<sup>169</sup>

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163. See *supra* note 38 and accompanying text.

164. See, e.g., *Bearbower*, 266 N.W.2d at 138 (McCormick, J., dissenting in part) (arguing that heartbalm torts encourage people to avoid responsibility for their own mistakes in intimate relations by blaming someone else); *Heiman v. Parrish*, 942 P.2d 631, 638 (Kan. 1997) (“Litigating fault for a broken engagement would do little but intensify the hurt feelings and delay the parties’ being able to get on with their lives.”); *Felsenthal v. McMillan*, 493 S.W.2d 729, 731-32 (Tex. 1973) (Steakley, J., dissenting) (“[A]n award of damages [for alienation of affections] will neither alleviate emotional distress nor strengthen marital ties. . . . [A] contested trial will almost certainly destroy any chance the spouses might otherwise have to reestablish a meaningful marital relationship.”); Bonnie Erbe, *Jilted Wife Wins in Court, Loses in Life*, ROCKY MOUNTAIN NEWS (Denver), Aug. 16, 1997, at 60A; Ray Recchi, *Jury Can’t Measure Price of Heartbreak*, SUN-SENTINEL (Ft. Lauderdale), Aug. 19, 1997, at 1E.

165. *CNN Crossfire: Panel Discusses Punishment in Divorce Cases and Who’s To Blame*, *supra* note 157 (statement of Nadine Strossen).

166. See Ellman, *supra* note 9, at 821 (discussing cases taking this view); Woodhouse & Bartlett, *supra* note 9, at 2528 (same).

167. See Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 734; Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 556.

168. See Regan, *supra* note 5, at 2314 & n.39. Regan argues that a good reform would be to make the legal consequences of marriage extend beyond the moment of divorce, so that dissolution would take place over time. In particular, economic responsibility would continue after divorce. See *id.* at 2388. The same argument could be made for the relationship before the legal marriage date. Before the marriage ceremony, the marriage itself lacks reality; yet people who are formally engaged expect to get married and do not expect to get divorced.

169. See Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J.

These ideas have also influenced premarital law in ways that do not necessarily reflect the attitudes of the parties when the engagement begins. If a person goes from stranger to spouse at the moment of marriage and back again instantaneously at the moment of divorce, then courts' reluctance to accept that engagement gifts are unconditional becomes more understandable: One does not give unconditional gifts to strangers. If a fiancée is not a legal stranger to her fiancé up until the moment of marriage, however, the issue becomes more complicated; in the real world, lost love often leaves enduring marks.

Over the last century, the focus of premarital law has shifted from the social consequences of broken engagements for women to the narrower question of who will keep the engagement ring. This is consistent with a general shift in attitudes toward marriage to the view that the law should not investigate the murky depths of love and loss, but should confine itself instead to the bluntly economic. Yet this very anti-emotional orientation makes it difficult for courts to understand some of the economic dimensions of dissolving relationships; in premarital law, the unrecognized harm includes expenses incurred in preparation for marriage. The shift to mandatory ring-return rules and the denial of women's claims for restitution have combined to make premarital law unfavorable to women. Until courts and legislatures elaborate a better theory of what no-fault rules are supposed to accomplish, this regime will remain both unequal and unjustified.

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2409 (1994). Property analysis, Rose argues, should be applied in intimate relations because property talk helps people take their acts seriously. *See id.* at 2420. People interested in family law should not pretend that property loses its normal characteristics when love and intimacy are involved: "Are diamonds a girl's best friend? Of course not. But they aren't chopped liver either, and the whereabouts of the diamonds (or property generally) may play a substantial role even in the context of intimate relations." *Id.* at 2421.