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A Legal Analysis Of Romantic Gifts

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While many law review articles are devoted to the legal analysis of gifts, this article addresses romantic gifts in particular, to which many legal exceptions apply. In addition to offering a review of the legal economics behind gift-giving, this article is the first to survey the five legal theories of revocability for romantic gifts, as well as an unprecedented new theory recently employed in federal court.

Although the general presumption is that gifts are irrevocable, courts have used five main theories to return romantic gifts to their donors—conditional gift, pledge, consideration, unjust enrichment, and fraud—as well as a new approach which has been used recently in federal court: criminal fraud. Criminal fraud is a surprising and unprecedented development because it not only requires the disgorgement of the gifts as the other theories do but also punishes the donee *beyond* the cost of the gift. Thus, it is the only theory of revocability that will change the *ex ante* incentives of the donee.

In the course of discussion, this article will note three economic paradoxes that arise in the context of romantic gifts: (1) non-cash gifts appear on first glance to be extremely inefficient because they involve guessing the desires of donees but are nonetheless ubiquitous; (2) extremely inefficient gifts tend to be better signaling mechanisms than efficient gifts in romantic relationships; and (3) although one who pursues a relationship blatantly for financial benefits faces more social condemnation than one who tastefully hides his or her motivations, he or she is actually facilitating a more efficient relationship. This leads to a discussion of when romantic gifts should be revocable, which theories of court interference are the most appropriate, and how courts should craft doctrine in the future. Because of the potential for over-deterrence, courts should only impose punishments that exceed the value of the gift when there is a clear enough information asymmetry between the donor and the donee that it would be impossible for the donor to give his informed consent to the relationship or the gift.

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I. INTRODUCTION

"If you marry for money, you will earn every penny." It is an old saying, but it captures a very topical phenomenon:[1] "gold digging."[2] A woman (or man) is a gold digger if she or he pursues a romantic relationship for its material benefits—a quid pro quo, a more-or-less equal exchange of relationship for money or gifts.[3] On one hand, these rela-

1. Recent studies show that money plays a big role in women's decisions to marry. *See, e.g.*, Liz Hull, *What Women REALLY Want: To Marry a Rich Man and Stay at Home with the Children*, DAILY MAIL, Jan. 10, 2011, http://www.dailymail.co.uk/femail/article-1345520/What-women-REALLY-want-To-marry-rich-man-stay-home-children.html ("Despite years of equality campaigning and advances for women in the workplace, 64 percent said they aspire to find a husband who brings home a larger pay packet than they do.").

2. Both men and women can be gold diggers, although historically, most cases present facts where women are the gold diggers. In my examples, I use gender-specific pronouns for convenience, but the reader may disregard them without loss of generality.

3. The term "gold digger" is prevalent in pop culture and media, used frequently on

tionships occur between private individuals, and their personal affairs should not face too much legal interference. On the other hand, some relationships are so predatory, or so against public policy, that there may be reasons for legal interference.

This article examines gifts given during the course of a relationship—both in relationships where gifts are bilateral and where they are grossly unilateral—and chronicles the way the legal system has responded in different situations. Although this discussion will address opportunism and gold digging, it also applies to good faith gifts given during the course of a relationship, which is something that almost every adult has experienced.

Because gifts are usually considered absolute and irrevocable,[4] the law needs a good reason to deviate from the standard and interfere with the presumed irrevocability of gifts. This article delineates the five principal theories courts use to counter the presumed irrevocability of gifts in the context of romantic gifts,[5] then turns to an unusually punitive sixth theory that has been recently applied in federal court. The five principal theories are the theories of conditional gift,[6] pledge,[7] consideration,[8] unjust enrichment,[9] and civil fraud.[10] The first three of these revoke the gift on the general basis that the gift itself is inherently different from the typical gift. Technically, the behavior and moral faults of the parties should not affect the revocability of the gift. The next theory, unjust enrichment, centers not on the nature of the gift, but on the bigger picture and on the behavior of both parties—whether there was some inequitable enrichment of one of the parties. The fifth principal theory,

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television, in movies, as well as in songs. It is the name of a song recorded by American rapper Kanye West, featuring Jamie Foxx, released in 2005. *See* KANYE WEST & JAMIE FOXX, *Gold Digger*, *on* LATE REGISTRATION (Roc-A-Fella Records, 2005). The internet is also filled with gold digger references. *See e.g.*, Dee Dee, *The Seven Most Famous Gold Diggers*, CELEBRITY NET WORTH (Aug. 15, 2012), http://www.celebritynetworth.com/articles/entertainment-articles/7-famous-gold-diggers/ (cataloging famous gold diggers); *Fool's Gold Digger*, SNOPES.COM, http://www.snopes.com/love/dating/golddigger.asp (last updated Oct. 11, 2007) (making fun of gold diggers); *How to Be a Gold Digger*, WIKIHOW, http://www.wikihow.com/Be-a-Gold-Digger (last visited Jan. 9, 2013); *How To Spot a Gold Digger*, ASKMEN, http://www.askmen.com/dating/doclove_100/138_relationship_expert.html (last visited Nov. 5, 2012) (discussing how to avoid gold diggers). The gold digger is also a prominent archetype in literature. *See Archetypes*, THE BOOK CLUB, http://www.pfspublishing.com/bookclub/archetypes.html (last visited Jan. 19, 2012).

4. *See e.g.*, Ver Brycke v. Ver Brycke, 843 A.2d 758, 771 (Md. 2004).

5. "Romantic gifts" will be used as a term referring to gifts given during courtships or engagements. Unless otherwise noted, this article discusses situations where marriage does not ultimately eventuate.

6. *See* discussion *infra* Section III.B.1.

7. *See* discussion *infra* Section III.B.2.

8. *See* discussion *infra* Section III.B.3.

9. *See* discussion *infra* Section III.C.

10. *See* discussion *infra* Section III.D.

fraud, focuses not on the nature of the gift, but on the behavior of the defendant.

United States v. Saenger, from U.S. District Court for the Western District of Washington, exemplifies a new approach, which is unprecedented in its severity to the donee.[11] In the facts leading up to *Saenger*, Shea Saenger convinced Norman Butler, her elderly boyfriend, to send her over two million dollars in the course of their five-year relationship.[12] Butler was noticeably suffering from Alzheimer's.[13] Saenger was found civilly liable for financially exploiting Butler, who was defined as a vulnerable adult under Washington law.[14] The civil penalty, however, was not Saenger's biggest concern: she was subsequently charged with violating the federal mail fraud statute.[15] She pleaded guilty, resulting in a criminal sentence of 46 months' imprisonment and $2,161,246.67 in restitution.[16] While this article does not argue that *Saenger* was wrongly decided, it does argue that *Saenger* is a great departure from the other theories, most notably because Saenger's penalty transcends return of the gifts and punitive damages.

This article will begin by examining the role of gifts in romantic relationships by first examining the economic role of gifts in general, then, more specifically, gifts in trust relationships and romances. The next section explores the different ways that courts interfere with gifts given during romantic relationships, including the courts' fixation on the contemplation of marriage. After that, the discussion turns to when a donor[17] becomes a victim and introduces the interesting and novel case of *United States v. Saenger.*

Taking a step back, this article presents three economic paradoxes that arise within the context of romantic gifts: (1) on first glance, non-

11. Information, United States v. Saenger, No. 2:11-CR-00223-RAJ (W.D. Wash. July 1, 2011), ECF No. 1.

12. *Id.* at 3.

13. *Id.* at 1.

14. Butler v. Saenger, No. 10-2-00430-3, at 2 (Wash. Super. Ct. Nov. 15, 2010).

15. *See* 18 U.S.C. § 1341 (2006).

16. *See* Judgment in a Criminal Case at 2, 5, United States v. Saenger, 2:11-CR-00223-001 (W.D. Wash. Jan. 6, 2012), ECF No. 25. In the civil case, Saenger had already been sent to jail for six months for contempt of court when she pleaded the Fifth. Defendant requested, during the Sentencing, credit for time served, which was denied. As a result, Saenger will actually have to stay in jail for fifty-four months because of her fraud. For her crime, the Sentencing Guidelines recommend a sentence of forty-six months to fifty-seven months. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

17. The terms "giver" and "donor" are used interchangeably; the terms "receiver" and "donee" are also used interchangeably. Both sets of terms are used regularly in gift law literature. *See e.g.*, Colin Camerer, *Gifts as Economic Signals and Social Symbols*, 94 AM. J. SOC. (SUPPLEMENT) S180, S181 (1988); *see also* Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 295 (1992).

cash gifts appear to be extremely inefficient because they involve guessing the desires of donees but are nonetheless ubiquitous; (2) in romantic relationships, extremely inefficient gifts tend to be better signaling mechanisms than efficient gifts; and (3) although the more blatant a "gold digger" is about her intentions, the more social disapproval she may face, the more blatant a "gold digger" is, the more efficient the relationship is, and the less likely someone is being victimized.

This leads to a discussion of when romantic gifts should be revocable and which theories of court interference are the most appropriate. Notably, the new theory presented in *Saenger* is powerful because it creates a situation where a potential gold digger might be faced with a negative expected value—this is unprecedented under the five traditional theories of recovery and will have deterrent effects on relationships if not applied in a manner that can be predicted reliably *ex ante*. Courts should only impose punishment beyond the value of the gift in cases where there is a clear information asymmetry about the intention of the donee to the extent that the donor is not only considered a victim of the donee, but that it would be impossible for him to give his informed consent to the gifts, given the asymmetry.[18]

II. GIFTS GIVEN IN ROMANTIC RELATIONSHIPS

A gift is "[t]he voluntary transfer of property to another without compensation."[19] The classical elements of a valid gift are: (1) an intention to give and surrender title to and dominion over the property (i.e. donative intent); (2) delivery of the property to the donee; and (3) acceptance by the donee.[20]

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18. The analysis presented in this Article can be applied to testamentary gifts in addition to lifetime gifts. As Professor Stewart Sterk points out in his review of this Article, "if we take Ms. Lee's argument on its own terms, the problems she identifies are not limited to lifetime gifts. Gold diggers—both those who feign romantic interest and those who mislead testators in other ways—can lead those testators to make substantial bequests in their favor. The traditional remedy for misconduct by will beneficiaries is invalidation of the will on undue influence grounds. But that remedy suffers from the same defect as the unjust enrichment remedy against lifetime donees who induce donors to make extravagant gifts under false pretenses: its deterrence potential is limited. Ms. Lee's analysis implicitly suggests that courts should consider punitive damages awards in at least some undue influence cases (see *Estate of Stockdale*, 953 A.2d 424 (N.J. 2008)), or should become more receptive to tortious interference with inheritance claims if punitive damages appear unfeasible in the context of a will contest proceeding." Stewart Sterk, *For Love or Money? Legal Treatment of Golddiggers*, JOTWELL (June 4, 2012), http://trustest.jotwell.com/for-love-or-money-legal-treatment-of-golddiggers.

19. BLACK'S LAW DICTIONARY 757 (9th ed. 2009).

20. *See e.g.*, Dobson v. Vick, 27 So. 3d 469, 475 (Ala. 2009); *see also* Zoob v. Jordan, 841 A.2d 761, 765 (D.C. 2004); Valley Victory Church v. Sandon, 109 P.3d 273, 276 (Mont. 2005); Ferer v. Aaron Ferer & Sons Co., 732 N.W.2d 667, 673 (Neb. 2007); Kovarik v. Kovarik, 765 N.W.2d 511, 515 (N.D. 2009); Kenyon v. Abel, 36 P.3d 1161, 1165 (Wyo. 2001).

Gifts are usually categorized as either gifts *inter vivos* (the voluntary transfer of property by one living person to another living person, without any valuable consideration, which is perfected and becomes absolute during the lifetime of the parties) or gifts *causa mortis* (a gift made in expectation of the donor's death and upon the condition that the property will belong to the donee if the donor dies, as long as it is not revoked in the meantime).[21] While there are some cases about the possession of courtship gifts when a marriage is prevented by the death of one of the parties,[22] this article focuses primarily on gifts *inter vivos*, where both parties survive but their relationship has ended. "[G]enerally, *inter vivos* gifts are absolute and, in order to be valid, they must be irrevocable."[23] One area of gift law that noticeably diverges from this standard, however, is for gifts given during courtships or engagements where marriage does not ultimately eventuate.[24]

The law struggles with the idea of gifts. Because so much of the law involves assumptions of rational actors and motives of self-interest, the idea of a completely gratuitous gesture performed out of altruism is slightly disturbing to the legal field and arouses suspicion.[25] On the other hand, law is much more comfortable with regulating exchanges, that is, reciprocal transfers, where self-interest can safely be assumed.[26] The conventional wisdom, therefore, is that promises of gifts—which

21. *See e.g.*, Creekmore v. Creekmore, 485 S.E.2d 68, 71 (N.C. Ct. App. 1997); Becker v. Cleveland Trust Co., 38 N.E.2d 610, 612 (Ohio Ct. App. 1941).

22. *See e.g.*, Ruehling v. Hornung, 98 Pa. Super. 535, 540 (1929) ("We think that it is always given subject to the implied condition that if the marriage does not take place either because of the death, or a disability recognized by the law on the part of, either party, or by breach of the contract by the donee, or its dissolution by mutual consent, the gift shall be returned. It only becomes the absolute property of the recipient if the marriage takes place."); *see also* Cohen v. Bayside Fed. Sav. & Loan Ass'n, 309 N.Y.S.2d 980, 983 (Sup. Ct. 1970) ("While it is improbable that at the time of the gift either gave a thought to the consequences that would arise in the event of the death of one of the parties, I firmly believe that had Richard thought of these consequences he would have intended that in the event of his untimely death Carol should keep the ring as a symbol of his love and affection. There appears to be no reason, in logic or morals to prevent such a result.").

23. Ver Brycke v. Ver Brycke, 843 A.2d 758, 771 (Md. 2004) (citation omitted).

24. The article will refer to such gifts as "romantic gifts." *See supra* note 5 (defining romantic gifts for the purposes of this article).

25. Rose, *supra* note 17, at 296 ("In short, however nice it might be to believe in spontaneous gift-giving, gifts seem to have a dangerous edge. When we come to exchange, we can breathe easier. Exchanges do not make us worry about all these ambiguities. . . . Exchanges might not be generous, but at least we can figure out the parties' motives.") Professor Rose proceeds to argue that the line between pure gifts and exchanges is not as clear as first appearances may suggest.

26. *See* Robert A. Prentice, *"Law &" Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 881 ("The refusal to enforce gratuitous promises absent consideration is one of the foundations of contract law. The rationales with which courts and scholars supported this traditionalist view—the evidentiary, cautionary, and channeling functions of consideration—have been framed and analyzed in terms of law and economics. . . . [But] they assume that certain factors that limit rational human decision making apply only to gratuitous promises and not bargained-for commercial promises.").

are gestures of altruism, love, or kindness[27]—are unenforceable by law, while contracts are enforceable.[28]

To the extent that law regulates gifts—or donative transfers—the law's approach focuses on formality rather than substance.[29] The formalities of gift law are largely explained by the development of the law of wills, which involved legal standards set in the 1500s.[30] Indeed, the "most highly developed portions of the law of gift" probably "revolve around [the law of] wills,"[31] which is "notoriously rigid and suspicious."[32] This in itself shows the law's emphasis on self-interest and skepticism about gifts—the law recognizes death as the foremost and most logical reason a person would ever want to give away things for free.[33]

More recent justifications[34] for the formalities include the ritual function ("the performance of some ceremonial for the purpose of

27. *See* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 567 (1999) ("Consequently, we characterize market activity as blatantly self-interested, in contrast with family life and personal relationships, which supposedly are completely supportive and dominated by acts of altruism and generosity.").

28. *See id.* at 563 ("Gratuitous promises are unilateral and, according to conventional lore, unenforceable. The well-accepted general rule—that most gratuitous promises are unenforceable—has been justified on various grounds, most notably that the costs of enforcement would far exceed the value that gratuitous promises create."); *see also* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 414–17 (1977).

29. *See* Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 155–56 (1989) ("[G]ifts and bargains are subject to divergent legal requirements, taught and learned in separate law school courses. Gifts require formalities such as delivery, signature, or attestation, whereas contracts require offer, acceptance and consideration. The divergence between the requirements is, under accepted principles, not arbitrary; rather, it is thought to be a rational response to the respective goals and settings of the two different fields of law. Thus, with respect to gifts, where the primary legal goal is to effectuate donative intent, formalities are said to be required to put that intent beyond question. In contrast, with regard to contracts, where the primary legal goal is protection of expectations and security of transactions, consideration is said to be required to mark off those promises customarily understood, in a market economy, to be binding.").

30. *Id.* at 160–61 ("The formalities of the law of donative transfers have a respectable historical pedigree. The modern requirements for a valid will—a writing, signature, witnesses—were codified centuries ago, in the Statute of Wills (1540) and the Statute of Frauds (1677)." (footnotes omitted)); *see also* Leslie, *supra* note 27, at 563 ("The unidimensional approach of wills law stems from the threshold characterization of a testamentary transfer as a gift rather than an exchange." (footnote omitted)).

31. Rose, *supra* note 17, at 303.

32. *Id.*

33. *Id.* ("In the case of transfers at death, the donor is pretty much stuck. She can't take it with her, or get anything for it when she goes, and so the only thing she can do is to give it away. On the other hand, we might think that if the donor *could* take it with her, she probably would; the only reason she makes a 'gift' is because she cannot do anything else.").

34. *See e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–15 (1941); Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 U. ILL. L. REV. 341, 350 (1926).

impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative"),[35] the evidentiary function (to "emphasize the purpose of supplying satisfactory evidence to the court"),[36] and the protective function (having "the stated prophylactic purpose of safeguarding the testator, at the time of the execution of the will, against undue influence or other forms of imposition").[37]

A. *The Economic Functions of Gifts*

Recently, there has been a trend in legal academia to recognize that gifts and exchanges are overlapping categories and that the traditional legal distinction between these categories may merit further examination.[38] Much of the ambiguity comes from the question of whether gifts are actually pure and unilateral,[39] or whether they are exchanges in disguise—not necessarily of goods, but of some other interests.[40] The examination of gifts as exchanges raises the question of what is being given from the donee to the donor in return for the gift.

Giving a gift might "be a step toward forming a new relationship or strengthening an established one, or the act might simply confer a boost to the self-image or an increased sense of well-being."[41] In addition to altruism and status-enhancement, Eric Posner suggests that a reason for gift-giving is "to create, enhance, or reaffirm relations of trust."[42] Trust

35. Gulliver & Tilson, *supra* note 34, at 4.

36. *Id.*

37. *Id.* at 4–5. These justifications are not necessarily accepted and have been critiqued by commentators. *See e.g.*, Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 46–59 (1992).

38. *See* Baron, *supra* note 29, at 168 ("There is no denying the popularity and appeal of Mechem's and Gulliver and Tilson's formulation. . . . Yet little attention has been paid to the assumptions underlying their argument. These assumptions are critical. The functional explanation asserts that ritual, reliable evidence, and protection (which are usually supplied by formalities, but which may be supplied by other means) are necessary."); *see also* Rose, *supra* note 17, at 303 ("Indeed, it is just in these special showings that we can see how the gift category gets swallowed up by exchange on the one hand, and by larceny on the other."). Rose also argues that exchanges involve incomplete gifts. *See id.* at 299–300.

39. *See e.g.*, Rose, *supra* note 17, at 298 ("Does anybody really ever give anything away, in the sense of sheer niceness, making the voluntary, unilateral transfer?").

40. *See* Baron, *supra* note 29, at 194 (noting that for disciplines such as anthropology, sociology, and psychology, "gifts are exchanges"; "[t]hey are not necessarily exchanges of goods, and they are distinct in important ways from the conventional exchanges of the market, but they are exchanges nonetheless."); *see also* Rose, *supra* note 17, at 296 (noting that "the unilateral aspects of gift transfers blur into the reciprocal aspects of exchange transfers, and vice versa.").

41. Leslie, *supra* note 27, at 564.

42. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 577–78 (adding that "[I]it has been increasingly recognized by academics that some nonlegal mechanism such as trust must account for long-term or 'relational' contracts,

is an important legal consideration in family law, as well as in business relations and politics.[43] Thus, gift-giving serves a signaling function in the context of relationships.[44]

When a romantic gift is given, it can be a way of showing that a long-term relationship is expected. If the donor expected only a short-term relationship with the donee, he would not expect enough in return, in terms of affection or trust, for the gift to be worth its cost. Because the cost of gift-giving exceeds any short-term gain, it would be difficult for an opportunist to copy this behavior.[45] This is the sign of a good signal.

Another way a good gift can be a signaling device is by demonstrating that the donor has "developed expertise" about the donee's interests and tastes. Only a donor planning a long-term relationship with the donee would invest in such expertise.[46] The value of this type of expertise is why personalized gifts—books about the donee's favorite subject, clothes from the donee's favorite store, music the donee is known to enjoy, a bottle of the donee's signature scent—tend to be better gifts than generic pre-packaged flowers or candy.[47]

B. *Gifts Given in Trust Relationships*

As signals, different gifts can be further distinguished. The gifts given during a romantic relationship can be categorized as either gifts given in a ritual, or as gifts given "as part of the loose quid pro quo in a trust relationship."[48] A ritualized gift is formal, often based on custom, and not clearly value-maximizing—for example, the gift of an engagement ring upon proposal. The other sort of gift, known as an "exchange

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in which significant value depends on one party acting in a way that cannot be verified by courts, frustrating legal enforcement").

43. *Id.* at 582 ("I have emphasized the importance of trust relationships in business, where they allow parties to exploit surpluses unobtainable through contractual mechanisms because of the cost of information. They are also important in family relations, where legal norms as well as information costs restrict the ability of family members to make and enforce marriage contracts pertaining to household production. The most vivid example of their importance, however, comes from the political arena.").

44. *Id.* at 579 ("Gift-giving serves as a signal that the cooperators use to distinguish themselves from the opportunists.").

45. *See id.* at 580–81.

46. *See id.* at 580.

47. *See id.* at 580–81 ("So a good gift—one that reveals that the donor has a deep understanding of the donee—is a reliable signal that the donor is a cooperator. And money could never be such a gift, since a gift of money requires no knowledge about the donee's tastes and personality.").

48. *Id.* at 581. Professor Posner calls the "ritualized gift" a "signaling gift," but the definition is the same. I have chosen to use "ritualized gift" to avoid confusion because both ritualized gifts and exchange gifts have the signaling properties—of investment and expertise—discussed in the preceding paragraph.

gift,"[49] is "best understood as any transfer from one party in a trust relation to the other, which benefits the recipient by more than it costs the donor," and is "motivated by a desire to obey the terms of the relationship so as to continue to benefit from it."[50] Unlike ritualized gifts, which are usually given at specific times, exchange gifts are given whenever the occasion arises.

Professor Posner has argued that the "proper legal approach to a trust-enhancing gift depends on whether the gift is meant to signal a desire to enter or enhance a relationship of trust or is made to benefit the donee pursuant to a relationship of trust."[51] The former type of gift is usually characterized "by the fact that usually they cost the donor more than they benefit the donee."[52] The latter type of gift, the "exchange gift," will be jointly maximizing: they will cost the donor less than they benefit the donee. Although "exchange gifts" are not gifts "in the sense that each party implicitly agrees *ex ante* to engage in all jointly-maximizing actions, [they] look like gifts because the quid pro quo is invisible."[53]

Ritualized gifts may result in very inefficient equilibriums—"too many people give gifts, or very expensive gifts, in order to avoid the risk of being thought untrustworthy."[54] But the efficiency of the equilibrium is beyond the abilities of most courts to determine, so the traditional refusal to enforce gratuitous promises or revoke gratuitous transfers seems to make sense.[55] Because exchange gifts are economically valuable, they should not be discouraged by courts.

The question of non-discouragement is different from the question of enforcement. On one hand, the exchange gift is part of an indefinite relational exchange, and the consideration doctrine does not allow courts to enforce indefinite relational exchanges. They are too vague, and the rationale is that systematic non-enforcement is preferable to uncertain judicial enforcement of vague terms.[56]

The idea of gifts as signals, as well as the distinction between ritu-

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49. *Id.*

50. *Id.* at 581–82.

51. *Id.* at 603.

52. *Id.*

53. *Id.* (adding that the "looseness of the arrangement, however, should not conceal the definite economic value of this relationship to both parties.")

54. *Id.* (citing the "extravagant treatment of summer associates by law firms during the late 1980s" as an example of the phenomenon).

55. At least it makes sense to Professor Posner. *See id.* at 604–05.

56. *See id.* at 606–07 ("Similarly, courts resisted enforcing firm offers and requirement contracts not because they were socially undesirable, but because, like gift exchanges, they were vague.").

alized gifts and exchange gifts, becomes important as we consider romantic gifts specifically.

III. When Romantic Gifts are Revocable

Several judicially-created theories have emerged from the case law in dealing with the return of romantic gifts. For the purposes of this article, a "romantic gift" is a gift that the donor gives the donee while the donor and the donee are either engaged or in a time of courtship. Unless otherwise noted, "revocability" refers to whether a court will allow the donor to take the gift back if the donor sues the donee for the gift after the dissolution of the relationship.

The five principal court-crafted theories of revocability for romantic gifts are (1) conditional gift,[57] (2) pledge,[58] (3) consideration,[59] (4) unjust enrichment,[60] and (5) fraud.[61] A common thread running through all of these theories is the importance of the promise of marriage—while not every single court will rule against the party who promised marriage but breached,[62] most courts do take into account, at least rhetorically, whether marriage was contemplated.

It will become apparent that the theories of unjust enrichment and fraud differ from the other theories in their stronger emphasis on the fault of the donee. Theories like conditional gift theory,[63] pledge theory,[64] or consideration theory,[65] will mandate a gift's return on a basis other than fault of the donee. The theories of unjust enrichment and fraud, however, focus not only on the wrongdoing of the donee, but also on moral judgments.[66]

The next section begins by exploring the role of the promise of marriage, generally, when courts examine revocability. Then the five different theories are examined in more detail.

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57. *See infra* Section III.B.1.
58. *See infra* Section III.B.2.
59. *See infra* Section III.B.3.
60. *See infra* Section III.C.
61. *See infra* Section III.D.
62. *See infra* Section III.A.
63. *See infra* Section III.B.1.
64. *See infra* Section III.B.2.
65. *See infra* Section III.B.3.
66. Fraud is fault-based on its face. Unjust enrichment is not always fault-based—for example, in a situation where the plaintiff accidentally deposits money into the defendant's bank account and then sues under a theory of unjust enrichment. In the context of engagement gifts, however, the analysis is very often fault-based, and courts that apply unjust enrichment will look at the donee's behavior in order to justify a finding of unjust enrichment in the context of the relationship. *See infra* Section III.C.

A. *The Role of Promise of Marriage*

1. Common Law Emphasis

Not every gift given between significant others is given with marriage in mind. Some couples are too early in their relationship, others mutually understand that the relationship is strictly short-term and commitment-free, and others do not contemplate marriage for other reasons. While courts could have chosen to ignore the contemplation of marriage as an element to consider in the context of gift-giving (and instead, focus on things like fault, value of the gift, or the words of the explicit agreement), history reveals otherwise.

Courts often place a very high emphasis on the role of the contemplation of marriage in the context of courtship gifts. For example, consider the court's language in *Sharp v. Kosmalski*,[67] which Emily Sherwin prominently uses as an example of an unjust enrichment case:[68]

> Plaintiff came to depend upon defendant's companionship and, eventually, declared his love for her, proposing marriage to her. Notwithstanding her refusal of his proposal of marriage, defendant continued her association with plaintiff and permitted him to shower her with many gifts, fanning his hope that he could induce defendant to alter her decision concerning his marriage proposal. Defendant was given access to plaintiff's bank account, from which it is not denied that she withdrew substantial amounts of money.[69]

Indeed, courts often begin their analysis of a dispute by considering whether a gift was made "in contemplation of marriage."[70] Gifts "made to promote the donor's suit but where the donee has made no promise to marry, are ordinarily regarded as absolute, and cannot be recovered," while gifts made in contemplation of marriage are made conditionally on the prospect of marriage.[71]

Although courts generally do not articulate why marriage is such an important consideration,[72] there may be several reasons why contemplation of marriage has become so important. The first reason is history. This does not tell us much, beyond the general assertion that courts have traditionally respected marriage as a pseudo-spiritual ritual to be held in

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67. 351 N.E.2d 721 (N.Y. 1976).

68. Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 Tex. L. Rev. 2083, 2089 (2001).

69. *Sharp*, 351 N.E.2d at 722.

70. *See, e.g.*, Fortenberry v. Ellis, 217 So. 2d 792, 793 (La. Ct. App. 1969).

71. Somple v. Livesay, No. 78 C.A. 16, 1979 WL 207444, at *1 (Ohio Ct. App. July 31, 1979).

72. Courts generally do not say any more beyond the assertion that they consider marriage valuable and sacred. *See, e.g.*, Beck v. Cohen, 262 N.Y.S. 716, 718 (App. Div. 1933).

high regard.[73] The courts might also use contemplation of marriage as a proxy for determining the seriousness of the parties in the relationship. When a couple begins talking and thinking about marriage—whether it is within the first few weeks of their relationship or after several years—this is a sign that both parties are somewhat committed and care about the relationship. Because different relationships move at different speeds, contemplation of marriage might be a usable proxy for an outside party—the court—to gauge how far the relationship has progressed.

2. The Role of Marriage in the Theories of Revocability

It is notable, too, that while contemplation of marriage plays a key role in courts' language concerning these cases, contemplation of marriage plays a different role in unjust enrichment and fraud cases than in the other, less fault-based theories. In unjust enrichment and fraud, contemplation of marriage is often used to show the existence of fault—for example, the donee purposefully used marriage as bait in order to receive her gift.[74] In addition, the contemplation of marriage rhetoric is used to evoke sympathy for the donor and implies the donor's honorable intention.[75] In contrast, when contemplation of marriage is used in the less fault-based theories (conditional gifts, pledge, consideration), contemplation of marriage is a prerequisite to the theory—for example, that the gift was given with marriage as a condition, that the pledge was for marriage, or that the consideration was marriage—but is not used to show fault or wrongdoing.[76]

This distinction—the different role that contemplation of marriage plays in unjust enrichment and fraud versus the less fault-based theories—will ultimately affect the analysis of what the best response is in the most egregious cases. For example, when a woman very blatantly and extravagantly takes advantage of an older man, whether or not he wants to marry her—and whether or not she leads him on—might influence the empirical determination of whether she is defrauding him, or whether they are mutually benefiting in an agreeable arrangement.[77]

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73. For a historical overview on western courts' treatment of marriage, see Ruth Sarah Lee, *Locking in Wedlock: Reconceptualizing Marriage Under a Property Model*, 17 Barry L. Rev. 243 (2012).

74. *See infra* Sections III.C–D.

75. *See id.*

76. *See* Aronow v. Silver, 538 A.2d 851, 852–53 (N.J. Super. Ct. Ch. Div. 1987) (citing Albanese v. Indelicato, 51 A.2d 110 (N.J. Dist. Ct. 1947)).

77. *See infra* Section IV.A.

B. *Non-Fault-Based Theories of Recovery*

1. Conditional Gifts

The predominant—and most famous—theory used in returning engagement gifts to the donor is the theory of conditional gifts. Courts applying conditional gift theory would return the gift to the donor, holding that it "does not matter who broke the engagement. A person may have the best reasons in the world for so doing. The important thing is that the gift was conditional and the condition was not fulfilled."[78] Another court has whimsically described conditional gift theory in the following way:

> A gift given by a man to a woman on condition that she embark on the sea of matrimony with him is no different from a gift based on the condition that the donee sail on any other sea. If, after receiving the provisional gift, the donee refuses to leave the harbor,—if the anchor of contractual performance sticks in the sands of irresolution and procrastination—the gift must be restored to the donor.[79]

Conditional gifts do not need to be explicitly conditional. Courts have found gifts to be "impliedly conditional" in cases where the couples have not designated them explicitly. The stereotypical example of the impliedly conditional gift is the engagement ring,[80] which is said to be a gift conditional on the subsequent eventuation of marriage. But sometimes courts have imputed the same condition for other types of gifts, including money.[81]

Not every court has found engagement gifts to be implicitly conditional upon the fulfillment of marriage,[82] but the idea of a conditional engagement gift is widely acknowledged, if not accepted.[83]

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78. *Aronow*, 538 A.2d at 852.

79. Pavlicic v. Vogtsberger, 136 A.2d 127, 130 (Pa. 1957).

80. *See, e.g.*, Fierro v. Hoel, 465 N.W.2d 669, 671 (Iowa Ct. App. 1990); *see also* Beck v. Cohen, 262 N.Y.S. 716, 718 (App. Div. 1933).

81. *See* McLain v. Gilliam, 389 S.W.2d 131, 132 (Tex. Civ. App. 1965) ("In Williamson v. Johnson, 62 Vt. 378, 20 A. 279, 9 L.R.A. 277, 22 Am. St. Rep. 117, it was held that a gift by a man to a woman, in expectation of marriage, of money to enable her to purchase her marriage wardrobe and to defray her expenses in going to his home to be married, was conditional, and entitled him to recover the money back upon her failure to fulfil [sic] the engagement, although he attached no conditions to the gift and had no expectation that the money would ever be refunded.").

82. *See, e.g.*, Linton v. Hasty, 519 N.E.2d 161, 161 (Ind. Ct. App. 1998) (finding that because there was no express condition that a ring given from the donor to the donee was conditioned upon marriage, the donor was not entitled to reclaim the ring when the relationship ended).

83. *See, e.g.*, Crowell v. Danforth, 609 A.2d 654, 655 (Conn. 1992); *see also* Lafontain v. Hayhurst, 36 A. 623, 624 (Me. 1896).

2. PLEDGE

Another way courts have made engagement rings revocable to the donor is by characterizing them as symbols or pledges "of the contract to marry," so when the engagement ends, the ring is returned to the donor.[84] Under this theory, possession of the ring "should be retained during the engagement, which it symbolizes, and is changed into firm ownership, upon marriage[;] [w]hen the engagement fails, the symbol of its existence should be returned to him who gave it."[85]

Revocability under pledge theory operates similarly to revocability under conditional gift theory because in both cases the gift would be returned to the donor if the marriage does not eventuate. But one key difference is that conditional gift theory applies to more than just engagement rings, whereas pledge theory generally applies only to engagement rings. Another key difference, theoretically, is that a conditional gift is a gift *conditioned* upon marriage, whereas a pledge gift is a gift that *symbolizes* the marriage.

3. CONSIDERATION

Considering the oft-stated dichotomy of gift versus contract,[86] it is not surprising that when courts want to diverge from the usual practice of irrevocability for gifts, they invoke the language of contracts. A few cases have recognized the gift as consideration for the contract to marry. When the marriage does not eventuate, the contract has been breached, and the engagement gift should be returned to the donor.[87]

In *Lambert v. Lambert*,[88] the defendant promised to marry the

84. Beck, 262 N.Y.S. at 718 ("Such a ring is a symbol hallowed by social usage. That it is a conditional gift seems inherent in its very purpose.").

85. *Id. See also* McIntire v. Raukhorst, 585 N.E.2d 456, 458 (Ohio Ct. App. 1989) ("Namely, the ring is a symbol of a pledge to marry.").

86. *See supra* Section II.A.

87. *See e.g.*, Rockafellow v. Newcomb, 57 Ill. 186, 191 (1870) ("A marriage contract, then, was made. It was a contract which was valid and effectual in law. Marriage is a valuable consideration. . . . The promise to marry formed the consideration for the deed. The refusal to marry destroyed the consideration. [Therefore, the gift] is wrongfully withheld from the rightful owner."). *See also* Schultz v. Duitz, 69 S.W.2d 27, 30 (Ky. 1934) ("Perhaps originally the engagement ring was only a custom evidencing the relations the parties had assumed toward each other, and had but little, if any, contractual significance. But in modern ages it has developed into more than a mere custom or symbol, and has become a part of the real consideration of the contract."). Although the typical remedy for breach of contract is expectation damages, in these marriage contract contexts, expectation damages are clearly unreasonable. Instead of forcing the parties into marriage, courts make the donee return the gift. *See e.g.*, Yubas v. Witaskis, 95 Pa. Super. 296, 300 (1929) (noting that it "is well settled in Pennsylvania that an infant cannot retain the consideration received under his contract and also recover the value of the consideration given by him[;] [i]t is his duty first to offer at least to restore the status quo").

88. 66 S.E. 689, 690 (W. Va. 1909).

plaintiff, who gave the defendant an organ, a sewing machine, and his sole estate, which was a farm.[89] When she failed to actually marry him, he sued her, claiming that "her promise to marry him was only an artifice and device to get his property."[90] He requested that the court return to him his farm, the organ, and the sewing machine.[91] The court found that the organ and the sewing machine were given to the defendant "in payment for services" (although suggestively failed to clarify what the services were, exactly).[92] For the land transfer, however, the court found differently:

> [T]he conveyance of the land was made upon the faith of marriage and that the same was its *sole consideration*. . . . Admissions proved to have been made by defendant, many of which are not denied by her, show that an engagement to marry existed between her and the plaintiff. . . . It is established by evidence, which is reasonably clear and certain, that the *real consideration for the deed [of the plaintiff's estate] was marriage*.[93]

Since *Lambert*, a few more recent cases have used the consideration rhetoric as well.[94] In many states, however, statutes have been passed that cast the validity of this theory into question, so that the idea of marriage itself being consideration for a contract is now considered antiquated.[95]

4. Statutory Issues

Conditional gift, pledge, and consideration are all common law revocation theories developed by courts.[96] But some states have passed statutes that explicitly address the revocability of engagement gifts. For example, in California:

> Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its

89. *Id.*

90. *Id.*

91. *Id.* The court does not clarify if this is a musical organ or a biological organ, but I would like to assume it is the former.

92. *Id.*

93. *Id.* (emphasis added).

94. *See, e.g.*, Vigil v. Haber, 888 P.2d 455, 457–58 (N.M. 1994).

95. *See* Kelsey M. May, Comment, *Bachelors Beware: The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry*, 45 Tulsa L. Rev. 331, 332 n.16 (2009) (listing twenty-eight state statutes that have abolished the breach of marriage promise action). *See also* Piccininni v. Hajus, 429 A.2d 886, 887 (Conn. 1980) (noting that under Connecticut state law, actions arising from breach of promise to marry are barred).

96. *See supra* Section III.B.

> value as may, under all of the circumstances of the case, be found by a court or jury to be just.[97]

This is basically a statutory unjust enrichment provision allowing revocability where the donee would be unjustly enriched by the gift. Unjust enrichment is addressed in Part III.C. of this article.

Similarly, many states have passed so-called "heart balm" acts, which abolish the common law right of action for breach of promise to marry. At least twenty-eight states and the District of Columbia have passed these acts.[98] These statutes do not necessarily bar recovery for gifts given during the engagement under different theories.[99] The statutes, however, have been used by defendants' attorneys to suggest that the consideration theory of revocability is untenable.[100]

Regardless of the statutes, courts continue to struggle with whether engagement gifts should be revocable, to consider whether there was contemplation of marriage, and to disfavor the party who prevented the marriage.

C. *Unjust Enrichment*

Unjust enrichment may be the most honest of all the theories of recovery. This is because the previously discussed non-fault-based theories of revocability (conditional gift, pledge, consideration) are judicial constructions or legal fictions—imputing meaning in the gift—holding that as a matter of law the gift represents something or constructing an abstract contract that the parties allegedly entered into. The fraud theory, discussed below, is often difficult to prove and requires some divination of the parties' mindsets and inner thoughts. On the other hand, unjust enrichment is the most straightforward explanation for why, in certain cases, the law should want to return the gift to the donee.

One could even argue that unjust enrichment is the heart of the theories of revocability—that conditional gift, pledge, and consideration are all inventions designed to prevent unjust enrichment of the donee at the expense of the donor. However, because courts operating under the other theories of revocability do not always admit to applying unjust enrichment, and also because courts often apply unjust enrichment as a theory by itself, it is categorized as a separate theory of revocability.

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97. CAL. CIV. CODE § 1590 (West 2012).

98. *See* May, *supra* note 95, at 332 n.16.

99. *See, e.g.*, *Piccininni*, 429 A.2d at 887–89 (ruling that a suit to recover an apparent engagement gift of money was not the type of suit prevented by Connecticut's Heart Balm Act); *see also* De Cicco v. Barker, 159 N.E.2d 534, 535 (Mass. 1959) (ruling that because the proceeding was one not to recover damages for the breach of contract to marry, but to obtain, on equitable principles, restitution of property held on a condition, the suit could move forward).

100. *See De Cicco*, 159 N.E.2d at 535.

"A person is enriched if he has received a benefit," and he is "unjustly enriched if the retention of the benefit would be unjust."[101] Usually the "measure of restitution is the amount of enrichment received," unless the "loss suffered" by the donor "differs from the amount of benefit received."[102] This is the major, pragmatic way that unjust enrichment theory differs from civil fraud—under unjust enrichment, the plaintiff usually may only recover what was transferred as a gift. There is no extra punishment or award. Under civil fraud,[103] however, discussed below, the donor will be able to recover more than the cost of the gift.

1. THE APPLICATION OF UNJUST ENRICHMENT

Courts have held that the donor may be entitled to recover the engagement gift at the dissolution of the relationship if it is necessary to prevent unjust enrichment.[104] Some courts prefer unjust enrichment to fraud because under unjust enrichment, there is no need to "examine the minds of the parties and determine their sincerity."[105] Unjust enrichment might also be preferable in cases where undue influence is difficult to prove.[106]

Courts are hesitant to mind-read, but they do not need to restrain themselves from judging the actions of the donee. Although bad behavior of the donee is not necessary for a showing of unjust enrichment,[107] it is often helpful in the context of romantic gifts. Courts have found unjust enrichment in cases where the donee is married to another man and committing adultery with the donor,[108] where the donee wrongfully

101. RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 1 cmt. a (1937).

102. *Id.*

103. *See infra* Section III.D.

104. *See, e.g.*, Sharp v. Kosmalski, 351 N.E.2d 721, 724 (N.Y. 1976) (discussed *infra* Section III.C.2.).

105. Wilson v. Dabo, 461 N.E.2d 8, 9 (Ohio Ct. App. 1983) ("Although some courts have predicated recovery of property transferred in contemplation of marriage on a theory of fraudulent representations, we think the better view permits recovery based on the equitable principle of unjust enrichment.").

106. *See, e.g.*, Sherwin, *supra* note 68 at 2090 (explaining that in *Sharp*, 351 N.E.2d at 721, "rather than try to assimilate the case to the doctrine of undue influence, the court simply determined that an unjust enrichment had occurred.").

107. For example, if A accidentally deposits $100 in B's bank account, B will be held to be unjustly enriched, even if he has done no wrong.

108. *See, e.g.*, Witkowski v. Blaskiewicz, 615 N.Y.S.2d 640, 642 (Civ. Ct. 1994) ("Such a result is even more egregious when the donee is the one . . . married, holds herself out as engaged, cohabitates with the donor for a significant period of time and solicits the donor's assistance in securing a divorce. It would appear that whatever social policy the court attempts to establish for the society at large should not prevail where the result would be unjust enrichment for one of the parties.").

terminated the relationship,[109] or where the donee was intentionally "fanning [the] hope" of marriage while being "showered" with gifts.[110] Although unjust enrichment cases, unlike fraud cases, do not turn on the bad conduct of the donee, courts often use bad conduct to reach their conclusion of "unjust."

As a side note, unjust enrichment is still a viable remedy in many states because courts have often found that heart balm acts do not prevent gift recovery suits from going forward under unjust enrichment.[111] Unjust enrichment, however, is not applied by every state; some courts have been hostile to theories of unjust enrichment, preferring other theories, like conditionality of the gift, instead.[112]

2. *SHARP V. KOSMALSKI*

Sharp is a case that illustrates several of the unjust enrichment principles discussed above.[113] The donor in *Sharp* was a fifty-six-year-old farmer with little education, and the donee was a schoolteacher sixteen years his junior.[114] She became his "frequent companion," and eventually he "declared his love for her, proposing marriage to her."[115] Although she refused his proposal, she "continued her association" with him and "permitted him to shower her with many gifts, fanning his hope that he could induce" her to change her mind about marriage.[116] This culminated in the plaintiff giving the defendant full access to his bank account and naming her the owner of his farm.[117] Sometime after that, the defendant "abruptly" ended the relationship with the plaintiff and

109. RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 58 cmt. c (1937) ("If there is an engagement to marry and the donee, having received the gift without fraud, later wrongfully breaks the promise of marriage, the donor is entitled to restitution if the gift is an engagement ring, a family heirloom or other similar thing intimately connected with the marriage, but not if the gift is one of money intended to be used by the donee before the marriage . . . .").

110. *Sharp*, 351 N.E.2d at 722, 724 (remanding case to the appellate court to determine if the defendant was unjustly enriched).

111. *See, e.g.*, Gikas v. Nicholis, 71 A.2d 785, 786 (N.H. 1950) ("It was not the intention of the New Hampshire Legislature in outlawing breach of promise suits to permit the unjust enrichment of persons to whom property had been transferred while the parties enjoyed a confidential relationship. To so construe the statute would be to permit the unjust enrichment which the statute is designed to prevent.").

112. *See e.g.*, Hooven v. Quintana, 618 P.2d 702, 703 (Colo. App. 1980) ("Hence, the trial court erred in applying the doctrine of unjust enrichment. . . . As to amounts paid by [plaintiff] subsequent to the dissolution, these amounts may be awarded . . . if the court finds that the amounts were paid conditioned upon a subsequent marriage . . . .").

113. *Sharp*, 351 N.E.2d at 722. *See also* Sherwin, *supra* note 68, at 2090.

114. *Sharp*, 351 N.E.2d at 722.

115. *Id.*

116. *Id.*

117. *See id.* at 722–23.

made him leave his farm and home, leaving him with nothing but $300 in all.[118]

Using flowery language about trust and honor, the court found that there was "a relationship of trust and confidence" between the parties that the defendant had "an obligation not to abuse," and that the plaintiff had placed a large "degree of dependence" upon the defendant's "trust and honor."[119] The Court then took the initiative of disagreeing with the lower court's finding that there was no unjust enrichment:

> The Trial Judge in his findings of fact, concluded that the transfer did not constitute unjust enrichment. In this instance also, a legal conclusion was mistakenly labeled a finding of fact. . . . Therefore, the case should be remitted to the Appellate Division for a review of the facts. . . . This case seems to present the classic example of a situation where equity should intervene to scrutinize a transaction *pregnant with opportunity for abuse and unfairness.* It was for *just this type of case that there evolved equitable principles and remedies to prevent injustices. Equity still lives.* To suffer the hands of equity to be bound by misnamed "findings of fact" which are actually conclusions of law and legal inferences drawn from the facts is to ignore and render impotent the rich and vital impact of equity on the common law and, perforce, permit injustice. Universality of law requires equity.[120]

The implication here is clear: The court suggests that the plaintiff is a sophisticated woman who took advantage of a poor, humble, love-struck farmer and financially destroyed him. There is a strong element of blame involved, as well as an emphasis on the deception or betrayal present in the case—regardless of the fact that this was not a fraud case.[121] This is one advantage of unjust enrichment: It allows courts to return the gift to the donor where there is not enough evidence to establish the intent necessary for a finding of fraud, but where the actions of the donee may be judged.[122]

The correct result in this case, at least implied by the court, is to return the gift (the farm) to the plaintiff through a trust because the defendant was unjustly enriched by her devious, flirtatious ways.[123] Unjust enrichment cases often contain morally indignant rhetoric, and

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118. *Id.* at 723.

119. *Id.*

120. *Id.* at 724 (emphasis added).

121. *Id. passim.* The fact that the court highlights the disparity in education between the plaintiff and the defendant also shows that the court is taking into account the disparity in sophistication between the two parties, which suggests undertones of fraud to this unjust enrichment determination.

122. *See* Sherwin, *supra* note 68, at 2090 (explaining that in *Sharp*, 351 N.E.2d at 721, "rather than try to assimilate the case to the doctrine of undue influence, the court simply determined that an unjust enrichment had occurred.").

123. *See Sharp*, 351 N.E.2d at 724.

the court in *Sharp* was clearly disgusted by the donee's behavior. As a result, the Court of Appeals of New York reversed the Appellate Division's determination that the transfer did not constitute unjust enrichment.[124]

D. *Civil Fraud*

In *Sharp*, the court expressed dismay at the donee's behavior and practically stated that she was unjustly enriched by the donor's gifts before remitting the case back to the appellate court.[125] The remedy would be for the donee to return the gifts. As fraud is considered a theory of revocability, however, it warrants consideration that the penalty for the donee under fraud may possibly exceed the value of the gift.

Cases involving fraud often read like stereotypical soap-opera stories: They involve some reincarnation of a greedy, beautiful woman who preys on well-meaning men and leaves them penniless. Courts sententiously describe donees as having "prepossessing appearance, and more than ordinary shrewdness," "entic[ing]" donors by their "female arts, false professions of love and affection, false statements of [their] property and financial prospects, and fraudulent promises of marriage," overwhelming the donors' "ordinary good sense."[126]

Of course, the gender roles may also be reversed. In *Hill v. Thomas*,[127] the court held there was no prejudicial error in refusing to define "fraudulent" for the jury, where an eighty-one-year-old female donor alleged that the donee, a fifty-nine-year-old man, "made his promise [to marry the donor] fraudulently 'for the sole and only purpose of the making, executing and delivery' of the deed by her to him. . . . [H]is sole purpose—a fraudulent purpose—in making the promise was simply to secure the deed . . . ."[128] Because the donee "had no intention, at the time the promise was made, to perform it," plaintiff's testimony provided sufficient pleadings for fraud and the trial court clearly had sup-

124. *Id.*

125. *See id.* at 723–24.

126. Douthitt v. Applegate, 6 P. 575, 576 (Kan. 1885). The court uses all of these phrases under the heading "FINDINGS OF FACT." *Id.* Specifically, the court determined that "for the sole and only purpose of obtaining plaintiff's property, defendant induced and enticed plaintiff to visit her at her house, and there, by female arts, false professions of love and affection, false statements of her property and financial prospects, and fraudulent promise of marriage, so infatuated the plaintiff that from time to time, during the years of 1881 and 1882, she caused plaintiff to convert his personal property into money, to the amount of over one thousand dollars, and pay it to her, and also caused plaintiff to convey to her the land above described, which was all the property, except a small amount of personal property, which plaintiff had." *Id.*

127. 140 S.W.2d 875 (Tex. Civ. App. 1940).

128. *Id.* at 877.

port for its judgment.[129]

1. Fraud and the Contemplation of Marriage

Like all of the other theories, courts invoking the theory of fraud also discuss contemplation of marriage throughout their opinions. For example, one court emphasized that the plaintiff was "anxious to make defendant his wife until she repeatedly and finally refused to marry him," so he gave her an interest in his property to end his "illicit" cohabitation with her and join her "in one that would be legal and respectable."[130] The court found fraud and ruled favorably for the plaintiff.[131]

This is a common theme in the fraud caselaw for engagement gifts: The fraudulent promise is almost invariably a promise of marriage made by the donee to the donor. For example:

> *Repeatedly* during the time they lived together defendant promised to marry plaintiff and finally when she became insistent that he do so, he said he would when she put the title to the property in their names jointly. In 1946, in order to show her readiness *"for sacrifice,"* plaintiff went to a notary public and signed a purported deed in which the property was placed in the name of plaintiff and defendant as joint tenants. In February 1947, the property was sold and plaintiff gave defendant half of the proceeds of the sale in consideration of his promise to marry her. *Defendant admitted that he did not at any time intend to marry plaintiff* and on February 2, 1948, plaintiff left defendant and thereafter demanded return of the money which she had given him in consideration of his promise to marry her.[132]

The court in this case found that the plaintiff met "the burden of proof of showing fraud by clear and convincing evidence,"[133] a higher standard than a preponderance of the evidence.

The focus on promises of marriage makes sense because "where the cause of action is predicated upon the use of a promise to accomplish a fraudulent purpose, the complaining party must allege and prove that, at the time the party gave the promise, there was no intention on his part to

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129. *Id.* at 878. ("It would be a mockery of logic to hold that the testimony of appellee did not raise the issue that appellant's promise to marry her was fraudulently made for the sole purpose of securing her property, and with no intention, at the time the promise was made, to perform it. The judgment of the court clearly has support in the evidence.").

130. Janes v. Goyne, 182 P.2d 231, 233 (Cal. Dist. Ct. App.1947). *See also* Weber v. Bittner, 75 Pa. D. & C. 54, 57–58 (Ct. Comm. Pl. 1950) (noting the allegation "that defendant, Edward C. Bittner, fraudulently induced [plaintiff] to convey to him, on November 21, 1946, the real estate so occupied by them[;] [w]e have an issue of facts raised by the pleadings, and for this reason also the preliminary objections may not be sustained").

131. *Janes*, 182 P.2d at 233–34.

132. Mack v. White, 218 P.2d 76, 78 (Cal. Dist. Ct. App. 1950) (emphasis added). *See also supra* note 110 and accompanying text.

133. *Mack*, 218 P.2d at 79.

perform it."[134] That promise is usually of marriage.[135] The importance of contemplation of marriage, however, transcends its mere role as an element of the offense, but often frames the entire offense. This is demonstrated by the fact that the *inverse* is true as well; that is, when it is the donor who refuses to marry and the donee who wants to marry, the court will find no evidence of fraud, even when the gift is similar in value to other cases where fraud is found and where the donor alleges other misrepresentations made by the donee.[136]

2. Fraud and Unjust Enrichment

Almost any award that is made under the theory of fraud may also be made under unjust enrichment. Unjust enrichment occurs when a defendant has been enriched by her perpetration of fraud. This is supported by caselaw.[137] Some cases include strands of both fraud and unjust enrichment.[138]

3. Fraud and Heart Balm Acts

The heart balm acts generally have not been interpreted to prohibit plaintiffs from suing under theories of fraud.[139] Courts explain that because an action suing for the return of a gift "is not one for breach of

134. *Hill*, 140 S.W.2d at 877 (agreeing with the appellant's interpretation of the law on this point).

135. *See, e.g., id.* at 876; *see also* Anderson v. Goins, 187 S.W.2d 415, 416 (Tex. Civ. App. 1945) (affirming a finding of fraud by noting that "said acts were done and said promises made without any intention at the time on the part of the mother and daughter, or either of them, that Dollie Anderson would consummate said marriage with appellee, or that said deed would be returned on her failure to marry him"); Burke v. Nutter, 91 S.E. 812, 813 (W. Va. 1917) ("If the money was a gift, it was made in consideration of marriage, and was fraudulently obtained, according to defendant's own admission, and it would be unconscionable to allow her to retain it after having broken her contract to marry plaintiff.").

136. *See* Pass v. Spirt, 315 N.Y.S.2d 393, 394 (App. Div. 1970) ("Appellant failed to prove any fraudulent misrepresentations or promises of marriage by respondent, or the other elements of fraud. . . . The evidence supports the conclusion that it was the respondent who urged marriage during the entire period of their relationship, but the decedent [represented by appellant] consistently refused to set the date.").

137. *See, e.g.*, McElroy v. Gay, 22 So. 2d 154, 154 (Fla. 1945) ("Indeed, this would seem to be all the more reason why the deluded victim of the female's importunities should have relief in an equity forum, a remedy at law not being available under the circumstances. . . . If the deed was procured by the means alleged the defendant has no right either in morals or law to retain the fruits of her fraud.").

138. *See, e.g., id.*

139. *See, e.g.*, Norman v. Burks, 209 P.2d 815, 816–17 (Cal. Dist. Ct. App. 1949) ("Plaintiff brought his action for recovery of the house and furnishings and the ring on the theory that the defendant took them in consideration of her promise to marry him; that her promise was fraudulently made, and that she holds the property for his use and benefit. . . . Defendant's suggestion that this is a heart balm action and barred by Section 43.5 of the Civil Code is without merit.").

promise to marry but is an action for obtaining money upon fraudulent representations[,] . . . [the heart balm act] has no application."[140]

E. *Summary of Theories of Revocability*

Below is an organizational summary of the theories of revocability for romantic gifts. The first five columns have been discussed in Sections III.B.–D. of this article.

The last column, criminal fraud, will be discussed in the next section (Part IV) of this article. Criminal fraud is a surprising and unprecedented development because it not only requires the disgorgement of the gifts as the other theories do, but also punishes the donee beyond the cost of the gift.

TABLE 1. PRINCIPAL THEORIES OF REVOCABILITY FOR ROMANTIC GIFTS

Theory of Recovery	Conditional Gift	Pledge	Consideration	Unjust Enrichment	Civil Fraud	Criminal Fraud
Example	*Pavlicic v. Vogtsberger*, 136 A.2d 127 (Pa. 1957).	*McIntire v. Raukhorst*, 858 N.E.2d 585 (Ohio Ct. App. 1989)	*Lambert v. Lambert*, 66 S.E. 689 (W. Va. 1909)	*Sharp v. Kosmalski*, 351 N.E.2d 721 (N.Y. 1976)	*Hill v. Thomas*, 140 S.W.2d 875 (Tex. Civ. App. 1940)	*United States v. Saenger*[141]
Emphasis on Promise of Marriage	Gift conditioned upon marriage.	Gift represents the pledge to get married.	Marriage and gift are both consideration for contract.	Although promises of marriage are not necessary for a finding of unjust enrichment, it is present in almost every case.	The promise of marriage to induce the gift is an element of the fraud.	The promise of marriage to induce the gift is an element of the fraud.
Potential Consequences for Donee	Least punitive <——————————————————> Most punitive					
	Replevin or restitution for value of gift.			Replevin or restitution for value of gift.	Replevin or restitution for value of gift plus potential punitive damages.	Replevin or restitution for value of gift plus *potential criminal sentence.*
Theory's Emphasis on Donee's Bad Behavior	Bad behavior is not relevant (although sometimes courts talk about it.			Bad behavior taken into account but not determinative.	Bad behavior determinative of result.	

140. Mack v. White, 218 P.2d 76, 78 (Cal. Dist. Ct. App. 1950). *See also Norman*, 209 P.2d at 817.

141. *See infra* Section IV.A.

IV. When Does a Donor Become a Victim?

The remedies provided by the theories of revocability discussed in Part III are generally limited to the value of the gift. Under conditional gift, pledge, consideration, and unjust enrichment, the donor—at the very best—will recover the value of his gift. Under civil fraud, punitive damages are possible. Now, however, we turn to a darker and more serious type of judicial interference with romantic gifts: criminal fraud. Criminal sanctions are clearly much more severe than civil penalties and require higher standards of proof. Normally, in the course of romantic relationships, even where the donee is clearly benefiting financially from the donor, there is a chance that the donor is deriving utility from the relationship, and there is no victim. Some cases, however, are so egregious that perhaps more punishment is warranted—that the donee should be punished beyond the value of the gift, perhaps with time in prison.

While this may sound far-fetched, a federal court in the state of Washington has recently sentenced a woman to forty-six months in prison for fraudulently soliciting and accepting gifts from her boyfriend. We will first explore the case, which is illustrative and provocative, and then consider the impact of such a sanction.

A. United States v. Shea Saenger

1. The Story of Norman Butler

Norman Butler had felt lost and lonely after the death of his wife, Mary, with whom he had spent over fifty-six years.[142] But he was in good shape, financially; as a retired optometrist, he owned a house and had about $2.5 million dollars in trust accounts.[143] In 2005, at age seventy-five, he began a long-distance relationship with a woman he met on an online dating website.[144] The woman, Shea Saenger, was significantly younger than Butler and resembled his ex-wife.[145] The couple enjoyed each other's company, traveling together and going on cruises.[146] Butler's three adult children were happy that their dad "had found some romance in his life."[147]

142. Mara Leveritt, *Murder, Fraud, $2.2 Million Somewhere*, Ark. Times, Aug. 3, 2011, http://www.arktimes.com/arkansas/murder-fraud-22-million-somewhere/Content?oid=1878052.

143. *Id.*

144. Alex Silverman, *Convicted Murderer Accused of Conning Alzheimer's Patient Out of $2M Fortune*, MyNorthwest.com (Dec. 21, 2010, 6:52 AM), http://mynorthwest.com/category/local_news_articles/20101221/Convicted-murderer-accused-of-conning-Alzheimer%27s-patient-out-of-$2M-fortune/.

145. Leveritt, *supra* note 142.

146. Silverman, *supra* note 144.

147. Leveritt, *supra* note 142.

The relationship, however, was much more sinister than it first appeared to the Butler children. Starting at the very beginning of their courtship, Butler began giving gifts to Saenger. In 2005, he gave her $113,292.[148] Over the next few years, Butler's mental health deteriorated as he began suffering increasingly from Alzheimer's disease.[149] During the same years, the gifts to Saenger escalated steadily: In 2006, Butler gave Saenger $169,667; in 2007, $391,622; in 2008, $686,559; and in 2009, $849,188.[150] Over the course of their romantic relationship—which lasted less than five years—Butler had given Saenger the bulk of his life's savings of over two million dollars.[151]

Apparently, these gifts were not given spontaneously. As Butler's mental capacity declined, Saenger began to "deceive, manipulate, intimidate and threaten" him increasingly in order to take his money.[152] Butler's Alzheimer's worsened; he confused Saenger with his deceased wife at times and lost track of the amount of money he had already given her.[153] Aware of the possibility that her scam would be discovered, Saenger urged Butler to hide their correspondence about these gifts by asking him to delete e-mails because they were "private" and "our personal business anyway."[154]

Additionally, Saenger made false promises of love, sex, and marriage, threats of abandonment, and even criminal prosecution to induce gifts.[155] Her web of lies was varied and detailed. She fabricated an ailing "Uncle Jimbo" who suffered from repeated strokes and needed his medical bills paid.[156] She pretended to have various car problems[157] and home repair issues.[158] She offered nonexistent "fantastic investment opportunit[ies]" in land.[159] She pretended to be harassed by multiple creditors.[160] In 2009, she lied about having breast cancer and asked for money for her operation.[161] After Butler obligingly sent her money, she waited a month for him to forget that he had already sent the money—

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. Supplemental Declaration of N. Douglas Butler at 5 Butler v. Saenger, No. 10-2-00430-3 (Wash. Super. Ct. Nov. 14, 2010).
153. *Id.* at 7.
154. *Id.* at 8–9 (Saenger proceeded to instruct Butler on how to delete e-mails, adding that she didn't want his family to "question you or my love for each other").
155. *Id.* at 9.
156. *Id.* at 10.
157. *Id.* at 11.
158. *Id.* at 15.
159. *Id.* at 17.
160. *Id.* at 18–22.
161. *Id.* at 24.

then requested money for the operation again.[162] She apparently executed several iterations of the breast cancer scam.[163]

It was not until Norman Butler's son, Doug, was preparing his father's 2009 tax return that he noticed the shocking state of his father's financial condition and decided to uncover where the money had gone.[164] When asked, Norman Butler, showing clear signs of Alzheimer's, "estimated" that he had given Saenger "a few hundred dollars."[165] Doug responded by hiring a private detective,[166] who promptly uncovered alarming information about Saenger's history. Saenger had arrest warrants issued for passing bad checks in 1970[167] and for theft in 1977.[168] Even worse, in 1987, Saenger was convicted of second-degree murder and served time in prison as a result.[169] Furthermore, the Butler children also learned that during Saenger's entire romance with Butler, she had been married to another man, Arthur Saenger.[170] Butler's children, and also apparently Butler, had no idea that Saenger was married.[171] Likewise, Saenger's husband, Art Saenger, apparently had no idea that Saenger was scamming Butler.[172]

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162. *Id.* at 25.

163. *Id.* at 25–26 ("Sadly, my dad could not do the math or recognize that he had already given Shea much more than the amount that the surgery supposedly cost.").

164. Leveritt, *supra* note 142 ("Doug Butler, a CPA, had prepared his parents' tax returns since 1970."). Doug Butler seems to suffer from much guilt about not noticing the gifts sooner. In the aftermath of the realization, he expended substantial time and resources trying to recover the gifts, which has been documented on his webpage. Doug Butler, BUTLER VS SAENGER ET AL, http://www.butlervsaenger.com/ (last visited Feb. 7, 2012).

165. Levi Pulkkinen, *Whidbey Woman Admits to Bilking Love Interest*, SEATTLE PI (July 14, 2011, 2:25 PM), http://www.seattlepi.com/local/article/Whidbey-woman-admits-to-bilking-love-interest-1466565.php.

166. The private detective is Rose Winquist, who has shown significant sympathy for the Butler family and has helped publicize their case. *See* Rose Winquist, *New Web Site for Butler v. Saenger*, ROSE WINQUIST PI BLOG (Feb. 24, 2011), http://www.rosewinquist.com/roseblog/2011/02/24/new-web-site-for-butler-v-saenger/; *see also* Alex Silverman, *Keep Loved Ones from Being Victimized With a Background Check*, MYNORTHWEST.COM (Mar. 28, 2011, 1:30 PM), http://mynorthwest.com/?nid=189&sid=405167 (interviewing Rose Winquist).

167. Affidavit for Warrant of Arrest, Municipal Court of Helena, Arkansas Criminal Division (Feb. 28, 1970), *available at* http://www.butlervsaenger.com/.

168. Affidavit for Warrant of Arrest, Municipal Court of Helena, Arkansas Criminal Division (March 1, 1977), *available at* http://www.butlervsaenger.com/.

169. Admission Summary by Arkansas Deptartment of Corrections, Arkansas v. Lumpkin, CR87-109 (Phillips Cnty. Cir. June 5, 1987), *available at* http://www.rosewinquist.com/roseblog/wp-content/uploads/2010/12/Murder-Conviction-and-Prison-Records1.pdf. Shea Saenger's previous aliases include Sharon Lumpkin, Ann Lumpkin, Sharon Miller, Shea Miller, Ann Shea Miller, Ann Haycraft, and Shea Miller. When the children found out, they were "floored, just sick." Leveritt, *supra* note 142.

170. Pulkkinen, *supra* note 165 (describing Saenger as "a married woman" "falsely portray[ing] herself as a widow"); *see also* Leveritt, *supra* note 142.

171. Pulkkinen, *supra* note 165 ("Speaking with detectives, Butler . . . also said he would not have given her the money or continued the relationship if he'd known she was married.").

172. Winquist, the Butlers' private investigator, has said, "Her poor husband. We've sort of

2. *Butler v. Saenger* and the Fifth Amendment

The Butlers filed a Protective Order of Vulnerable Adult in the Superior Court of the State of Washington for Kittitas County.[173] They also filed a civil lawsuit under the Washington State statute protecting "vulnerable adults" from abuse and financial exploitation.[174]

On November 15, 2010, the Superior Court found for Butler, holding that:

> 5. [Saenger] abused and financially exploited the [sic] Norman Butler . . . .
> 7. Petitioner, Trustee of the Norman H. Butler Survivor's Trust and the Mary E. Butler Decedent's Trust, is entitled to recover $2,161,246.67 in damages from [Saenger] for the benefit of Norman Butler.
> 8. Petitioner is entitled to recover his fees and costs incurred in this action . . . .[175]

The Butlers had trouble recovering the money that Saenger had siphoned off to her relatives.[176] Butler and his private investigator traced the money to relatives in Mississippi, Louisiana, and Arkansas.[177]

During the course of the lawsuit, Saenger refused to answer questions asked by the judge, pleading her Fifth Amendment right.[178] The Judge responded by placing Saenger in jail for contempt of court, where she stayed for several months due to her refusal to cooperate.[179] Meanwhile, the Butlers struggled financially and had to put Norman Butler in

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befriended him, which is sort of ironic. He's a veteran. He's very feeble, very ill. He took pride in his reputation in the community. He knew nothing about any of this. He's another victim." Leveritt, *supra* note 142.

173. *See* Order for Protection of Vulnerable Adult, Butler v. Saenger, No. 10-2-00430-3, (Wash. Super. Ct. Oct. 25, 2010).

174. *See* WASH. REV. CODE §§ 74.34.020(2)(c)-(d), (17)(a) (West 2012); WASH. REV. CODE ANN. § 74.34.010(6) (West 2012) (repealed 1999).

175. Butler v. Saenger, No. 10-2-00430-3, at 2 (Wash. Super. Ct. Nov. 15, 2010).

176. Leveritt, *supra* note 142.

177. *Id.* ("Despite Saenger's silence, Butler and Winquist were able to trace quite a bit of what Saenger had done with the money. According to documents they've filed in various courts, she sent some of it to relatives in Mississippi and Louisiana. But according to the filings, she sent most of it to relatives in Arkansas: more than $1.1 million to her brother, Mark Lumpkin, a farmer in Phillips County, and his wife Rosemary; another $195,555 was sent to her niece Shannon Wiggins of Hazen—the same niece whose boyfriend Saenger (Sharon Lumpkin at the time) had killed in 1987.").

178. Commissioner's Ruling at 2, Butler v. Saenger, No. 29522-2-III (Wash. Ct. App. Jan. 19, 2011).

179. *Id.* at 3 ("There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter submitted to the court for its determination as to the validity of each claim" (quoting Eastham v. Arndt, 624 P.2d 1159 (Wash. Ct. App. 1981))). "Every Monday for weeks in early 2011—until the arrangement was changed to monthly—[Saenger] was brought into court to reveal where the money went. Week after week, then month

an assisted-care facility.[180] This was very upsetting for Doug Butler, who said that his father had saved his money in order to afford care at home.[181] Somewhat ironically, the family seemed to have befriended Art Saenger, Shea Saenger's husband—even giving him full lifetime use of a modular home his wife had bought him with the stolen money.[182]

3. Criminal Charges and Prison Sentence

On July 9, 2010, the U.S. Postal Inspection Service received a tip from Doug Butler that Saenger had used the U.S. Postal Service to carry out her fraud.[183] A U.S. Postal Inspector began investigating the claim.[184] Aravind Swaminathan, an Assistant U.S. Attorney, took special interest in the case after speaking to Doug Butler and the other victims.[185] On July 1, 2011, Saenger was charged with one count of Mail Fraud.[186] The charging document alleged that:

> The essence of Shea Saenger's scheme and artifice to defraud was to pretend to be romantically interested in and available to [Norman Butler ("N.B.")], and then to obtain money and property from N.B. based on false and misleading representations regarding, among other things, that she was single and available to be married to N.B., that

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after month, she refused and was returned to her cell in the Kittitas County jail." Leveritt, *supra* note 142.

180. Leveritt, *supra* note 142 ("There was also the financial part. Norman Butler finally had to be moved into an assisted-care facility. That costs $1,900 a month. All but $200 of that is covered by his Social Security check. But medications cost another $400. 'And,' says Doug Butler '. . . . We plan to rent the house because now we're burning through what capital he had left.").

181. Doug Butler emotionally expressed sadness and some remorse over having to put his father in an assisted living facility during his Victim Impact Statement at the conclusion of *United States v. Saenger.*

182. *See* Butler, *supra* note 164 ("Although Art has done nothing wrong, he has recognized that it is wrong for him to keep property that was purchased with stolen money. We have reached an agreement with Art regarding the home and truck. Art has signed the title of both over to the Mary Butler Decedent's Trust, we have given him the full use of both for his lifetime and Art has agreed to pay a nominal rent. See the Satisfaction of Judgment. Art Saenger, a retired 75 year old sailor with COPD, is the only stand-up honorable man in Saenger's entire extended family."); *see also* Satisfaction of Judgment, Butler v. Saenger, No. 10-2-00430-3 (Wash. Super. Ct. May 4, 2011).

183. Pulkkinen, *supra* note 165 ("On July 9, 2010, the U.S. Postal Inspection Service received a complaint from a man who reported that his father, [Norman] Butler, had been swindled by the Coupeville woman he'd met online. The man's son described his father as an aging optometrist who has since been diagnosed with Alzheimer's disease. Butler's son said he began investigating his father's relationship with Saenger and came to believe she'd bilked about $2.2 million out of the man, a postal inspector told the court. The inspector noted that her own review of the transactions backed that claim.").

184. *See* Application for a Search Warrant, No. MJ10-539 (W.D. Wash. Dec. 15, 2010).

185. *See* Information at 5, United States. v. Saenger, CR11 0223 RAJ (W.D. Wash. July 1, 2011), ECF No. 1 During his argument at Saenger's Sentencing Hearing, he told Judge Jones that he had been the strongest proponent in his office of pursuing the charge as a federal offense because his conversations with the victims resonated with him.

186. *Id. at* 1; *see also* 18 U.S.C. §§ 981(a)(1)(C), 2461(c) (2006).

> she had an ailing uncle who she was caring for, and that she had breast cancer and needed surgery. In fact, during the relevant time, Shea Saenger was married, and not romantically available, had no ailing uncle, and did not have breast cancer.[187]

Because Saenger had used the United States Postal Service in some of her correspondence with Butler, her acts fell within the scope of the federal mail fraud statute. The United States noted that:

> Saenger, having devised the above-described scheme to defraud, for the purpose of executing and in order to effect the scheme to defraud, did knowingly cause to be delivered by U.S. Mail, according to the directions thereon, a check dated August 7, 2008, drawn on an account held by N.B. . . . .[188]

Because Saenger had "used, or caused to be used, the U.S. Mail to carry out or attempt to carry out an essential part of the scheme," the federal Mail Fraud Statute was relevant.[189] Interestingly, had Saenger used a private mail service for her correspondence rather than USPS, she could have evaded the charge altogether.[190] Saenger pled guilty two weeks thereafter.[191]

On January 6, 2012, Judge Richard Jones of the U.S. District Court for the Western District of Washington sentenced Saenger to 46 months—almost four years—in prison.[192] Although Saenger argued at the sentencing hearing that her sentence should be reduced by the total number of days she spent in custody in Kittitas County Jail, in connection with the *Butler v. Saenger* lawsuit, and the United States did not object, the judge declined to award credit for time served.[193] The Judge also ordered Saenger to pay restitution in the amount of $2,161,246.67.[194]

During the Sentencing, Saenger's attorney argued that "[a]lthough

187. Information, *supra* note 185, at 1–2.

188. *Id.* at 3.

189. *See* 18 U.S.C. § 1341 (2006).

190. *See* David Michael Cantor, *Bank, Mail and Wire Fraud (Federal Charge)*, L. OFFICES OF DAVID MICHAEL CANTOR, http://dmcantor.com/fraud-theft-crimes/bank-mail-and-wire-fraud-federal-charge (last visited Feb. 8, 2012) ("Private courier services such as Federal Express, UPS, etc. do *not* satisfy the mail fraud statute.").

191. *See* Plea Agreement, United States v. Saenger, CR11-223RAJ (W.D. Wash. July 14, 2011), ECF No. 11.

192. *See* Judgment in a Criminal Case, *supra* note 16, at 2.

193. *See* Plea Agreement, *supra* note 191 at 9 ("[T]he [United States] agrees at the time of sentencing to recommend a term of imprisonment no greater than the low-end of the United States Sentencing Guidelines Range as determined by the Court at the time of sentencing, but in no event lower than a term of imprisonment of forty-six (46) months. The government further agrees not to object to a recommendation by Shea Saenger that her sentence be reduced by the total number of days she has spent in custody in Kittitas County Jail, in connection with Butler v. Shea Saenger, No. 10-2-00430-3 (Superior Court for Kittitas County).").

194. *See* Judgment in a Criminal Case, *supra* note 16, at 5.

the relationship was marred by Ms. Saenger's exploitation, that exploitation was not the extent of the relationship. The relationship was real and meaningful for both Saenger and Butler."[195] Then Saenger shuffled to the lectern in front of the Judge, looked down, and said grudgingly, "I would like for you to know that I love Norman Butler very much and I am sorry for what I have done to him."[196] Thus, the Butlers prevailed in both civil and federal court.[197]

B. *Criminal Sanctions and Romantic Gifts*

1. A New, Intimate Type of Mail Fraud

The *Saenger* case is illustrative not only because it evokes strong sentiments about morality, but also because it is unprecedented. First, the only reason that Saenger was indicted was because she happened to use the United States Postal Service.[198] This is perhaps one reason cases like *Saenger* are rare. Second, private exploitation cases like *Saenger* are not the typical target of 18 U.S.C. § 1341. Mail fraud cases usually revolve around business—not personal—transactions. For example, recent mail fraud defendants include Allen Stanford, who "bilked investors out of more than $7 billion, mostly through the sale of certificates of deposit, or CDs, from his bank";[199] Joseph Belasco, who defrauded Pepsi Bottling Group of nearly three million dollars over a ten-year period;[200] Gregory Viola, whose Ponzi scheme defrauded more than fifty investors;[201] and Anthony Cutaia, another Ponzi investment

195. The author was present at Saenger's sentencing hearing in the U.S. District Court for the Western District of Washington. *See also* Levi Pulkkinen, *Killer Who Stole $2.2 Million from Elderly Man: I Love Him*, Seattle PI (Jan. 6, 2012, 3:51 PM), http://www.seattlepi.com/local/article/Killer-who-stole-2-2-million-from-elderly-man-I-2444452.php.

196. Saenger read a pre-written statement to the Court at her sentencing hearing, at which the author was present.

197. Doug Butler came across this Article on line, and took the initiative to reach out to me. He wrote, "My clearly biased opinion on analysis of romantic gifts is that it is an excellent paper. I forwarded a copy of it to the multitude of attorneys involved in the case," and that he wished to add "how hard it is to get a case of this type prosecuted. We succeeded in large part due to just some blind luck. In spite of the fact that "some cases are so egregious that perhaps more punishment is warranted" the local Kittitas County prosecutor refused to file charges of any type (not even for violations of the protective order) because he 'couldn't make a case' which I interpret as 'it's too much work.'" E-mail from Doug Butler, son of Norman Butler, to author (June 6, 2012, 9:42 EST) (on file with author).

198. *See* Cantor, *supra* note 190.

199. Juan A. Lozano, *Ex-Stanford Exec to Jury: 'Follow the Money,'* FoxNews.com (Feb. 8, 2012), http://www.foxnews.com/us/2012/02/08/defense-relentless-in-questioning-ex-stanford-exec/.

200. *See* Associated Press, *NJ Vending Company CFO Accused of $3M Pepsi Fraud*, Yahoo! (Feb. 2, 2012, 12:40 PM), http://finance.yahoo.com/news/NJ-vending-company-CFO-apf-140432 9005.html.

201. *See Orange Man Admits Guilt in Mail Fraud*, New Haven Reg., Feb. 2, 2012, http://www.nhregister.com/articles/2012/02/02/blotter/doc4f2b50525e7d0200878230.txt.

schemer.[202] Perhaps most famously, Andrew Fastow, the former CFO of Enron, was charged with mail fraud, among other things, in 2002.[203]

Most mail fraud is executed rather impersonally, very often in a Ponzi scheme, very often in business transactions. The *Saenger* use of the mail fraud statute is strikingly different because Saenger's fraud was incredibly personal. Instead of targeting numerous faceless investors, she targeted one man—specifically, the man she claimed to love.[204] In the United States' sentencing memorandum in *Saenger*, the government emphasized the strikingly personal nature of Saenger's fraud:

> Saenger lied about having breast cancer, a life threatening condition that takes thousands of lives every year. These lies were effective because most people would never imagine that anyone would ever lie about these circumstances. They were credible simply because they were uttered. Indeed, few would ever doubt a person's claim that she, or her family member, were facing a life threatening illness. That is precisely what makes this crime so vile: Saenger lied about the kinds of things that tug at the heartstrings and engender true compassion.[205]

Judge Jones also emphasized the personal nature of the crime. He told Saenger, "your greed superseded your professed concern for the victim . . . the only real love interest you had was for his bank account . . . lust for unlimited access to his wealth."[206]

2. Effects of Criminal Sanctions for Gifts

Unlike the remedies of conditional gift, pledge, consideration, unjust enrichment, and restitution, a criminal sanction like mail fraud punishes the donee *beyond* the cost of the gift. This has consequences for the *ex ante* considerations of the parties.

Suppose that courts consider all romantic gifts to be irrevocable, like ordinary gifts. This means that when the donor gives his gift, he knows that he will not get it back, no matter what—even if the donee reneges on the relationship. As a result, his costs are higher. The signal-

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202. Press Release, U.S. Attorney's Office S. Dist. of Fla., Boynton Beach Man Sentenced to Jail in Mail Fraud Ponzi Investment Scheme (Jan. 18, 2012), *available at* http://fbi.gov/miami/press-releases/2012/boynton-beach-man-sentenced-to-jail-in-mail-fraud-ponzi-investment-scheme.

203. Press Release, U.S. Dep't of Justice, Former Enron Chief Financial Officer Andrew S. Fastow Charged with Fraud, Money Laundering, Conspiracy (Oct. 2, 2012), *available at* http://justice.gov/opa/pr/2002/October/02_crm_568.htm.

204. *See supra* text accompanying notes 195–96.

205. *See* Press Release, U.S. Attorney's Office W. Dist. Wash., Former Whidbey Island Resident Sentenced to 46 Months in Prison for Taking More Than $2 Million from Elderly Victim: Woman Preyed Upon Vulnerable Alzheimer's Patient to Enrich Herself and Her Relatives (Jan. 6, 2012), *available at* http://www.justice.gov/usao/waw/press/2012/jan/saenger.html.

206. The author was present at the Sentencing.

ing function of the gift is clearer: He believes the relationship will last; otherwise the investment would be wasteful to him.

In contrast, consider the conditional gift, pledge, or consideration regime.[207] Under these legal regimes, the donor knows that if the relationship crumbles, he will be able to retrieve his romantic gift. This means that the gesture of the gift, the signaling function, is weaker. A donor who spends a lot of money on a gift, while knowing that he will be able to retrieve the full gift upon dissolution of the relationship, is a much weaker signaler than a donor who does not have the same assurances. If both parties—donor and donee—are aware of this legal rule, then both will realize that the signaling function has been weakened, and the donor will have to find other ways to compensate in order to send a stronger signal.

Under an unjust enrichment regime,[208] the signaling function of the gift is somewhat different. Because here the court will take into account the behavior of both parties, and consider bad behavior, the donor is no longer guaranteed that his gift will be revocable. As a result, the gift has a better signaling function than it does under a conditional gift, pledge, or consideration regime because the donor's gift is an investment in the relationship. Where there is a less-than-certain chance that the gift is revocable, the donor bears some expected loss upon dissolution of the relationship. Therefore, the gift is a better signaling function.

Under the fraud regimes, both civil and criminal (although the effects are amplified in the criminal fraud case), the calculus is again different. We are no longer considering only the incentives of the donor, but the focus is on the donee. In a proper case of fraud, by definition,[209] the donor will not know, at the time the gift is given, that the donee has taken advantage of him. Therefore, while the donor is giving the gift, he is trusting the donee—at least to some extent. The donee, on the other hand, will be faced with a balance: She can accept the gift and benefit from the value of the gift, but on the other hand, if there is a chance of a civil or criminal sanction, she will have to take that into account, discounted by the probability that it will happen.

Under the regimes of conditional gift, pledge, consideration, and unjust enrichment, the donee who does not have any emotional attachment to the donor should nonetheless always accept the gift. Mathematically:

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207. *See supra* Sections III.B.1.–3.

208. *See supra* Section III.C.

209. Fraud statutes vary in elements, but one requirement in every statute is that of some sort of deception—that the victim be deceived as to the falsity of the perpetrator's promises. *See, e.g.*, 26 WILLISTON ON CONTRACTS § 69:3 (2012).

$$E = (1-p)G,$$

where E is the expected value of the donee's gain, G is the value of the gift, and p is the probability that the donor will eventually take the donee to court under the conditional gift, pledge, consideration or unjust enrichment theories, and win. Clearly, because p=1, E is always greater than or equal to zero.

If there is a chance that courts will impose sanctions as in *Saenger*, however, the expected value of the donee does not always favor acceptance of the gift:

$$E = G-q(G+S),$$

where E is the new expected value of the donee's gain, G is the value of the gift, q is the probability that the donor will be sentenced to a sanction for fraud (such as punitive damages or jail time), and S is the severity of the punishment. The probability q is multiplied by (G+S) because if the court makes a finding of fraud, the court will certainly impose restitution. Here, E is not always guaranteed to be positive. Even if q is a small probability, S might be nonetheless quite large (for example, forty-six months of jail time for Saenger). Therefore, under the fraud regime, there are some cases where the donee should actually turn down a gift.

Perversely, the harsher the sanction, the more reason a donee has for hiding the frequency or value of gifts. But as discussed below,[210] discrete donors are more egregious threats than blatant donors. Or, conversely, donees will have to be particularly careful to maintain evidence that substantial gifts are not products of fraud. In some cases—in *Saenger*, for example—it is unclear that much more than circumstantial evidence is needed. The donor was mentally ill; much of the government's brief discussed his Alzheimer's diagnosis. The amount of money that Saenger received was substantial—$2 million, most of his life savings.

The court does not really examine the utility that Butler received from his relationship with Saenger. Butler clearly valued Saenger's attention, especially if he was lonely, yet there was no weighing of this value against the costs to Butler. Perhaps such a weighing would be offensive to the moral senses. In some other case, however, it is possible for a donor to value a donee's affections more than his entire life savings—that he would, quite romantically, be willing to give everything to her. The crux of the *Saenger* case, then, is perhaps Butler's vulnerability. We do not know how much Saenger—even in the midst of her lies and manipulation—brightened Butler's life. But we do know that, as

210. *See infra* Section IV.C.3.

social policy, we do not want to take the chance that the Saengers of the world will prey on the Butlers of the world.

C. *Three Economic Paradoxes of Romantic Gift-Giving*

There are three interesting economic paradoxes, or principles, in romantic gift-giving that are somewhat unexpected but worth noting. First, non-cash gifts appear at first glance to be extremely inefficient because they involve guessing the desires of donees, but they are nonetheless ubiquitous. Second, extremely inefficient gifts tend to be better signaling mechanisms than efficient gifts in romantic relationships. Third, although the more blatant a "gold digger" is about her intentions the more social disapproval she may face, the more blatant a "gold digger" is, the more efficient the relationship is, and the less likely someone is being victimized.

1. The Paradox of Costly Non-Cash Gift-Giving

First, if consumers "know their own tastes and markets function smoothly, givers should give cash (if anything) rather than trying to guess the desires of receivers. But this prescription seems to betray the spirit of gift giving."[211] The paradox is that gifts are obviously very prevalent in our society.

This paradox has been addressed in much economic and anthropological literature: Gifts have intangible benefits—signaling and symbolic roles in relationships.[212] As a signal, gifts, "are symbolic of some qualities of gift givers or receivers; gifts are actions people take that convey meaning."[213] A "signaling equilibrium" results "when expectations about what signals mean are fulfilled by behavior."[214] As discussed previously, romantic gifts are valuable as signaling devices. One illustration of the use of gifts:

> Consider an earnest young suitor, expecting a lifetime of familial production with his fiancée (given her consent); he will gladly "sink" the costs of a diamond ring and expensive dinners against the expected gains of joint production, if he must, to convince her of his intentions and elicit her cooperation. The lusty bachelor whose planning extends

211. Camerer, *supra* note 17, at S181.

212. *See supra* Section II.A. Note that a "difference between the economists' use of the term 'signal' and the sociologists' use of term 'symbol' is that economic signals mean something because people who do not have the characteristics the signals convey cannot afford those signals, by definition." Camerer, *supra* note 17, at S182. For example, if expensive gifts are used to signal the desire to pursue a long-term relationship, it is a valid signal only if opportunists who only wish to mimic the desire cannot purchase such expensive gifts because the cost is too high for a short-term relationship.

213. Camerer, *supra* note 17, at S182.

214. *Id.*

> only to dawn cannot afford such costly investments, ceteris paribus, since he expects less gain from a short-term relationship with his lady of that evening. In courtship situations like this, gift giving can sort potential partners according to their intentions (i.e., their investment plans). Furthermore, gift giving will often be reciprocal (though not always), because gifts are meant to spur investments that are reciprocal. . . . Potential mates or partners hope courtship gift giving is reciprocal, because in my model it takes two people to make a relationship.[215]

If we accept gifts as signaling mechanisms, we notice that some gifts are better signals than other gifts. Some signals are clear because of custom; for example, "[i]f flowers are what well-intentioned gentlemen give young ladies on first dates, then gentlemen give flowers in order to be thought of as well intentioned, even if young ladies would rather be cooked a meal or sung a song."[216] Another example of this is the diamond engagement ring—it is a very clear signaling device.

2. The Paradox of Inefficient Romantic Gifts

This leads us to the second paradox. Because gift giving is supposed to be somewhat reciprocal, inefficient gifts that are not worth as much to the donee may actually be better signals than efficient gifts—it is precisely the extravagance, the inefficiency, that signals the donor's intentions.[217] Generally, the more inefficient the gift is, the more obvious the signal is. For example, if a wealthy man offers to buy a woman a dress made of 9,999 real red roses,[218] an extravagant mink fur coat, or the entire inventory of a Tiffany's jewelry store, his romantic intentions are much clearer than if the same man gives the woman a year's supply of food, even though the food would be much less wasteful.[219] White elephant gifts, which are expensive but not useful, are useful signaling devices. Similarly, a wife might prefer a gift of a pretty locket (even if she seldom wears necklaces) to a gift of a new vacuum cleaner (even if she often vacuums) from her husband because of the signaling function of the romantic gift. While the vacuum cleaner is actually more efficient

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215. *Id.* at S183.

216. *Id.* at S193.

217. *Id.* at S183 ("Accepting an overpriced dinner instead of its cash equivalent has an opportunity cost to the receiver; so, incurring that cost is simultaneously a signal of the giver's intentions and of the receiver's intentions.").

218. *See* Sadie Whitelocks, *The Ultimate Valentine's Day Bouquet: Chinese Man Proposes to Girlfriend with Dress Made from 9,999 Real Red Roses*, Daily Mail, Feb. 14, 2012, http://www.dailymail.co.uk/femail/article-2101010/Valentines-Day-2012-Chinese-man-proposes-girlfriend-dress-9-999-red-roses.html.

219. This is an extreme example because of the divergence of costs between a fur coat, jewelry, and a casual lunch, but the lunch might be the most useful to the donee, especially if she is hungry and not in the mood to deal with the maintenance of owning an island.

for the donor (it might contribute to his enjoyment of a clean house) and the donee (she may be tired of her old vacuum cleaner, and she would use it very often), the necklace is the preferred gift because it says something romantic.

Jewelry store advertising campaigns are established on this principle, with slogans like "Every kiss begins with Kay" and "diamonds are forever." The implication is, of course, not only that diamonds are forever, but that the gift donor's love will last forever as well.

3. The Paradox of "Tasteful" Gold Digging

If inefficient, extravagant gifts signal intentions more clearly, the reflection of that problem is the question of how clearly the donee is signaling her intentions. For example, suppose that Donee begins a relationship with Donor because Donee is interested in the contents of Donor's bank account. Donee can be more or less obvious about her reasons for entering into the relationship. We can consider three simplified approaches adopted by Donee.

Most obvious. Donee might be very obvious about her intentions for dating Donor. She might tell Donor straight-out that she is only in the relationship for his money, or it may be a silent agreement between the two fully-informed parties. Either way, it will be obvious to the Donor why the Donee is pursuing the relationship. In this situation, Donor would know that Donee is with him for his money and will choose his course of action with this information in mind. If Donor decides that Donee's company is worth the financial cost, he will stay in the relationship. If he does not think Donee's company is worth the cost, he will terminate the relationship. Economically, this is a completely pareto-optimal, mutualistic relationship. No party is made worse off by the relationship because if either party were made worse off, they would terminate the relationship.[220]

Hints and implications. On the other hand, Donee might not be too obvious about her intentions—she might consider herself too tasteful, or fear social disapproval too much, to admit her intentions outright. Perhaps she knows that being too obvious would scare away the Donor. So instead, she might hint at them; for example, she might consistently talk about the importance of gifts ("if you really loved me, you would buy

220. This is assuming that both parties are rational. A possible critique is that in situations of romance, people are irrational and may pursue relationships that are detrimental to themselves. I am assuming that in those cases, they are deriving some sort of intangible utility from the relationship, from their inordinate fondness of the other party, or some other benefit—otherwise they would not be pursuing the relationship.

me this") to the point that an ordinarily prudent Donor would notice that she might not really love *him*.

It is possible, if Donor is not too prudent, that he is in a position where he is dating Donee, but if he were to find out her true intentions, he would terminate the relationship. This is a possibly inefficient relationship caused by an information asymmetry. This is possibly not pareto-efficient because Donor is worse off from being in the relationship even if Donee is better off. Depending on the specific instance, it may or may not be Kaldor-Hicks efficient.[221]

Subtlety. Lastly, Donee might choose to be as subtle as she can about her intentions. Again, this may be the result of a desire to appear tasteful, or a fear of social disapproval. Donee might make the deliberate decision to pursue Donor for his money but to hide this decision at all costs. Donee will consistently insist that she is with Donor for love, not money; or alternatively, Donor is mentally ill or debilitated in some way so that he cannot be expected to suspect Donee's intentions.[222] The key is that in this scenario, Donor does *not* know that Donee is with him for his money. Thus, he cannot adequately protect his own interests or evaluate whether Donee is worth dating, and he will not terminate a relationship solely on account of Donee's intentions.

This last scenario runs the most significant risk of egregious conduct on the part of Donee, the most harm to Donor, and the most overall inefficient economic outcomes. If Donor is not aware of Donee's intentions, he cannot gauge whether her company is worth her cost. If the relationship turns out to be Kaldor-Hicks efficient, it will be by chance; most likely, the net gain to Donee would exceed the net harm to Donor because there is no extrinsic check on the amount of money Donee can demand from Donor.

D. *Consequences of Court Interference*

Consider the scenario of the subtle gold digger. Because this type of relationship—where Donor is unaware of Donee's true motivations for staying with him—is the most likely to result in the victimization of Donor, the court's harshest remedy, criminal fraud, should be limited to these situations. Furthermore, because criminal fraud is the only approach that may actually change the incentives of the donee—and

221. An outcome is considered Kaldor-Hicks efficient if an outcome can be possibly reached by arranging sufficient compensation from those that are made better off to those that are made worse off so that all would end up no worse off than before. There is a wealth of law and economics scholarship on Kaldor-Hicks efficiency. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 17 (8th ed. 2010).

222. This is the situation exemplified in *United States v. Saenger*. *See supra* Section III.A.

therefore may deter some efficient relationships that only appear inefficient to outsiders—it is an approach that should not be used in other types of cases.

When courts approach cases using the six theories of revocability (conditional gift,[223] pledge,[224] consideration,[225] unjust enrichment,[226] civil fraud,[227] and criminal fraud[228]), they should consider whether the relationship is economical or not, instead of only considering the moral reprehensibility of a "gold digger." Ordinarily, courts tend to punish a blatant "gold digger" more than a subtle one. Indeed, the more obvious the donee is about her love for the donor's money rather than for the donor himself, the more likely she is to be required to give up the gift under unjust enrichment.[229] The more obvious the gold digger is about her intentions, the more social disapproval she faces. Accordingly, women will often repeatedly, publicly proclaim their love in efforts to dissuade the impression that they are gold diggers.[230] Ironically, the more obvious a woman is about being a "gold digger," the less morally reprehensible it is if she actually is one. Courts should take this into account when considering whether to punish a donee.

Under the five traditional theories, a potential "gold digger" will always have a positive expected value in venturing into a relationship because the worst case scenario, which occurs with a less-than-certain chance, is that the gifts will be returned, and she will have an outcome of zero. This is why the traditional five theories will not technically deter "gold diggers."

If the courts begin enforcing criminal punishments with more frequency, however, this will result in a possibly negative expected value of additional punishment, including jail time. This might deter "gold diggers."

This might also, however, cause over-deterrence. When a party

223. *See supra* Section III.B.1.

224. *See supra* Section III.B.2.

225. *See supra* Section III.B.3.

226. *See supra* Section III.C.

227. *See supra* Section III.D.

228. *See supra* Section IV.A.

229. *See supra* text accompanying notes 67–69.

230. For example, Anna Nicole Smith defended her intentions in several interviews. *See, e.g.*, *Wedding Shockers: Odd Couples and Peculiar Pairings Cause Star-Watchers to Quake*, PEOPLE MAG., July 24, 1995, at 123, *available at* http://www.people.com/people/archive/article/0,,20101169,00.html ("'I'm very much in love,' Smith told an interviewer, flashing her asteroid-size 22-carat engagement diamond and her diamond-dusted wedding band after the June 27, 1994, nuptials. 'I could have married him four years ago if I'd just wanted to get rich.' Their interests spanned their half-century-plus age gap."); Heather Mills McCartney has also repeatedly denied being a gold digger. *See* Tim Nudd, *Heather Mills: I'm Not a Gold Digger*, PEOPLE.COM. (Nov. 22, 2006, 9:35 AM), http://www.people.com/people/article/0,,1561237,00.html.

fears that she might appear predatory in a relationship, she might avoid it, even if she genuinely likes the other party. For example, younger women might avoid dating anyone old enough to possibly develop Alzheimer's to avoid possible accusations of fraud from the donor's family. Whether or not this would be desirable is a normative question, but it should be considered. But this is also why very obvious signals of "gold diggers" are better than subtle ones—they lessen the risk of false positives.

I have argued above that subtle gold digging is worse than blatant gold digging because there is a much greater chance of informational asymmetry. In cases of the biggest gaps of informational asymmetry, like in the facts of *U.S. v. Saenger*, the court imposes the harshest punishments. This seems to be the correct result in the *Saenger* case, although courts should be far more careful with the sixth theory—criminal fraud—than they are with the other five because such a harsh potential punishment creates the possibility of a negative expected value for parties seeking relationships.

V. Conclusion

There is a spectrum of theories available for cases where one lover allegedly takes advantage of another by inducing gift-giving. On one end of the spectrum are the non-fault-based theories, which include conditional gift, pledge, and consideration. These mandate the return of the gift because of the nature of the gift, not for any wrongdoing on the part of the donee. In the middle is unjust enrichment, which imputes some assumption of wrongdoing on the donee, although wrongdoing is not necessary. The remedy is the return of the gift, as well. Next is civil fraud, where the donee has definitely exhibited bad behavior, is at fault, and needs to return the gift as a result. Pushing the end of the spectrum is criminal fraud: In novel cases like *Saenger*, the donee is not only required to return the gift, but is also punished for her behavior beyond the cost of the gift with jail time or other fines.

While the *Saenger* outcome is not incorrect, it is striking and new and deserves consideration. It is a quite different type of remedy because it imposes additional punishment on the donee. Taking this into account, a potential donee might actually find that pursuing a relationship will have a negative expected value, *ex ante*, which is different than under the traditional five remedies, which will always produce an expected value of at least zero. As a result, criminal fraud may result in over-deterrence. In relationships where the parties differ greatly in financial status, the donee might fear punishment if she or he is perceived as taking advantage of the donor.

Although the more blatant a gold digger is about her intentions the more social disapproval she may face, the subtle gold digger is actually much more dangerous. A donee who is blatant about her intentions may face a much harder time finding a partner, but once established, the relationship is much less likely to be coerced, economically inefficient, or fraudulent. This suggests that the social forces dictating subtlety are actually detrimental to both donors and donees in romantic relationships. Thus, when courts decide to apply the harshest judgments against donees, they should only do so in situations where they are absolutely certain that the relationship and the gift-giving are not informed and consensual.

Punishment beyond the cost of the gift should be applied very sparingly and only where the donor could not possibly have given informed consent for the gift. English poet Samuel Daniel wrote, "Love is a sickness full of woes."[231] Romantic relationships compel people to do things they would not ordinarily do, to suffer grievances they would not ordinarily suffer, and to give gifts they would not ordinarily give. Romantic gifts are often emotionally driven, and the legal battles over revocation are emotionally charged. But while courts should apply the law to protect donors from true fraud, it is not the role of the courts to protect donors from the manipulations of their partners, the entreaties of their lovers, or the generous whims of their own hearts.

231. SAMUEL DANIEL, HYMEN'S TRIUMPH act 1, sc. 5 (1615), *song reprinted in* 3 THE HOME BOOK OF VERSE; AMERICAN AND ENGLISH, 1580-1912: POEMS OF LOVE, PART I 462 (Burton Egbert Stevenson ed., 1915).