

**THE BRIDE, THE GROOM, AND THE COURT:  
A ONE-RING CIRCUS**

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INTRODUCTION

In August of 1994, Jerod proposed to Heather and gave her a diamond engagement ring that cost him \$9,033.<sup>1</sup> By October of 1995, Jerod had decided to end the engagement and asked for the engagement ring back.<sup>2</sup> Heather refused to return the ring, and Jerod filed a lawsuit the following April.<sup>3</sup>

The Kansas Supreme Court decided that “engagement rings should be considered, by their very nature, conditional gifts given in contemplation of marriage.”<sup>4</sup> As a result of that determination, the court said that Heather had no ownership rights in the ring until wedding vows were exchanged.<sup>5</sup>

The court went on to conclude that the issue of who was at fault for the termination of the engagement<sup>6</sup> was ordinarily irrelevant for purposes of determining ownership of the engagement ring.<sup>7</sup> As such, the court required Heather to return the diamond engagement ring to Jerod.<sup>8</sup>

The dissenting judge refused to infer a condition precedent on the gift of an engagement ring.<sup>9</sup> She asserted that the engagement ring was a

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<sup>1</sup> See *Heiman v. Parrish*, 942 P.2d 631, 632 (Kan. 1997).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 634.

<sup>5</sup> See Brian L. Kruckenberg, Comment, “*I Don’t*”: *Determining Ownership of the Engagement Ring When the Engagement Terminates*, 37 WASHBURN L.J. 425, 425 (1998).

<sup>6</sup> Both Jerod and Heather agreed that Jerod ended the relationship, but neither stipulated whose fault, if any, actually caused the termination of the engagement. See *Heiman*, 942 P.2d at 632.

<sup>7</sup> *Id.* at 638. The court determined that fault should be considered only in “extremely gross and rare situations.” *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* at 639 (Marquardt, J., dissenting).

complete and valid gift, transferring title of the ring to Heather.<sup>10</sup> In the alternative, the lone dissenter suggested, fault should be a relevant factor for the court to consider.<sup>11</sup> She argued that it is unfair for Jerod, the one who called off the engagement, to be made financially whole while Heather remained uncompensated for the wedding preparation expenses she had incurred.<sup>12</sup>

This case is not a unique or unusual occurrence.<sup>13</sup> With the increasing number of lawsuits to recover engagement rings,<sup>14</sup> it is time for an economic discussion of the costs, benefits, and incentives that courts create when they rule on these cases. Was the Kansas Supreme Court right in adopting a conditional gift approach? Or was the dissent correct in stating that fault must be a determining factor? Which approach creates the appropriate economic incentives for parties deciding whether to get engaged?

This Article seeks to answer some of those questions by first describing both the historical context of civil lawsuits concerning broken engagements and also the development of diamond engagement rings. Part II then undertakes an economic analysis of the alternative approaches courts have taken. First, property law is examined to determine the incentives that gift and conditional gift law create and how the parties will respond to either law. Next, various contract law (fault-based) approaches are analyzed, again with an eye to the incentives created by any one particular regime. Finally, in Part III, this Article concludes with the surprising recommendation that courts should order specific performance for broken engagement contracts.

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<sup>10</sup> See *id.* at 639–40.

<sup>11</sup> See *id.* at 640.

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Andy Geller, *Mogul Gets His Rock Back*, N.Y. POST, Dec. 17, 1997, at 4 (discussing the settlement reached between millionaire John Lattanzio and model Ines Misan in which Misan kept over \$200,000 of gifts but agreed to return the \$290,000 engagement ring); Daniel J. Lehmann, *Court Discards Jury Award to Jilted Fiancee*, CHI. SUN-TIMES, Jan. 21, 1995, at 5 (discussing a lawsuit filed in Illinois for breach of promise to marry).

<sup>14</sup> See *infra* note 50 and accompanying text.

## I. BACKGROUND

A. *Breach of Promise to Marry Actions*

Prior to the 1930s, many states allowed a legal claim for breach of promise to marry.<sup>15</sup> The legal mechanism for these actions arose from English common law standards, which essentially treated marriage as a property transaction.<sup>16</sup> A breach of promise to marry action was typically brought by a woman whose fiancé had broken their wedding engagement.<sup>17</sup> She filed such a lawsuit to recover monetary damages of three types: expectation damages to place her in the financial and social position she would have attained had the marriage taken place (very much akin to the rights of a divorced spouse); traditional tort damages to recover for the emotional anguish and humiliation of the broken engagement; and reliance damages including the lost economic security,<sup>18</sup> opportunity costs of a foregone alternative such as employment, and also the impaired prospects of marrying another due to the woman's status now as "damaged goods."<sup>19</sup>

The only defense that could be offered by the male defendant in a breach of promise to marry suit was that his prospective bride "lacked chastity or otherwise acted in a manner substantially at odds with

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<sup>15</sup> See, e.g., Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 205–06 (1990); 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, 1020 (1995).

<sup>16</sup> See Kruckenberg, *supra* note 5, at 428.

<sup>17</sup> See Brinig, *supra* note 15, at 204.

<sup>18</sup> Williams, *supra* note 15, at 1025–26; see also Brinig, *supra* note 15, at 204; ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 117 (1980) ("[A]s late as 1930, nearly 90 percent of all American wives remained out of the work force. Marriage was still the main career for women. . . . [R]are was the employed woman—either married or single—who really could maintain economic independence.").

<sup>19</sup> Williams, *supra* note 15, at 1025–26; see also Brinig, *supra* note 15, at 204–05 (1990) ("Many, if not most, women who brought such actions had not only lost a husband, but also their virginity. . . . [S]exual intimacy with her fiancé reportedly occurred nearly half the time." (citing ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 336 tbl.78 (1953); ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 364 tbl.92 (1948))); MAY, *supra* note 18, at 43–44, 97–98 (discussing the disruption and instability in marriages due to the woman's prior sexual activity). "[F]or women, . . . purity was essential in the open marriage market." MAY, *supra* note 18, at 93.

prevailing norms of womanhood.”<sup>20</sup> With this evidence, the defendant could seek to reduce the amount of damages awarded by the jury.<sup>21</sup> However, the jury was just as likely to increase the damages if they believed that the defendant was simply casting unfounded aspersions at the plaintiff’s character.<sup>22</sup>

By the late nineteenth century, breach of promise to marry suits were more popular in America than they were in England.<sup>23</sup> The trials had become “social phenomen[a]”—entertainment for the entire town and fodder for sensationalistic tabloid media.<sup>24</sup>

Many criticisms of the breach of promise to marry action arose. The jury often awarded verdicts that seemed excessive.<sup>25</sup> Lax evidentiary standards allowed for private and sensational details to be admitted and often skewed the outcome of the case in favor of the plaintiff.<sup>26</sup> These suits were used as blackmail and extortion by malevolent women.<sup>27</sup> In addition, societal attitudes had shifted the focus of engagement and a

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<sup>20</sup> Williams, *supra* note 15, at 1027; *see also* Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1777–78 n.32 (1985) (“[S]uccessful defenses generally relate to the ‘condition of the flesh’ bargained for. Moral, spiritual, or emotional reasons for canceling the marriage are not good defenses. . . . For example, the defendant would have a successful defense if the plaintiff were not a virgin, a fact unknown to the defendant at the time of the engagement, or if the plaintiff had venereal disease.” (quoting W.J. Brockelbank, *The Nature of the Promise to Marry—A Study in Comparative Law*, 41 ILL. L. REV. 1, 7–8 (1946))). These same arguments could also be made after marriage in justifying a divorce. *See* MAY, *supra* note 18, at 157 (“A woman who was not genteel in her demeanor, who acted like (or indeed was) a ‘whore,’ or who violated the boundaries—physical as well as moral—of a woman’s proper sphere, might be shed in the divorce court.”).

<sup>21</sup> Williams, *supra* note 15, at 1027.

<sup>22</sup> *See id.*

<sup>23</sup> *Id.* at 1025.

<sup>24</sup> *See id.*

<sup>25</sup> *See Heartbalm Statutes and Deceit Actions*, *supra* note 20, at 1773–74.

<sup>26</sup> Kruckenberg, *supra* note 5, at 428 n.28.

<sup>27</sup> *See* Williams, *supra* note 15, at 1029–30; Brinig, *supra* note 15, at 205. “By the beginning of the Depression, the breach of promise suit came to be regarded as legally sanctioned blackmail.” *Id.* The term “gold-digger” originated with Anita Loos’s 1925 novel *Gentlemen Prefer Blondes*, which featured a breach of promise plaintiff as the main character. Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1, 7 n.31 (1989). *See generally* ANITA LOOS, *GENTLEMEN PREFER BLONDES* (Penguin Books 1992) (1925).

subsequent marriage from a mere property transaction to a union of love.<sup>28</sup> Thus, plaintiffs were no longer deemed worthy of receiving monetary damages for a broken heart.<sup>29</sup>

### B. *Heartbalm Laws*<sup>30</sup>

Beginning in the 1930s,<sup>31</sup> many states enacted laws that have come to be known as “heartbalm” statutes.<sup>32</sup> These laws attempted to rectify the problems with the breach of promise to marry action by abolishing it.<sup>33</sup> Legislatures claimed that the new laws were enacted to promote gender equality in light of the changing societal views of engagements and marriages.<sup>34</sup> Some commentators suggest, however, that many of the laws were written because of the “overzealous” female plaintiffs who abused the breach of promise to marry action.<sup>35</sup>

As of 1997, twenty-one states explicitly prohibit breach of promise to marry actions via heartbalm laws.<sup>36</sup> In addition, a few states have opted to impose restrictions on the breach of promise to marry actions.<sup>37</sup>

<sup>28</sup> See Coombs, *supra* note 27, at 8 (“Marriage was ‘companionate,’ a partnership rooted in love and affection.” (citing Christina Simmons, *Companionate Marriage and the Lesbian Threat*, 4 FRONTIERS 54, 54–55 (1979))).

<sup>29</sup> *Heartbalm Statutes and Deceit Actions*, *supra* note 20, at 1778.

<sup>30</sup> “‘Heartbalm’ statutes are also known as ‘Heart Balm,’ ‘heart-balm,’ and ‘Heart-Balm’ statutes. The name is a sardonic reference to the broken heart that supposedly justified a breach of promise suit.” *Id.* at 1770–71 n.4. In addition, the laws are occasionally identified as “anti-heartbalm” legislation. See Coombs, *supra* note 27, at 5.

<sup>31</sup> Technically, the first heartbalm law was passed in North Dakota in 1877. Brinig, *supra* note 15, at 207 n.11. “This may have been because it was one of the original ‘divorce mill’ states, enjoying popularity for dissolution of marriage during the period 1871–99.” *Id.* (citing MARY SOMERVILLE JONES, AN HISTORICAL GEOGRAPHY OF CHANGING DIVORCE LAW IN THE UNITED STATES 25, 33 (1987)). With the exception of North Dakota, the first wave of heartbalm laws was passed in 1935. See *id.* at 205 & n.8.

<sup>32</sup> See *Heartbalm Statutes and Deceit Actions*, *supra* note 20, at 1770–71.

<sup>33</sup> See *id.*; Coombs, *supra* note 27, at 5.

<sup>34</sup> See Brinig, *supra* note 15, at 207 (“The scanty legislative history for the statutes abolishing breach of promise indicates that one motivation, and perhaps the primary one, may have been removal of a vestige of women’s historic legal inferiority to men.”).

<sup>35</sup> See Williams, *supra* note 15, at 1031–32; Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583, 2587 (1998) (“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>36</sup> See Kruckenberg, *supra* note 5, at 429 n.31 (providing a list of the relevant state statutes). A typical heartbalm statute is only one or two sentences. *E.g.*, CAL. CIV. CODE (continued)

C. *Emergence of Engagement Rings*

In 1377, Emperor Maximilian gave to Mary of Burgundy the first reported diamond engagement ring.<sup>38</sup> Although diamonds were associated with a proposed marriage in the United States beginning in the 1840s,<sup>39</sup> diamond engagement rings were not a standard part of a marriage proposal for another one hundred years.<sup>40</sup> By 1945, however, engagement rings had grown in commonality so that the “typical” bride wore one with a wedding ring to match.<sup>41</sup>

In a 1990 economic study of the demand for diamonds,<sup>42</sup> Professor Margaret F. Brinig established a causal connection between the removal of breach of promise to marry actions and the emergence of diamond engagement rings. “The change in demand for diamond engagement rings may . . . be explained by an increase in need for such a bond because of the abolition of a cause of action for breach of marriage promise.”<sup>43</sup>

As Coase<sup>44</sup> might have predicted, since transactions costs are low between two lovers, the change in law (abolishing breach of promise to marry actions) had no great effect on the rate of parties getting engaged in the 1930s.<sup>45</sup> The prevalence of diamond engagement rings coincides with

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§ 43.5 (West 1982) (“No cause of action arises for . . . [b]reach of promise of marriage.”); COLO. REV. STAT. § 13-20-202 (2006) (“All civil causes of action for breach of promise to marry . . . are hereby abolished.”).

<sup>37</sup> Illinois and Tennessee have statutes that provide limitations with respect to notice and proof of the contract awarded for breach of promise to marry suits. Kruckenberg, *supra* note 5, at 429 n.31. Although there is no applicable statute in Washington, the Washington Supreme Court opted to restrict the damages available in breach of promise to marry actions. *See Stanard v. Bolin*, 565 P.2d 94, 97 (Wash. 1977).

<sup>38</sup> Brinig, *supra* note 15, at 203.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See generally* Brinig, *supra* note 15.

<sup>43</sup> *Id.* at 213.

<sup>44</sup> *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The Coase theorem, in essence, states that “[w]hen transaction costs are zero, an efficient use of resources results from private bargaining, regardless of the legal assignment of property rights.” ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 85 (3d ed. 2000).

<sup>45</sup> *Cf.* Brinig, *supra* note 15, at 210–11. A similar application of the Coase theorem was recognized in 1981 with respect to changes in the divorce law, which affected the distribution of property rights, but not the rate of divorces. *See* GARY S. BECKER, *A TREATISE ON THE FAMILY* 226, 228–29 (1981). “Whatever the laws might be, people who  
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the removal of the breach of promise to marry actions because the parties used the rings to contract around the law. The rings served as a “bond” for the woman and allowed her monetary compensation by means of the diamond should her fiancé break off the engagement.

*D. Today*

In current society, engagement rings are part of the marriage tradition. Attitudes and circumstances, however, have changed significantly from the 1930s. Women now have increased access to the labor market and are therefore not economically dependent upon men.<sup>46</sup> In addition, most men do not expect virgin brides.<sup>47</sup> “A prospective bride’s access to the marriage market is no longer significantly impaired by virtue of having indulged in pre-marital sexual activity.”<sup>48</sup> As a result of these societal changes, the need for a diamond engagement ring as a bond for sexual intimacy is significantly lessened.<sup>49</sup>

Recently, courts have been faced with litigants who were once parties to an engagement that has been terminated.<sup>50</sup> The focus, however, has

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wish to terminate their unions will do so, and fit into the legal structure that is available.” MAY, *supra* note 18, at 5.

<sup>46</sup> See Williams, *supra* note 15, at 1036.

<sup>47</sup> See *id.*

<sup>48</sup> *Id.*; see also *id.* at 1052 (“In most cases today, a jilted party’s access to the marriage market will not be substantially compromised as a result of having been aggrieved by a breached promise to marry.”).

<sup>49</sup> See Brinig, *supra* note 15, at 212, 213 (“[T]he wearing of a diamond symbolic of engagement is no longer a prerequisite to premarital intimacy . . . because the cost to a woman of a broken engagement is no longer as significant.”).

This is not to say that there is no current relationship between permission for sexual intercourse and the wearing of the engagement ring. . . . [T]he element of “surprise, even if it is feigned, plays the same role of accommodating dissonance in accepting a diamond gift as it does in prim sexual seductions: it permits the woman to pretend that she has not actively participated in the decision.” A recent *Life* magazine ad for DeBeers [the diamond-importing institution] is suggestively captioned “Want to Turn on the Heat?”

*Id.* at 211–12 n.19 (citations omitted) (quoting Edward Epstein, *Have You Ever Tried to Sell a Diamond?*, 249 ATLANTIC MONTHLY 23, 27 (1982)). In addition, it could be argued that the engagement ring serves as a bond for the wedding expenses incurred by women after the engagement. This notion will be discussed in Part II.C.

<sup>50</sup> See, e.g., Fowler v. Perry, 830 N.E.2d 97 (Ind. Ct. App. 2005); Clippard v. Pfefferkorn, 168 S.W.3d 616 (Mo. Ct. App. 2005); Karim v. Malik, 788 N.Y.S.2d 106

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shifted from “the social consequences of broken engagements for women to the narrower question of who will keep the engagement ring.”<sup>51</sup> Many courts treat such cases as property disputes and choose between treating the ring as a gift and treating it as a conditional gift.<sup>52</sup> Others engage in a contract-based discussion, which includes a discussion of which party is at fault for breaking the engagement.<sup>53</sup>

## II. ECONOMIC ANALYSIS OF JUDICIAL REGIMES FOR DETERMINING OWNERSHIP OF THE RING

### A. *What Should be the Goal of the Courts?*

Many commentators have suggested that the approach of the courts should generally be to accommodate, and not punish, those who wish to leave an engagement.<sup>54</sup> This argument is based on the notion that engagements are trial periods during which parties can determine if they truly want to marry their partner.<sup>55</sup> Imposing costs on persons who wish to break engagements would destroy the utility of the engagement period as it

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(N.Y. App. Div. 2005); *Cooper v. Smith*, 800 N.E.2d 372 (Ohio Ct. App. 2003); *Curtis v. Anderson*, 106 S.W.3d 251 (Tex. App. 2003); *DeFina v. Scott*, 755 N.Y.S.2d 587 (N.Y. Sup. Ct. 2003); *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475 (Minn. Ct. App. 2001); *Meyer v. Mitnick*, 625 N.W.2d 136 (Mich. Ct. App. 2001); *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999); *Heiman v. Parrish*, 942 P.2d 631 (Kan. 1997).

It is interesting to note that “litigation involving gifts given in contemplation of marriage still surfaces in jurisdictions regardless of whether [heartbalm] legislation exists.” *Kruckenbergh*, *supra* note 5, at 429. Although heartbalm statutes prohibit seeking recovery of expenses incurred in preparation for the wedding, they have been held “not to bar actions for the recovery of money or property transferred as part of the engagement.” Elaine Marie Tomko, Annotation, *Rights in Respect of Engagement and Courtship Presents When Marriage Does Not Ensnare*, 44 A.L.R.5TH 1, at § 2[a] (1996).

<sup>51</sup> See Tushnet, *supra* note 35, at 2618.

<sup>52</sup> See Tomko, *supra* note 50, at §§ 3–5. We have adopted a convention of categorizing gift or conditional gift regimes as a property law approach that generally ignores fault in its application. We recognize, however, that this may be an overly simplistic characterization and that courts do not always neglect fault in the treatment of property. Such considerations, however, are not relevant to our analysis.

<sup>53</sup> See *id.* at §§ 9, 20–25. We recognize that contract law may not always consider fault in resolving disputes. Again, however, for the sake of simplicity, we refer to contract law to denote discussions where fault is at issue.

<sup>54</sup> E.g., Coombs, *supra* note 27, at 8.

<sup>55</sup> See *Heartbalm Statutes and Deceit Actions*, *supra* note 20, at 1778.

relates to marriages, and make it “as expensive to get engaged as it is to get married.”<sup>56</sup>

Economic analysis, however, suggests otherwise; efficiency is best served if parties “test the waters” *prior* to engagement and use the dating relationship as the trial period.<sup>57</sup> In other words, in addition to desiring an efficient number of marriages, the law should also seek an efficient number of engagements. In so doing, society can avoid not only wasted expenses on an engagement ring and wedding arrangements, but also the opportunity costs of being out of the “marriage market” during an engagement that never comes to fruition.

In all cases, the goal of the courts should be to encourage thoughtful deliberation by the parties potentially involved in an engagement *prior* to the actual engagement. Breach of promise to marry actions accomplished this in part by “encourage[ing] men to take promises of marriage seriously and to invest significantly in searching for, and determining compatibility with, a prospective mate prior to entering into an engagement.”<sup>58</sup> Similarly, courts should adopt an approach in lawsuits to determine ownership of the engagement ring that has this same result—encouraging both parties to carefully assess the benefits, costs, and risks before exchanging promises to wed.

#### B. Property Law

Courts may choose to adopt a property law approach for determining ownership of the engagement ring. This regime focuses on whether the ring should be treated as a gift (in which case the woman will always keep the ring) or as a gift conditioned on the occurrence of the future wedding (in which case the man will always receive the ring back).<sup>59</sup> Under this analysis, any wedding expenses incurred by the woman<sup>60</sup> are irrelevant to the court’s decision;<sup>61</sup> those expenses, however, are certainly still considered by both parties to an engagement.

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<sup>56</sup> *Id.* (quoting Brockelbank, *supra* note 20, at 11).

<sup>57</sup> See Williams, *supra* note 15, at 1031. Williams stated that “promises to marry are the wellspring of a 30-billion dollar industry in the United States.” *Id.* at 1037.

<sup>58</sup> *Id.* at 1036.

<sup>59</sup> See Tomko, *supra* note 50, at §§ 3–5.

<sup>60</sup> This Article is premised on the tradition that brides incur most of the pre-wedding expenses. See Tushnet, *supra* note 35, at 2608.

<sup>61</sup> With a contract law approach, the wedding expenses that a woman incurs will be relevant in so far as they form the other half of the contract. See discussion *infra* Part II.C.

### 1. *Gift*

If the court announces that it considers an engagement ring as a gift to a woman, a man contemplating engagement has an incentive to be careful and confident about his engagement partner. He knows, *ex ante*, that if the engagement is broken for any reason, the woman is legally entitled to keep the ring.<sup>62</sup>

The woman has less of an incentive to deliberate prior to engagement. She knows that she will ultimately get the ring. She will still lose, however, any amount spent on wedding preparations that exceeds the value of the ring.<sup>63</sup>

### 2. *Conditional Gift*

Under the conditional gift approach, the engagement ring is a gift given in contemplation of, and conditioned on the occurrence of, a future specified event—in this case, the wedding.<sup>64</sup> If the wedding does not come to fruition, the ring is to be returned to the donor.<sup>65</sup> This system encourages deliberation by the woman because she knows that she will always lose the ring and any expenses incurred in planning the wedding. On the other hand, the man has very little incentive to make the relationship work because his costs will be fully reimbursed via ultimate possession of the ring if the engagement is broken.<sup>66</sup>

### 3. *Efficiency Concerns*

Coase has suggested that in situations of low transaction costs, parties will bargain to an efficient solution, and the state of the law, therefore, is

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<sup>62</sup> See Tomko, *supra* note 50, at § 5.

<sup>63</sup> See *supra* note 60 and accompanying text. Although this Article lacks space for the discussion, it would be interesting to do empirical research in gift-regime jurisdictions to determine if inexpensive engagement rings result in inexpensive weddings.

<sup>64</sup> Tomko, *supra* note 50, at §§ 3–4.

<sup>65</sup> *Id.*

<sup>66</sup> To achieve efficiency goals, economic analysis of incentives really needs to focus only on the person who is most constrained in the decisionmaking. Because an engagement requires the consent of both a man and a woman, incentives for one party to perhaps not get engaged satisfy efficiency concerns. However, society may benefit most from a system that encourages precaution on both sides of the transaction. For that reason the gift approach (in which the man loses the cost of the ring and the woman loses wedding expenses that exceed the value of the ring) is superior to the conditional gift regime (in which the woman loses the wedding expenses incurred, but the man recovers the cost of the ring).

largely inconsequential.<sup>67</sup> In situations of an engagement contract, transaction costs are indeed low. No search costs are involved because the two parties are already identified. Negotiation costs will be relatively low because discussion must take place between only two persons.<sup>68</sup> Subjective transaction costs might be slightly higher if the breakup is hostile and if parties value making the other party miserable by being stubborn and uncooperative.

As it turns out, however, it is likely that parties will contract around either a gift or conditional gift law to a fault-based regime.<sup>69</sup> It is not unreasonable to assume that prior to an engagement, each party believes that if the engagement is broken, the other person will be at fault. In the alternative, the parties may suppose that if they change their minds and want out of the relationship, they can behave in such a manner as to induce the other person to call off the wedding. As such, everyone agrees that it is in their best interest to adopt a fault-based regime where the nonbreaching party is entitled to retain the engagement ring.

Suppose, for example, that Jerod and Heather live in a conditional gift jurisdiction. Heather knows that if Jerod breaks the engagement, her wedding expenses will be uncompensated. The implicit negotiation, if put into words, might go something like this:

Jerod (presenting a \$9,033 diamond engagement ring):  
Heather, will you marry me?

Heather: Jerod, I know that you're the one true love of my life. But, there are so many other women more personable and attractive than I. I'm worried that you may change your mind. I realize the law entitles you to the engagement ring if you choose to leave, but my wedding expenses would remain uncompensated. Therefore, if you break the engagement, I would like to keep the ring as reimbursement for part of my costs.

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<sup>67</sup> See COOTER & ULEN, *supra* note 44, at 85. See generally Coase, *supra* note 44.

<sup>68</sup> Most couples do not bargain prior to entering the marriage relationship. Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 426–27 (1992). Negotiation costs might, in some cases, be higher if broaching the subject of antenuptial agreements signals a lack of commitment. See *id.*

<sup>69</sup> It is theoretically possible, although unlikely, that parties will contract to some form of negotiated settlement. For example, the parties might agree to split the value of the ring, regardless of who ends the engagement. This alternative will be discussed below in Part II.C.4.

Jerod (thinking to self): This is a safe bet. Heather is the one true love of my life. I would never call off the engagement. And if for some reason I do change my mind, I'll make myself so incredibly unattractive to her that she'll call off the engagement.

Jerod: Okay.

Heather: Okay. I'll marry you.

The inefficiencies of adopting fault-based approaches will be discussed below in Part II.C.4. In addition to those problems, however, the party who is legally entitled to the ring (dependent upon the law adopted in that jurisdiction) may require the other party to go to court and enforce the contract. The temporal distance between the making of the contract and the performance of it causes additional enforcement costs because it is likely that the value of performance for at least one of the parties has changed.

### *C. Contract Law*

A second approach the courts could adopt is a contract law regime. Conceptually, the engagement ring is consideration for a contract within a contract. The primary contractual relationship involved is the mutual exchange of promises to marry. The engagement ring serves as the man's half of a subsidiary bargain in which the woman agrees to make expenditures for the wedding ceremony.

This subcontract serves to ameliorate the informational asymmetry regarding the intentions of a woman's suitor. The informational asymmetry in an engagement context is primarily one-sided: after exchanging promises to marry, the woman then begins spending money on wedding preparations. A broken engagement by definition results in both parties losing a potential mate, but it also leaves the woman with wasted expenditures.

The engagement ring, then, is needed in order to induce a woman to get engaged and begin planning a wedding. The exchange of a ring solves the mutual commitment problem by serving as collateral and consideration for the expenses the woman will incur.

A contract-based regime of analysis for the ultimate ownership of the ring is implicitly a fault-based system where the identity of the person who

broke the engagement is a relevant factor for the court.<sup>70</sup> Economic analysis favors remedies for breach of contract that the parties know will be enforced and that will lead to breach only when it is efficient to do so.<sup>71</sup> The concept of an efficient breach is a Pareto notion, suggesting that breach of a contract is more efficient than performance in situations where both parties agree and no one party is worse off than they would have been from performance.<sup>72</sup> When faced with a case to determine ownership of the engagement ring, courts have various options.

### 1. *Liquidated Damages*

Traditional contract law allows liquidated damages only to the extent that they equal the reasonable amount of actual damages incurred.<sup>73</sup> If the court chooses to treat the engagement ring as the amount set by the parties to be recovered in case of breach, ownership of the ring would be awarded to the nonbreaching party.

If the man calls off the engagement, the woman is entitled to keep the ring as compensation for her wedding expenses. Since it would be rare that the cost of the ring equals the exact amount spent for the wedding, an engagement ring as liquidated damages may do a poor job of approximating the amount lost by the innocent party. If, for example, a man calls off the engagement shortly after it began, the value of the ring will be much higher than the amount spent by the woman on wedding preparations. Traditional contract law would suggest, then, that the ring does not closely approximate the amount of losses suffered by the nonbreaching party, and the liquidated damages clause should not be enforced. If, on the other hand the engagement is broken after a longer period of time, the value of the ring will likely be less than the value of wedding preparations made. Traditional contract law might well enforce the implied liquidated damages clause and the parties' intentions, subject, of course, to other formation defenses such as unconscionability.<sup>74</sup>

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<sup>70</sup> See *Pavlicic v. Vogtsberger*, 136 A.2d 127, 130 (1957) ("If, after receiving the [engagement ring], the donee refuses to leave the harbor,—if the anchor of contractual performance sticks in the sands of irresolution and procrastination—the [ring] must be restored to the donor.").

<sup>71</sup> See Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 342 (1984).

<sup>72</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12 (6th ed. 2003).

<sup>73</sup> See E. ALLEN FARNSWORTH, *CONTRACTS* 814–15 (4th ed. 2004); see also U.C.C. § 2-718(1) (2000).

<sup>74</sup> See FARNSWORTH, *supra* note 73, at 301.

If the woman is the party who ends the engagement, return of the ring as the stipulated damages by definition compensates the man for his losses—the expense of the engagement ring. Traditional contract law, then, would encourage the court to remedy this contract by adopting the liquidated damages set forth by the parties via the engagement ring.

Economic analysis, on the other hand, argues that parties should be allowed to stipulate to whatever damages they deem appropriate for the situation.<sup>75</sup> This analysis suggests, however, that a liquidated damages approach to breach of an engagement contract is not the most efficient remedy. In contrast to more typical liquidated damages clauses, the parties to an engagement do not typically bargain over the size or value of the engagement ring.<sup>76</sup> It is not the mutually agreed upon amount of damages that would compensate each for losses incurred—both objective and subjective losses. As such, treating the engagement ring as a liquidated damages clause is not efficient and does not serve the traditional economic purposes of allowing liquidated damages.

## 2. *Reliance Damages*

If the court opted to award reliance damages for breach of the engagement contract, the ring would again be awarded to the nonbreaching party as compensation for costs incurred in relying on the promise to marry.<sup>77</sup> Historically, after the abolition of the breach of promise to marry actions, the woman kept the engagement ring as compensation for the damages incurred in relying on the man's promise to marry her.<sup>78</sup> The losses she suffered were the decline in her "market value" in the search for a husband, the economic dependence she could no longer find, and her opportunity costs in being away from the marriage market.<sup>79</sup>

Today, if a man calls off an engagement, the ring would be awarded to the woman as compensation for the wedding expenses she has incurred and for her lost time on the marriage market.<sup>80</sup> Conversely, if the woman is the breaching party, she would be ordered to return the ring, by definition compensating the man for expenses and paying for the opportunity of the man in being off the marriage market.<sup>81</sup>

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<sup>75</sup> See POSNER, *supra* note 72, at 128.

<sup>76</sup> See *supra* note 68 and accompanying text.

<sup>77</sup> See Ulen, *supra* note 71, at 358.

<sup>78</sup> See *supra* notes 42–45 and accompanying text.

<sup>79</sup> See *supra* notes 18–19 and accompanying text.

<sup>80</sup> Cf. *Heiman v. Parrish*, 942 P.2d 631, 635 (Kan. 1997).

<sup>81</sup> Cf. *id.*

### 3. *Specific Performance*

Traditional contract law prefers specific performance in situations where unique goods (such as land or special personal services) or long-term input is involved.<sup>82</sup> Economic analysis suggests that it is appropriate for a court to order specific performance in breach of contract situations when transaction costs are low.<sup>83</sup> In those cases, it is argued, the parties should be bargaining with each other to achieve the most efficient result.<sup>84</sup> Most likely, the parties themselves can find the utility-maximizing division of the cooperative surplus, whereas any remedy adopted by the court would likely not reach that outcome.

As discussed earlier, the transaction costs of entering into an engagement are quite low—the parties involved are already identified; there are only two parties to be considered; and they presumably have close physical proximity, or at least frequent contact. Enforcement costs are minimal because there is no future commitment involved; once the settlement is reached and effectuated, the parties have no further responsibilities to each other. It would therefore seem probable that the parties to an engagement would be able to bargain to an efficient allocation of the engagement ring if the engagement is broken.

If the court orders specific performance in cases of broken engagements, the court in essence orders the parties to get married. Because transaction costs are low, the parties are able to bargain, and indeed have strong incentive to do so. They must determine who ends up with the ring, or get married under court order.

### 4. *Efficiency Concerns*

Court remedies premised on fault—the awarding of liquidated or reliance damages—create incentives for too many engagements to take place.<sup>85</sup> Specific performance is the only possible contract remedy that alleviates this moral hazard problem and encourages the efficient number of engagements.<sup>86</sup>

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<sup>82</sup> Ulen, *supra* note 71, at 364–65.

<sup>83</sup> *Id.* at 369. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093–05 (1972); Ulen, *supra* note 71, at 366–71 (extending the analysis of Calabresi and Melamed to specific performance).

<sup>84</sup> See Ulen, *supra* note 71, at 369.

<sup>85</sup> See *supra* Part II.C.1–2.

<sup>86</sup> See *supra* Part II.C.3.

One problem with the fault regime of contract law is that it creates incentives for one party to act in a manner that would induce the other party to actually call off the engagement.<sup>87</sup> The courts, then, would order damages to be paid by the person who officially ended the engagement while awarding the engagement ring and any monetary damages to fully compensate the party who is truly responsible for the demise of the relationship.<sup>88</sup> This results either in fundamental unfairness or inefficiency or would require a very costly,<sup>89</sup> fact-intensive inquiry by the court to determine who is really responsible for the breach of contract.<sup>90</sup>

Such fault-based regimes are also inefficient because they result in too many engagements and therefore in wasted costs during engagements that do not result in marriages. Several factors cause this inefficient number of engagements.

It is a natural a priori assumption that both parties enter into engagements believing that if the marriage does not occur, it will be because the other party ended the relationship. Ex ante, both parties assess

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<sup>87</sup> See Tushnet, *supra* note 35, at 2595 n.62.

<sup>88</sup> See *id.* at 2594–95 (“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. This limited conception of fault was unstable because it ignored behavior that almost anyone would consider relevant in determining true fault.”).

<sup>89</sup> See Asides, *Wisdom of Solomon*, WALL ST. J., Nov. 10, 1999, at A22 (“Because you folks can’t solve it, it takes the services of a . . . judge, a bailiff, and a court reporter.” (omission in original) (quoting Judge Gerald Harcastle berating Frances and Harold Mountain who required court time and effort to divide up their collection of Beanie Babies following their divorce)).

<sup>90</sup> See *Heiman v. Parrish*, 942 P.2d 631, 637 (Kan. 1997).

What is fault or the unjustifiable calling off of an engagement? By way of illustration, should courts be asked to determine which of the following grounds for breaking an engagement is fault or justified? (1) The parties have nothing in common; (2) one party cannot stand prospective in-laws; (3) a minor child of one of the parties is hostile to and will not accept the other party; (4) an adult child of one of the parties will not accept the other party; (5) the parties’ pets do not get along; (6) a party was too hasty in proposing or accepting the proposal; (7) the engagement was a rebound situation which is now regretted; (8) one party has untidy habits that irritate the other; or (9) the parties’ have religious differences. The list could be endless.

*Id.* Further, “[I]itigating 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.” *Id.* at 638.

the probability of their own fault at zero (and therefore suffering losses). As a result, the expected value of getting engaged is artificially high for both parties, and too many engagements (in excess of the socially optimal number) will occur.

In addition, under a fault-based regime, the parties know that if they change their minds and want out of the engagement, they can act in such a manner as to cause the other person to call off the wedding and they again suffer no losses.<sup>91</sup> Such rationalization causes an even higher over-inflation of the expected value of the engagement and would encourage hesitant persons to get engaged and still feel insulated from any future losses. Efficiency (reaching the optimal number of engagements) requires that each party accurately consider the risk that they will be responsible for a broken engagement, and that they therefore will not always fully recover their losses.

Specific performance requires the court to order the wedding to take place, assuming of course that the parties will bargain together to reach the most efficient result.<sup>92</sup> Recall that, under a fault-based system, courts must either expend considerable resources in uncovering which party is truly responsible for the broken engagement, or they may award damages in a fundamentally unfair or inefficient manner.<sup>93</sup> Because the court does not consider fault in ordering specific performance, it will not have to incur great litigation costs in uncovering the true facts of the breakup.

In addition, specific performance encourages thoughtful deliberation by the parties prior to the engagement because parties know *ex ante* that, regardless of who actually calls off the engagement, neither party will typically be *fully* compensated for their expenses. For example, assume the man purchased a \$3,000 engagement ring, and the woman has invested \$15,000 in wedding expenses thus far.<sup>94</sup> In the negotiation process, the parties have only \$3,000 to split between them as reimbursement for \$18,000 of expenditures. Only in cases where no money has been spent on the wedding can both parties fully recover their losses.

Recall that under property law regime, application of the Coase theorem suggested that the parties would contract around gift or

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<sup>91</sup> Tushnet, *supra* note 35, at 2595 n.62.

<sup>92</sup> See *supra* Part II.C.3.

<sup>93</sup> See *supra* notes 88–90.

<sup>94</sup> Today, the average total cost of a wedding in the United States is close to \$30,000. Grace Wong, *Ka-Ching! Wedding Price Tag Nears 30K*, CNN.MONEY.COM (May 20, 2005), <http://money.cnn.com/2005/05/20/pf/weddings/>.

conditional gift law to a fault-based system.<sup>95</sup> Recall, too, however, that it is theoretically possible, although unlikely, that the parties would contract to some sort of negotiated settlement<sup>96</sup> similar in nature to the negotiations that would take place under a specific performance regime.<sup>97</sup> This outcome is less efficient than adopting a clear specific performance regime because every engaged couple would opt to contract around the property law approach. Under a contract law/specific performance system, only parties whose engagements fail will bear the costs of this negotiation.

#### CONCLUSION

Engagement ring law should be structured to achieve the socially-optimal number of engagements by encouraging thoughtful deliberation prior to the engagement. To ensure precaution on both sides of the transaction, the courts should adopt the approach that creates in both parties a financial incentive in the success of the engagement.

The conditional gift approach, adopted by most courts including the Kansas Supreme Court in *Heiman v. Parrish*,<sup>98</sup> leaves the woman uncompensated while fully reimbursing the man for his expenses. Treating the engagement ring as a gift is perhaps a slightly better approach in that the man remains uncompensated and the woman loses the amount of wedding expenses that exceed the value of the ring. Under either regime, parties can potentially contract around the law, most likely to a fault-based determination of ownership.

Contract law approaches, which treat the engagement ring as a form of damages awarded to the nonbreaching party, result in fundamental inequities or expensive fault-finding inquiries. In addition, fault-based regimes create incentives for too many engagements to occur.

Only by adopting specific performance as the remedy for breach can courts encourage a more efficient number of engagements by creating the proper incentives to parties who are considering getting engaged. This is accomplished by allowing parties themselves to find the utility-maximizing division of the ring while at the same time compensating neither party fully for losses incurred.

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<sup>95</sup> See *supra* notes 44–45 and accompanying text.

<sup>96</sup> See *supra* text accompanying notes 68–69.

<sup>97</sup> Ulen, *supra* note 71, at 369.

<sup>98</sup> 942 P.2d 631, 634 (Kan. 1997).