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WHAT TO DO WHEN THERE'S NO "I DO": A MODEL FOR AWARDING DAMAGES UNDER PROMISSORY ESTOPPEL

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Abstract: Since its inception in the seventeenth century, the common-law action for breach of promise to marry has been the subject of recurrent legal debates. Beginning in the 1930s, some states began passing statutes that abolished the action altogether. Even so, today about half of American jurisdictions retain the breach-of-promise action in some form.

This Article advocates a compromise that is not currently the law in any American jurisdiction: parties who breach promises to marry should be liable for damages, but only to the extent they have induced reliance by those to whom they were formerly engaged. Under this proposed model, courts would employ promissory estoppel to define both the nature and scope of damages available to those aggrieved by broken nuptial promises. Through the prism of promissory estoppel, this Article re-examines the broad range of damages courts traditionally awarded breach-of-promise plaintiffs at common law and explains why, given modern social conditions, reliance damages are the only appropriate elements of recovery. In this context, reliance damages would include provision both for expenditures made and economic opportunities foregone in anticipation of marriage. The reliance-based approach advocated in this Article would encourage responsibility, honesty, and forthrightness in romantic relationships, but avoid the abuses associated with the historical breach-of-promise action.

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INTRODUCTION

At common law, a party who breaches a promise to marry can be sued for considerable damages.[1] Beginning in the 1930s,[2] twenty-five states enacted legislation, commonly known as "heartbalm" statutes,[3] abolishing the common-law action for breach of promise to marry.[4]

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1. *E.g.*, 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 1.4 (2d ed. 1987); Charles T. McCormick, *Handbook on the Law of Damages* § 111 (1935). Hereinafter, the common-law action for breach of a promise to marry will often be referred to simply as the breach-of-promise action.

2. 1 Clark, *supra* note 1, § 1.5, at 21; Note, *Heartbalm Statutes and Deceit Actions*, 83 Mich. L. Rev. 1770, 1770–71 (1985).

3. 1 Clark, *supra* note 1, § 1.5, at 21; Note, *supra* note 2, at 1771. The "heartbalm" terminology is also broad enough to capture statutes that abolished the common-law torts of seduction, criminal conversation and alienation of affections. *See* Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 Mich L. Rev. 979, 979 (1935). The statutes are also sometimes referred to as "Anti-Heartbalm Acts." *See* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 63 (1985).

4. *See* Ala. Code §§ 6-5-330 to 331 (1977); Cal. Civ. Code §§ 43.4–43.5 (West 1982); Colo. Rev. Stat. §§ 13-20-202 to 203 (1989); Conn. Gen. Stat. Ann. § 52-572b (West 1991); Del. Code Ann. tit. 10, § 3924 (1975); Fla. Stat. Ann. §§ 771.01–.07 (West 1986); Ind. Code Ann. §§ 34-4-4-1 to 8 (West 1986); Me. Rev. Stat. Ann. tit. 14, § 854 (West 1980); Md. Code Ann., Fam. Law §§ 3-102 to 104 (1991); Mass. Gen. Laws Ann. ch. 207, § 47A (West 1981); Mich. Comp. Laws Ann. § 600.2901 (West 1986); Minn. Stat. Ann. §§ 553.01–.03 (West 1988); Mont. Code Ann. § 27-1-601 to 606 (1991); Nev. Rev. Stat. Ann. §§ 41.370–.420 (Michie 1986); N.H. Rev. Stat. Ann. § 508:11 (1983); N.J. Stat. Ann. § 2A:23-1 (West 1992); N.Y. Civ. Rights Law §§ 80a–84 (McKinney 1992);

Three other states have adopted statutes that place limitations on the breach-of-promise action.[5] About half of American jurisdictions, therefore, still recognize the action in some form.[6]

In acknowledging this split among the states, Professor Michael Grossberg characterizes the public policy debate over the breach-of-promise action as having "ended in stalemate,"[7] with no one viewpoint being able to "fashion a convincing definition of the public interest in courtship that would vanquish its opponents."[8] This Article revisits the public-policy debate from the vantage point of the late twentieth century. In the end, it is clear that the heartbalm statutes provide too much protection to parties who dishonor promises to marry, thereby insulating them from responsibility for the consequences of their actions.[9] However, retaining the action in its traditional form is clearly out of step with contemporary mores and social attitudes.[10] Instead, a more appropriate approach lies on middle ground presently unoccupied by any state court or legislature: parties who breach promises to marry should bear responsibility for their conduct, but only to the extent they have induced reliance by those to whom they were formerly engaged.[11]

N.D. Cent. Code § 14-02-06 (1991); Ohio Rev. Code Ann. § 2305.29 (Anderson 1991); Pa. Stat. Ann. tit. 23, §1901 (1991); Vt. Stat. Ann. tit. 15, §§ 1001–1003 (1989); Va. Code Ann. § 8.01-220 (1992); W. Va. Code § 56-3-2a (Supp. 1992); Wis. Stat. Ann. §§ 768.01–.08 (West 1981); Wyo. Stat. §§ 1-23-101 to 104 (1988).

The District of Columbia also has abolished the breach-of-promise action. *See* D.C. Code Ann. § 16-923 (1989). For a source that provides a summary chart (updated from time to time) of the status of the breach-of-promise action in various American jurisdictions, see Leonard Karp & Cheryl L. Karp, *Domestic Torts: Family Violence, Conflict and Sexual Abuse* app. k (1989 & Supp. 1995).

5. *See* Breach of Promise Act, Ill. Comp. Stat. Ann. ch. 740, §§ 15/1–15/5 (West 1993) (limiting recoverable damages to "actual damages" and imposing notice requirement); S.C. Code Ann. § 32-3-10(3) (Law. Co-op. 1991) (requiring promise to marry to be evidenced by written memorandum); Tenn. Code Ann. §§ 36-3-401 to 405 (1991) (requiring corroboration of alleged nuptial promise by written evidence or two disinterested witnesses and allowing jury to consider age and experience of parties as basis for reducing damages); *see also infra* note 247 and accompanying text (discussing the Illinois Breach of Promise Act).

In Stanard v. Bolin, 88 Wash. 2d 614, 565 P.2d 94 (1977), without a legislative mandate, the Washington Supreme Court became the only state court to place a substantial limitation on the breach-of-promise action. The court ruled that, in Washington, breach-of-promise plaintiffs would no longer be able to recover damages for loss of expected financial and social position, but otherwise left the action intact. *Id.* at 620–21, 565 P.2d at 97–98. For criticism of the Washington Supreme Court's refusal to limit recovery of damages for emotional anguish, see *infra* part IV.B.2.

6. Note, *supra* note 2, at 1771 n.7.

7. Grossberg, *supra* note 3, at 63.

8. *Id.*

9. *See infra* part IV.B.4.

10. *See infra* parts IV.B.1–B.3.

11. *See infra* part IV.B.

Promissory estoppel provides the framework for reaching this compromise.[12]

Part I contains a brief examination of the history and theoretical foundation of the breach-of-promise action,[13] followed by a detailed discussion of the broad range of damages courts have awarded breach-of-promise plaintiffs.[14] Part I closes with an in-depth review of the criticisms that inspired the enactment of heartbalm statutes by a number of state legislatures.[15] As noted in this Article, many of the complaints against the action were founded on unfair stereotypes of female plaintiffs.[16] Part II identifies the circumstances which necessitate the type of dispassionate re-evaluation undertaken in this Article as to whether it is appropriate to impose liability for breach of a promise to marry, and if so, to what extent. Among other things, part II, recognizing evolving attitudes about gender, employment, courtship, marriage, and divorce, discusses modern laws that hold people to higher standards of conduct in a variety of interactions between the sexes. The analysis set forth in part II demonstrates how a breach of a promise to marry, due in part to the evolution of values, does not harm late twentieth century women in the same manner, or to the same extent, as nineteenth century women.[17] Nevertheless, as observed at the close of part II, broken nuptial promises continue to be a source of considerable economic harm in today's society.

In part III, the relationship of the breach-of-promise action to general contract theory is analyzed. Courts concluded that engaged parties entered into a contract when they exchanged promises to marry.[18] The discussion reveals, however, that in developing the breach-of-promise action, nineteenth-century courts made stark departures from the rather rigid rules they applied in contracts cases involving commercial parties.[19] With their focus on contextual fairness considerations, these courts, when developing the breach-of-promise action, appear to have anticipated the development of the more flexible contract law of the

12. *See infra* part IV.B.

13. *See infra* part I.A.

14. These damages comprise an atypical mix of contract and tort damages. *See infra* part I.B.

15. *See infra* part I.C.

16. *See infra* part I.C.

17. *See infra* part II.

18. *See infra* part III.

19. *See infra* part III.

twentieth century.[20] In that regard, the protection of reliance interests has emerged as one of the fairness considerations at the heart of modern contract law.[21]

Part IV begins with a discussion of promissory estoppel, which is the general reliance-based theory of obligation set out in section 90 of the *Restatement (Second) of Contracts*.[22] The Article next argues that promissory estoppel, rather than bargain contract, is the common-law theory best suited to reformulate liability for breaches of promises to marry in terms that reflect the mores and social realities of the late twentieth century.[23] Employing section 90 to re-examine the major types of damages awarded under the traditional breach-of-promise action provides substantial support for the conclusions prescribed in this Article: that the liability of a party who breaches a promise to marry should be measured by, and limited to, reliance costs reasonably incurred by a prospective mate.[24] These costs generally will include expenditures incurred in preparation for the wedding ceremony and the value of opportunities foregone in reliance on a broken nuptial promise.[25] Another benefit of reliance-based liability is the potential for strengthening romantic relationships, by encouraging responsibility, honesty, and forthrightness, without being susceptible to abuses associated with the traditional breach-of-promise action.[26]

In part V, the manner in which the reliance-based liability model can be integrated into existing schemes is outlined. Specifically, courts in jurisdictions with heartbalm statutes could consider expanding the scope of liability for breaches of promises to marry by recognizing a promissory-estoppel exception to the statutes. Conversely, in jurisdictions that have not legislatively abolished the breach-of-promise action, courts could adopt the reasoning in this Article to limit the liability of a party who breaches a nuptial promise to the aggrieved party's reliance interest.[27] However, in spite of the ability of the courts to limit liability to reliance-based interests as argued herein, state legislatures, in light of troublesome case law precedent, constitute the

20. *See infra* part III.

21. *See infra* part III.

22. *Restatement (Second) of Contracts* § 90 (1979) [hereinafter *Second Restatement*].

23. *See infra* part IV.A.

24. *See infra* part IV.B.

25. *See infra* part IV.B.4.

26. *See infra* part IV.B.4.

27. *See infra* part V.

most promising venues for advocating the recognition of reliance-based liability.[28]

I. THE TRADITIONAL BREACH-OF-PROMISE ACTION AND ITS CRITICS

A. General History of the Breach-of-Promise Action

In England, ecclesiastical courts were the first to assert jurisdiction over promises to marry.[29] These courts, however, could not award damages for breach of a nuptial promise.[30] Instead, by threatening to expel breaching parties from the church, ecclesiastical courts would often "persuade" those parties to honor their promises of marriage.[31] By the fifteenth century,[32] English courts of law began exercising jurisdiction over nuptial promises, but only in cases where an aggrieved party alleged that the breaching party deceitfully made a promise to marry.[33] In these early cases, the jilted lover typically was able to recover only expenditures made in reliance on the deceitful promise to marry.[34] In the seventeenth century, however, English common-law courts began awarding damages for breached promises to marry, without requiring proof that breaching parties acted fraudulently.[35]

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28. *See infra* part V.

29. Grossberg, *supra* note 3, at 34; W.J. Brockelbank, *The Nature of the Promise to Marry* (pt. 1), 41 Ill. L. Rev. 1, 3 (1946).

30. Grossberg, *supra* note 3, at 34; Brockelbank, *supra* note 29, at 3.

31. Grossberg, *supra* note 3, at 34; Brockelbank, *supra* note 29, at 3.

32. *See* Brockelbank, *supra* note 29, at 3.

33. *See id.*; 1 Clark, *supra* note 1, § 1.1, at 1; Grossberg, *supra* note 3, at 34.

34. *See* 1 Clark, *supra* note 1, § 1.1, at 1. Therefore, by advocating reliance-based recovery under promissory estoppel, this Article proposes recovery for breach of a nuptial promise similar to the recovery originally available at common law. But under promissory estoppel, a promisee's reliance interest would include, in addition to out-of-pocket expenditures, the value of foregone opportunities. *See infra* part IV.B.4. In addition, it would not be necessary for an aggrieved promisee, under promissory estoppel, to establish that the promisor fraudulently made the broken nuptial promise.

For an article that advocates the recognition of a deceit exception to heartbalm statutes, see Note, *supra* note 2, at 1780–97. Interestingly, as was the case with the original action at common law, the approach recommended in that article also would largely limit a promisee's recovery for a fraudulent nuptial promise to out-of-pocket expenditures. *See id.* at 1788–90. Professor Larson argues that the emerging tort of sexual fraud should be applied in situations where a promise to marry is fraudulently made in order to procure sexual relations. Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374, 466 (1993).

35. *See* 1 Clark, *supra* note 1, § 1.1, at 1; Brockelbank, *supra* note 29, at 3–4.

The breach-of-promise action proved to be a popular import to American jurisdictions.[36] In fact, the action was so well received in the former colonies that, by the late nineteenth century, breach-of-promise suits were more prevalent in America than in England.[37] Breach-of-promise cases became a genuine social phenomenon. Many people attended trials dealing with broken hearts and broken promises for purposes of entertainment.[38] Presaging modern tabloid journalism, the media of that earlier generation often covered breach-of-promise suits in a manner that veered toward sensationalism.[39] As detailed in part I.C, the parties who brought these suits, almost always women,[40] became favorite targets of commentators.[41]

The theoretical basis for enforcing promises to marry at common law was an assumption that engaged parties entered into a contract when they exchanged promises to marry.[42] In essence, courts would treat a proposal of marriage as an offer that became legally enforceable when it was accepted.[43]

B. Damages Awarded for Breach-of-Promise To Marry

Damages awarded in breach-of-promise actions exceed those that would be available to aggrieved parties if courts adhered strictly to a contract model.[44] Generally speaking, in a breach of contract suit, the party aggrieved by the breach recovers "expectation damages"—those that will place her in the position she would have been in had the contract been performed.[45] Accordingly, consistent with such an expectation-damages approach, courts hearing breach-of-promise actions would generally award the complainant an amount that would place her in the

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36. *See* Grossberg, *supra* note 3, at 35; 1 Clark, *supra* note 1, § 1, at 2.

37. *See* Grossberg, *supra* note 3, at 37.

38. *See* Rosemary J. Coombe, *'The Most Disgusting, Disgraceful and Inequitous Proceeding in Our Law': The Action for Breach of Promise of Marriage in Nineteenth-Century Ontario*, 38 U. Toronto L.J. 64, 64 (1988).

39. *See* Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 Yale J.L. & Feminism 1, 16 (1989).

40. *See* McCormick, *supra* note 1, § 111, at 397; Grossberg, *supra* note 3, at 37–38, 53.

41. *See infra* part I.C.

42. *See* Grossberg, *supra* note 3, at 34; 1 Clark, *supra* note 1, § 1.1, at 2; Brockelbank, *supra* note 29, at 4.

43. *See* 1 Clark, *supra* note 1, § 1.2, at 6.

44. *See generally* McCormick, *supra* note 1, § 111, at 397–98; 1 Clark, *supra* note 1, § 1.4; Coombs, *supra* note 39, at 4–6.

45. *E.g.*, E. Allan Farnsworth, *Contracts* § 12.8, at 871–72 (1990).

position, financial and social, she would have enjoyed had the marriage taken place.[46] In effect, the aggrieved party was deemed to have a claim to the breaching party's assets and future income akin to what a divorcing spouse might assert.[47]

In addition, a successful breach-of-promise plaintiff could recover unreimbursed expenditures made in preparation for the impending marriage, if such expenditures were incurred in reliance on the broken nuptial promise.[48] This was permitted even though, under general contact theory, it would be deemed inappropriate to allow recovery of these expenditures if expectation damages have been awarded.[49] Opportunities foregone in reliance on a promise of marriage were also sometimes awarded in the traditional breach-of-promise action.[50] For example, some plaintiffs were awarded damages for employment opportunities foregone in reliance on a breached promise of marriage.[51] Also, upon appropriate proof, an aggrieved party might even recover damages to the extent the breach impaired her prospects of marrying someone else.[52]

Moreover, successful breach-of-promise plaintiffs were also able to recover items of damages often associated with the law of torts.[53] For example, they were sometimes awarded damages for the emotional anguish and humiliation caused by broken nuptial promises.[54] Upon

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46. *See* 1 Clark, *supra* note 1, § 1.4, at 17–18; McCormick, *supra* note 1, § 111, at 399–400; Coombs, *supra* note 39, at 4.

47. *See* Coombs, *supra* note 39, at 3–4 n.15; Brockelbank, *supra* note 29, at 11.

48. *See* 1 Clark, *supra* note 1, § 1.4, at 18; McCormick, *supra* note 1, § 111, at 398.

49. *See* Farnsworth, *supra* note 45, § 12.16, at 930–31; Theodore W. Cousens, *The Law of Damages as Applied to Breach of Promise of Marriage*, 17 Cornell L.Q. 367, 368 (1932).

50. *See* 1 Clark, *supra* note 1, § 1.4, at 18.

51. *Id.*

52. *See id.*; McCormick, *supra* note 1, § 111, at 398; Cousens, *supra* note 49, at 381.

53. *See* 1 Clark, *supra* note 1, § 1.4, at 17; McCormick, *supra* note 1, § 111, at 397; Harter F. Wright, *Action for Breach of the Marriage Promise*, 10 Va. L. Rev. 361, 371–75 (1924). *But see* Brockelbank, *supra* note 29, at 11–12 (observing that, despite sources claiming that most breach-of-promise damages are tortious, the majority of the damages can be reconciled with contract theory).

In several other respects, the breach-of-promise action arguably resembles tort more than contract. For example, the right to recover damages for breach of a nuptial promise does not survive the death of a promisee. *Id.* at 5. Moreover, a breach-of-promise plaintiff cannot assign her right of action, as she would be able to do with a pure contract claim. *Id.* at 6.

54. *See* 1 Clark, *supra* note 1, § 1.4, at 17; McCormick, *supra* note 1, § 111, at 398; Brockelbank, *supra* note 29, at 12.

In cases in which a plaintiff had given birth to a defendant's child, she also often was awarded aggravated damages (under a "seduction" theory) for the humiliation associated with the out-of-wedlock birth. 1 Clark, *supra* note 1, § 1.4, at 18–19. Generally, at common law, a woman could not sue for her own seduction, under the theory that she had consented to the objectionable intercourse. McCormick, *supra* note 1, § 111, at 394. Therefore, common-law actions for seduction generally had

proving that an engagement had been terminated in an especially egregious manner, a victim of a broken promise of marriage might also recover punitive damages in many jurisdictions.[55] Consequently, an aggrieved party in a breach-of-promise action could conceivably recover, among other items described herein, expectation damages, unreimbursed expenditures, and damages for foregone opportunities and pain and suffering.

In a traditional breach-of-promise action, a defendant could seek to reduce damages against him by showing that a plaintiff lacked chastity or otherwise acted in a manner substantially at odds with prevailing norms of womanhood.[56] Caution had to be exercised in pursuing this litigation tactic, however, because additional damages could be awarded if a jury decided that a defendant made a bad-faith attempt to reduce recoverable damages by casting unfounded aspersions against a plaintiff's character.[57]

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to be maintained by the father of the woman who had allegedly been seduced. Larson, *supra* note 34, at 382–84; McCormick, *supra* note 1, § 111, at 394–95. As a result, the breach-of-promise action provided an indirect route for women to sue for seduction on their own behalf, particularly in situations involving pregnancy. *See* McCormick, *supra* note 1, § 111, at 400–01; 1 Clark, *supra* note 1, § 1.4, at 19. This was an especially valuable right prior to the advent of modern child-support statutes. Coombs, *supra* note 39, at 11. Courts, in essence, abided a fiction that the seduction was "a circumstance to be considered in estimating the damages for the breach of promise." McCormick, *supra* note 1, § 111, at 401.

In addition to its focus on barring the breach-of-promise action, the heartbalm reform movement also sought to eradicate the common-law action of seduction. *See* Larson, *supra* note 34, at 394 n.85. Toward that end, approximately one-third of American jurisdictions legislatively abolished the seduction tort. *Id.* at 394. For a discussion of the relationship of the tort of seduction to an emerging common-law tort of sexual fraud, see *id.* at 401–12. When a fraudulent nuptial promise is used as a ploy to gain access to sexual relations, the tort of sexual fraud would provide adequate redress. *See id.* at 466. If a child is born of such a union, modern child-support statutes also are available. Accordingly, the breach-of-promise action is no longer needed to redress "seduction." The emergence of the tort of sexual fraud is emblematic of the evolution of social and sexual mores in the twentieth century. *See infra* part II.

55. *See* McCormick, *supra* note 1, § 111, at 402–03 (noting that award of punitive damages must be supported by showing of "fraud, malice, or wantonness"); 1 Clark, *supra* note 1, § 1.4, at 20 (noting that punitive damages were awarded if a "defendant had the required malicious or wanton state of mind").

56. *See* McCormick, *supra* note 1, § 111, at 401; 1 Clark, *supra* note 1, § 1.4, at 19–20; Grossberg, *supra* note 3, at 43–44.

57. McCormick, *supra* note 1, § 111, at 402; 1 Clark, *supra* note 1, § 1.4, at 20.

C. *Criticisms of the Action*

By the late nineteenth and early twentieth centuries, the breach-of-promise action had become the subject of scathing criticism.[58] Considered exorbitant by many critics, damages awarded in breach-of-promise cases were cited as grounds for limiting or even dismantling the action altogether.[59] In particular, as described above, some academic opponents of the action chastised courts for illogically melding elements of both contract and tort damages in breach-of-promise cases.[60]

Critics also condemned the evidentiary standards applied by courts in suits seeking redress for broken nuptial promises.[61] They contended that too broad a range of evidence was admissible in these cases, thereby contributing to the circus atmosphere that often surrounded breach-of-promise suits.[62] For example, since her perceived sexual purity and reputation were relevant in assessing damages,[63] lurid details regarding a plaintiff's sexual history were often introduced into evidence.[64] Similarly, Professor McCormick believed the fount of excessive jury awards, in many cases, to be the introduction into evidence of information about a defendant's financial status.[65] Some also argued that the evidentiary requirements courts imposed on breach-of-promise plaintiffs often were too lenient. In some instances, they asserted, courts permitted a plaintiff to prevail when her uncorroborated testimony was

58. *See generally* Grossberg, *supra* note 3, at 51–56; McCormick, *supra* note 1, § 111, at 403–406; Coombs, *supra* note 39, at 5–9; Wright, *supra* note 53, *passim*; Edwin W. Hadley, *Breach of Promise to Marry*, 2 Notre Dame Law. 190, 192–95 (1927); Anthony M. Turano, *Breach of Promise: Still a Racket*, 32 Am. Mercury 40 *passim* (1934).

59. *See, e.g.*, McCormick, *supra* note 1, § 111, at 403–04 & n.56 (including table to demonstrate that judgments in breach of promise cases "are often seemingly disproportionate to amounts given for more substantial claims, such as bodily injuries"); Wright, *supra* note 53, at 371–75 (condemning awards in breach-of-promise cases on various grounds, including the proposition that "the average jury" is "proverbially generous with the money of other people").

60. *See supra* notes 53–55 and accompanying text.

61. *See* 1 Clark, *supra* note 1, § 1.2, at 4–6; Grossberg, *supra* note 3, at 40; Note, *supra* note 2, at 1777; Coombs, *supra* note 39, at 5 & n.22.

62. Admissible evidence included intimate details of the litigants' personal lives. *See* Brockelbank, *supra* note 29, at 13 (arguing that innocent men would often settle in order to avoid a public trial and resulting "financial ruin . . . and social ostracism"); Coombs, *supra* note 39, at 16 (observing that "the cases that actually went to trial were a fount of offensively sensationalistic testimony").

63. *See supra* notes 56–57 and accompanying text.

64. *See* Grossberg, *supra* note 3, at 40–44.

65. McCormick, *supra* note 1, § 111, at 399.

the only substantial evidence that a defendant had in fact made a promise to marry.[66]

The concerns about the size of verdicts and permissive evidentiary standards were magnified by negative attitudes about the women who brought breach-of-promise suits.[67] If one believed the characterizations of critics, one would surmise that the typical breach-of-promise case involved a conniving adventuress of low character[68] who attempted to take advantage of a trusting man of high means.[69] The all-male juries of an earlier age were also perceived to be the unwitting tools of these supposedly scheming women.[70] As one often-quoted critic expressed a prevailing sentiment, the verdicts in breach-of-promise cases tended primarily to be a product of two factors: "the plaintiff's beauty and the defendant's ability to pay."[71] Moreover, there was a perception that in many cases women used breach-of-promise suits as a tool to blackmail innocent men who did not want their good names sullied in a public venue.[72] Not surprisingly, the term "gold-digger" traces its origins to a

66. *See* Grossberg, *supra* note 3, at 40; 1 Clark, *supra* note 1, § 1.2, at 4–5; Note, *supra* note 2, at 1776–77; Hadley, *supra* note 58, at 194 (describing breach-of-promise action as a "law which aids the perjured money-grabbing of Mammon-worshiping plaintiffs").

67. *See generally* Grossberg, *supra* note 3, at 52–56; Coombs, *supra* note 39, at 6–9; Larson, *supra* note 34, at 394–97; Coombe *supra* note 38, at 81 (describing similar perceptions of women breach-of-promise plaintiffs in Canada).

68. Indeed, to many, the very fact that a woman brought such a suit was evidence of her low character. *See* McCormick, *supra* note 1, § 111, at 405 ("The remedy will never help the sensitive and refined woman, for she will never thus parade in public her wounds of the heart."); Hadley, *supra* note 58, at 193 (describing the "vast majority of plaintiffs [as being] of low character and dubious veracity"); Wright, *supra* note 53, at 377 ("Even very inferior women . . . will submit to the gravest injustice without retaliation. This is the feminine nature, because love is so large a part of their being, and we say it in their honour.").

69. *See* Grossberg, *supra* note 3, at 54–55; Coombs, *supra* note 39, at 16. Professor Grossberg argues, however, that the public perception of breach-of-promise plaintiffs differed dramatically from the reality represented by cases that were appealed in the late nineteenth century: "[These cases are] peopled with pregnant servants, anguished farm girls, and duped daughters. . . . Nevertheless, the stereotype began to dominate public attitudes, and helped sustain charges that the breach-of-promise suit undermined matrimony, thereby threatening society itself." Grossberg, *supra* note 3, at 55. *See also* Coombs, *supra* note 39, at 16 n.115 (arguing that appellate cases "show a complexity of stories behind the lawsuits, and do not reinforce the 'gold-digger' image"); Larson, *supra* note 34, at 395–97 (asserting that misogynistic attitudes played a role in public perception of women who sought heartbalm relief).

70. *See* McCormick, *supra* note 1, § 111, at 405; Coombs, *supra* note 39, at 7.

71. Wright, *supra* note 53, at 374. *See also* Grossberg, *supra* note 3, at 56 (describing argument by popular Baptist minister that breach-of-promise plaintiffs exploited the "natural kindness in man toward a woman").

72. *See* McCormick, *supra* note 1, § 111, at 403–05; Grossberg, *supra* note 3, at 52–53; Coombs, *supra* note 39, at 7; Note, *supra* note 2, at 1776.

novel about a breach-of-promise plaintiff.[73] Interestingly, early feminists also joined the chorus of voices condemning breach-of-promise plaintiffs (who were viewed contemptuously as perpetuating stereotypes about the economic dependency of women).[74] Indeed, in several states, women legislators were the sponsors of heartbalm legislation.[75]

Objectors to the breach-of-promise action also pointed to an evolution of attitudes about marriage as justification for abolishing the action. When the breach-of-promise action first gained prominence in America, marriages (particularly among the wealthy) were often arranged affairs negotiated by families on the basis of financial and property considerations.[76] In particular, as part of the nuptial arrangements, the father of the bride often agreed to transfer property to the prospective groom upon consummation of the marriage.[77] Under these circumstances, opponents observed, it might make sense to provide a contractual remedy for breaches of promises to marry; nuptial promises (like commercial promises) were means of facilitating the transfer of property interests.[78] However, by the late nineteenth century, the norm of companionate marriage[79] supplanted the view that it was appropriate to approach marriage like a type of inter-family business transaction.[80] Given this shift in sentiment, critics argued that granting a damages remedy for breach of a promise to marry had the unfortunate effect of commercializing matters of the heart.[81] Where there is no love, they maintained, there should be no marriage. As one writer wryly observed, the breach-of-promise action had the effect of weighing "[t]he ashes . . . on the cold altar after the sacred flame has gone out."[82]

Expanding on the theme of companionate marriage, critics argued that a party who had fallen out of love with a prospective mate should be

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73. *See* Coombs, *supra* note 39, at 7 n.31, 12–13 (discussing Anita Loos, *Gentlemen Prefer Blondes* (1925)).

74. *See* Grossberg, *supra* note 3, at 55; Coombs, *supra* note 39, at 12–13; Larson, *supra* note 34, at 397–98.

75. Coombs, *supra* note 39, at 12; Larson, *supra* note 34, at 397.

76. 1 Clark, *supra* note 1, § 1.1, at 2; Grossberg, *supra* note 3, at 34–35.

77. *See* Grossberg, *supra* note 3, at 35.

78. 1 Clark, *supra* note 1, § 1.1, at 2; Grossberg, *supra* note 3, at 35.

79. Companionate marriages are those based on mutual love and affection. Coombs, *supra* note 39, at 8.

80. *See* Coombs, *supra* note 39, at 8; Note, *supra* note 2, at 1778; Grossberg, *supra* note 3, at 58–59; 1 Clark, *supra* note 1, § 1.1, at 2–3.

81. *See* McCormick, *supra* note 1, § 111, at 405; Grossberg, *supra* note 3, at 59.

82. *See* McCormick, *supra* note 1, § 111, at 405 (quoting James Schouler).

granted the utmost flexibility to end the engagement.[83] Awarding damages to a jilted fiancée, they conjectured, unfairly penalized conduct that was meritorious.[84] A party who ends an engagement, in their view, should be commended for eschewing a union that was destined to be loveless and unstable, thereby avoiding harm to the institution of marriage and any children who might have been born of the pairing.[85] In the opinion of these commentators, an engagement constitutes a sort of probationary period during which prospective mates should explore their compatibility.[86] A person might indeed suffer emotional anguish as a result of an engagement's being broken, the critics admitted, but money cannot heal a broken heart[87]—a refrain often paraphrased in many heartbalm statutes.[88]

II. THE BREACH-OF-PROMISE ACTION AND A CHANGING SOCIETY

The criticisms of the breach-of-promise action fueled the legislative reform movement that led to the adoption of heartbalm statutes in some American jurisdictions.[89] As a federal district court suggested in 1994,

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83. *See* Grossberg, *supra* note 3, at 58–59; Coombs, *supra* note 39, at 8; Wright, *supra* note 53, at 369–70 (quoting Lord Mansfield as saying that "it would be most mischievous to compel parties to marry who can never live happily together").

84. *See* Grossberg, *supra* note 3, at 58–59; Coombs, *supra* note 39, at 8; Note, *supra* note 2, at 1778.

85. *See* Grossberg, *supra* note 3, at 58; Wright, *supra* note 53, at 380–81.

86. *See* Grossberg, *supra* note 3, at 58–59; Wright, *supra* note 53, at 369–70; Note, *supra* note 2, at 1778.

87. *See* Coombs, *supra* note 39, at 12.

88. *See infra* note 89.

89. 1 Clark, *supra* note 1, § 1.5, at 21–22; Grossberg, *supra* note 3, at 62–63. A number of jurisdictions incorporated some of the critics' standard arguments in the heartbalm statutes' statements of purpose. For example, although the Illinois Breach of Promise Act only limits available damages, it sets out in its statement of purpose excoriating language similar to that used in a number of heartbalm statutes:

> It is hereby declared, as a matter of legislative determination, that the remedy heretofore provided by law for the enforcement of actions based upon breaches of promises or agreements to marry has been subject to grave abuses and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable in such actions and the consequent fear of persons threatened with such actions that exorbitant damages might be assessed against them. It is also hereby declared that the award of monetary damages in such actions is ineffective as a recompense for genuine mental or emotional distress.

Ill. Comp. Stat. Ann. ch. 740, § 15/1. For a discussion of the Illinois Breach of Promise Act, see *infra* note 247.

however, those who voted for legislation abolishing or limiting the breach-of-promise action may have been more heavily swayed by negative attitudes about "overzealous" female plaintiffs than by "changing societal views of engagement and marriage."[90] This is of particular concern, because it is apparent in retrospect that many of the charges leveled against breach-of-promise plaintiffs were exaggerated and tainted by sexist attitudes.[91]

Some 60 years after the enactment of the first heartbalm statutes, the time is ripe for an objective re-evaluation of whether it is appropriate to impose liability for breach of a promise to marry; and if so, to what extent liability should be imposed. Although they are not as legion as they once were, cases involving the breach-of-promise action still appear in the appellate reports of jurisdictions that retain the breach-of-promise action.[92] Interestingly, most appellate cases involving allegations of broken nuptial promises appear to be in jurisdictions that abolished the breach-of-promise action, where courts are still attempting to define the exact scope of the heartbalm statutes.[93] As a result of this litigation, parties in the great majority of heartbalm jurisdictions may recover, in equity, gifts given a betrothed in contemplation of a marriage that does not occur.[94] However, when confronted with the issue, the majority of courts in heartbalm jurisdictions have ruled that a party who dishonors a promise of marriage is barred from recovering the engagement ring.[95] Prohibiting the return of the ring evinces the courts' uneasiness with a

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90. *See* Wildey v. Springs, 840 F. Supp. 1259, 1262 (N.D. Ill. 1994), *rev'd on other grounds*, 47 F.3d 1475 (7th Cir. 1995). *See infra* note 247 and accompanying text (discussing facts of *Wildey*).

91. *See* Grossberg, *supra* note 3, at 54–55; Coombs, *supra* note 39, at 6–8; Larson, *supra* note 34, at 395–98; *cf.* Frederick L. Kane, *Heart Balm and Public Policy*, 5 Fordham L. Rev. 63, 71 (1936) (suggesting that heartbalm statutes, like prohibition, were largely products of "a smoke screen of false agitation").

92. *See Wildey*, 840 F. Supp. 1259; Thorpe v. Collins, 263 S.E.2d 115 (Ga. 1980); Glass v. Wiltz, 551 So. 2d 32 (La. Ct. App. 1989); Menhusen v. Dake, 334 N.W.2d 435 (Neb. 1983); Kuhlman v. Cargile, 262 N.W.2d 454 (Neb. 1978); Hutchins v. Day, 153 S.E.2d 132 (N.C. 1967); Bradley v. Somers, 322 S.E.2d 665 (S.C. 1984); Scanlon v. Crim, 500 S.W.2d 554 (Tex. Ct. App. 1973); Stanard v. Bolin, 88 Wash. 2d 614, 565 P.2d 94 (1977). For discussions of *Wildey* and *Stanard*, see *infra* part IV.B.2.

93. See the cases collected in John D. Perovich, Annotation, *Rights in Respect of Engagement and Courtship Presents When Marriage Does Not Ensue*, 46 A.L.R.3d 578, 588–95 (1972 & Supp. 1995). *See also infra* note 306 (listing cases refusing to recognize reliance-based exceptions to heartbalm statutes).

94. *See* Perovich, *supra* note 93, at 588–95.

95. *See id.* at 602–04. *But see* Aronow v. Silver, 538 A.2d 851, 852 (N.J. Super. Ct. Ch. Div. 1987) (acknowledging majority rule, but electing to adopt minority position). For a discussion of the implications of judicial uneasiness with the wholesale abandonment of the fault ideal, see *infra* part V.

wholesale abandonment of the fault ideal. In addition, contemporary state legislatures still find themselves confronted from time to time with proposals for heartbalm reform.[96] Occasionally, reminiscent of the breach-of-promise action's heyday, a case involving a jilted fiancé or fiancée will garner considerable media attention.[97]

Indeed, a great deal has changed in our society since the first heartbalm statutes were enacted in the 1930s. Attitudes about gender, employment, courtship, marriage, and divorce have undergone fundamental transformation.[98] In contexts where they were once insulated from liability, people are now expected to bear greater responsibility for the impact of their conduct on members of the opposite sex. Consequently, the law has evolved to hold people to higher standards of conduct in a variety of situations where there are interactions between the sexes.[99] For example, in relation to employment, statutes have been enacted that prohibit acts of sexual discrimination and harassment.[100] No longer is the employment relationship viewed as a predatory preserve in which it is up to women to fend for themselves without the benefit of legal protections.

Although the focal point of their movement was the breach-of-promise action,[101] heartbalm reformers felt that many of the basic arguments they raised were also applicable to the tort of seduction,[102] another common-law action that policed sexual relationships and peaked in popularity in the late nineteenth century.[103] Not surprisingly, an additional legacy of the heartbalm movement was the enactment, in about one-third of American jurisdictions, of legislation that abolished

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96. For a discussion of the failure of a 1994 heartbalm proposal in the Illinois legislature, see *infra* note 247.

97. For example, the recent *Wildey* litigation was extensively covered by the media. *See, e.g.*, Daniel J. Lehmann, *Court Discards Jury Award to Jilted Fiancee*, Chi. Sun-Times, Jan. 21, 1995, at 5; Gretchen Reynolds, *A Breach of Promise*, Chi. Mag., April 1994, at 63.

98. *See generally* Lenore J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* 135–67 (1981) (examining trends in marriage, divorce, and economic options for women).

99. *See* Larson, *supra* note 34, at 439–40 (pointing to reformulation of public-private dichotomy in the context of sexual interactions in the workplace and arguing for a similar progressive approach to sexual-fraud claims).

100. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988) (prohibiting employment discrimination on basis of sex); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–69 (1986) (ruling that Title VII prohibits acts of sexual harassment); Ill. Comp. Stat. Ann. ch. 20, § 1510/50 (West 1993) (prohibiting employment discrimination on basis of sex at state level).

101. Larson, *supra* note 34, at 394 n.85.

102. *See id.*

103. Larson, *supra* note 34, at 382–83 & n.32. For a discussion of the seduction tort, see *supra* note 54.

the tort of seduction.[104] Correspondingly, suits involving claims of seduction waned in number.[105] However, this trend is being reversed in the latter half of the twentieth century. The seduction action is re-emerging as "sexual fraud"—a new tort that regulates courtship by promoting norms like frankness and honesty instead of Victorian gender stereotypes.[106]

Similarly, earlier in this century, approximately three-quarters of American jurisdictions adopted statutes that abolished common-law marriages,[107] thereby venting moral contempt for couples who cohabit for extended periods of time by denying them legal protections available to those who formally wed.[108] In recent decades, however, many courts have tempered the abolition of common-law marriages by applying other common-law doctrines in innovative ways to protect contract and property interests of cohabitants,[109] thereby placing a cohabitant on a plane more closely approximating that of a legally recognized spouse.[110] In these "palimony" suits, courts often justify legal intervention by noting that social attitudes about cohabitation have become more relaxed[111] and contending that a policy of non-intervention into these disputes often has the untoward effect of allowing one of the cohabitants

104. Larson, *supra* note 34, at 394; Karp & Karp, *supra* note 4, app. k (showing by chart that, as of 1994, 19 states had abolished the seduction tort). *See also* Larson, *supra* note 34, at 401 & n.118 (asserting that the seduction tort clearly remains part of the common law in seventeen states and the District of Columbia and its recognition is not statutorily barred in remaining states that have not abolished the tort).

105. Larson, *supra* note 34, at 401.

106. *See id.* at 401–13.

107. *See* 1 Clark, *supra* note 1, § 2.4, at 101–02 (noting that 37 states, either by statute or case law, have abolished common-law marriage).

108. *See id.* at 120–22 (noting, but rejecting, arguments that common-law marriage was an immoral institution).

109. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987); 1 Clark, *supra* note 1, § 2.4, at 122–24; Weitzman, *supra* note 98, at 393–409; Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101 (1976).

110. Courts that use contract law or equitable doctrines to support the claims of cohabitants are careful to emphasize, however, that they do not consider themselves to be circumventing the legislative prohibition of common-law marriages. *See, e.g.*, *Marvin*, 557 P.2d at 122 n.24; *Watts*, 405 N.W.2d at 310 n.15. But, in rejecting claims by cohabitants, other courts have concluded that a grant of relief would, in effect, revive the institution of common-law marriage. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1207–09 (Ill. 1979); Carnes v. Sheldon, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981).

111. *See Marvin*, 557 P.2d at 122; *Watts*, 405 N.W.2d at 311.

to retain a disproportionate share of assets accumulated through the joint efforts of both parties.[112]

Given the social realities of the nineteenth and early twentieth centuries, the breach-of-promise action probably addressed legitimate harms suffered by the women who brought suits.[113] During this period, the worth of women was largely defined by their prospects in the marriage market rather than in the employment market.[114] And the marriage market of this time, insofar as women were concerned, placed a premium on youth and virginity.[115] Typically, therefore, a woman had much to lose when she relied on a promise of marriage, particularly in cases where the promise was breached after a long engagement[116] or where, in recognition of the engagement, she succumbed to the sexual advances of her prospective mate.[117] Furthermore, attitudes regarding divorce were starkly different from those prevalent today.[118] Once entered into, marriage was viewed as a lifetime commitment.[119] Consequently, in contrast to modern "no-fault" approaches, divorces were begrudgingly granted only upon establishing specific grounds;[120] and, when they were granted, awards to women generally reflected an assumption that they deserved to be placed in the social and economic position they would have been in had they remained married.[121] Given

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112. *See Marvin*, 557 P.2d at 121; *Watts*, 405 N.W.2d at 311–12.

113. *See* Coombs, *supra* note 39, at 9–11.

114. *See id.* at 9–10 (observing, among other things, that most American women of this period depended on marriage for survival); Margaret F. Brinig, *Rings and Promises*, 6 J.L. Econ. & Organ. 203, 204 (1990) (noting that, until recently, marriage was the only career open to most women); Coombs, *supra* note 39, at 11–13; Larson, *supra* note 34, at 397. The point made in the text is true notwithstanding the early feminist condemnation of the breach-of-promise action for fostering gender stereotypes. *See* Coombs, *supra* note 39, at 11–13; Larson, *supra* note 34, at 397.

115. *See* Brinig, *supra* note 114, at 204–05; Coombs, *supra* note 39, at 9–10.

116. Coombs, *supra* note 39, at 9.

117. Brinig, *supra* note 114, at 205 (noting that women who lost virginity suffered a loss in "market value" and that, according to a 1948 Kinsey study, engaged women became sexually intimate with their prospective mates half of the time); Coombs, *supra* note 39, at 9–10 (commenting that, upon loss of chastity, a woman became "damaged goods" in the marriage market).

118. *See* 1 Clark, *supra* note 1, § 13.1, at 697–700; Weitzman, *supra* note 98, at 139–41.

119. *See* 1 Clark, *supra* note 1, § 13.1, at 697–700; Weitzman, *supra* note 98, at 139–41; Coombs, *supra* note 39, at 3–4 n.15.

120. *See* 1 Clark, *supra* note 1, § 13.1, at 697–98; Coombs, *supra* note 39, at 3–4 n.15.

121. *See* Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 Tul. L. Rev. 855, 873–74 & n.80 (emphasizing that, when a society provides women limited opportunities for remarriage or economic support, they should be awarded damages measured by their expectation interest in the marriage); Coombs, *supra* note 39, at 3–4 n.15 (noting that, in the early twentieth century, a married woman was deemed "to have a legal claim . . . on the man's income stream for the rest of her life").

what was at stake, the emergence of legal rules that provided similar protection to women victimized by breached nuptial promises is not surprising.[122] In addition to compensating plaintiffs for real injuries they may have suffered, damage awards in breach-of-promise cases encouraged men to take promises of marriage seriously and to invest significantly in searching for, and determining compatibility with, a prospective mate prior to entering into an engagement.[123]

By the late twentieth century, however, women have gained significant access to the employment market. No longer are they almost exclusively relegated to, and defined by, domestic roles.[124] Furthermore, after the sexual revolution, most men do not expect women to be sexually inexperienced at the time nuptials take place.[125] A prospective bride's access to the marriage market is no longer significantly impaired by virtue of having indulged in pre-marital sexual activity.[126] Also, reflecting another radical shift in modern attitudes, all states have now passed "no-fault" divorce laws, leaving either mate virtually free to end a marriage at any time.[127] Viewed from a modern perspective, a nuptial promise is not a commitment to enter into a presumptively permanent relationship.[128] Accordingly, when promises of marriage are broken, modern women do not sustain the same economic and social costs that their predecessors sustained in the late nineteenth and early twentieth centuries.

This is not to say, however, that breached promises to marry have ceased to be a source of considerable harm. Even today, many people suffer emotional devastation and outright humiliation upon the breakup of what is perhaps the most intimate relationship short of marriage.[129] Moreover, even if one believes that people today marry for love rather

122. *See* Coombs, *supra* note 39, at 3–4 n.15.

123. *Cf.* Richard A. Posner, *Sex and Reason* 246 (1992) (noting that, when costs of divorce are prohibitive, parties will invest more in searching for a compatible mate). For a discussion of how recovery based on the reliance interest would provide appropriate incentives for promises of marriage to be taken seriously in modern society, see *infra* part IV.B.4.

124. *See* Weitzman, *supra* note 98, at 168–88 (detailing increasing participation of women in the workplace and emergence of new norms for sharing responsibilities in marriage).

125. *See* Coombs, *supra* note 39, at 3–4 n.15.

126. *See id.*

127. Brinig & Carbone, *supra* note 121, at 867.

128. *See* Coombs, *supra* note 39, at 3–4 n.15.

129. *See infra* part IV.B.2 (finding that emotional anguish and humiliation are foreseeable consequences of the breach of a promise to marry).

than financial considerations,[130] promises to marry do not exist solely on some spiritual plane separate from the worldly realm of economic activity. In fact, on an annual basis, promises to marry are the wellspring of a 30-billion dollar industry in the United States.[131] Statistics show that in 1993 the average wedding in this country cost $15,500.[132] When an engaged party breaks a promise to marry, a prospective mate will often have incurred significant costs preparing for a ceremony that will not take place. It remains a social convention in this country for the bulk of wedding expenses to be borne by the bride and her immediate family. One, therefore, would expect a rule of law, such as a heartbalm statute, that insulates parties from liability for dishonoring their nuptial promises to have a disproportionately adverse financial impact on women.[133]

In part IV, promissory estoppel is adopted as the common-law theory best suited for reformulating liability for breach of a promise to marry in terms that reflect the mores and social realities of the late twentieth century. Ideally, in applying promissory estoppel, recovery for breach of a promise of marriage would be predicated on (and limited to) the aggrieved party's reliance interest. Before proceeding with the promissory-estoppel analysis, however, part III will detail the relationship of the breach-of-promise action to general contract theory.

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130. Of course, one of the arguments against the traditional breach-of-promise action was that it approached matters of the heart as if they were property transactions, even though people nowadays marry for love. *See supra* part I.C. Even today, however, it appears that financial considerations often play a role in that complex phenomenon known as love. *See* Robert Wright, *Our Cheating Hearts*, Time, Aug. 15, 1994, at 45, 50 (detailing research in evolutionary psychology suggesting that human mating patterns, which have a genetic basis, are heavily influenced by socioeconomic considerations).

131. *See* Denise Fields & Alan Fields, *Bridal Bargains* 4 (1995).

132. Cahners Research, *Modern Bride's Consumer Council Survey: A Study of Engaged Women* 2, 7 (1993). This figure includes the expense of an engagement ring, but does not take into account expenditures by the couple on matters such as costs related to the honeymoon or by wedding guests on gifts and travel. *See id. See also* Fields & Fields, *supra* note 131, at 5–6 (noting that average cost of a formal wedding with 200 or more guests exceeds $18,000); *Dateline NBC: Father of the Brides* (NBC television broadcast, Sept. 6, 1994) (interviewing wedding organizer who has planned weddings costing "close to a million dollars").

133. The engagement ring, of course, is the major wedding-preparation expense traditionally borne by men. *See* Cahners Research, *supra* note 132, at 2, 7 (finding that average amount spent on an engagement ring in 1993 was approximately $3000).

III. THE RELATIONSHIP OF THE BREACH-OF-PROMISE ACTION TO GENERAL CONTRACT THEORY

In the nineteenth century, a theory of contract law emerged in America that was based on the paradigm of market-exchange transactions.[134] Under this contractual theory, a basic facet of English contract law was modified by a requirement that consideration for a promise be "bargained-for"; that is, it had to be something extracted by the promisor (and given by the promisee) in exchange for the promise.[135] Classical contract theory also incorporated other policies that were viewed as being conducive to America's emerging market economy. For instance, it was thought to be in the best interests of business that the outcomes of cases involving contract issues be rather easily predictable from basic first principles.[136] Hence, the contract law that emerged was somewhat mechanical, marked by a preference for relatively rigid rules over flexible standards.[137] Moreover, reflecting an underlying emphasis on promoting free exchange, classical contract law was viewed almost exclusively as a device for giving effect to the intentions of contracting parties.[138] The role of courts deciding contract cases was to determine the intent of the parties and to apply established rules in an ostensibly neutral manner.[139] Only when the process of agreement was marred in an obvious way by the likes of fraud, duress, or undue influence, was it appropriate for a court not to enforce the expressed intent of the parties regarding their exchange.[140] There was little room in the classical

134. Such contract law is now widely referred to as "classical" contract law. *See* Charles Fried, *Contract as Promise* 16 (1981); *see also* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829, 834–36, 850 (1983) [hereinafter *Critical Approaches*]; Samuel Williston, *Freedom of Contract*, 6 Cornell L.Q. 365, 366–67 (1921).

135. *See* James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 Cornell L. Rev. 987, 988 (1990) (discussing the elements of bargained-for consideration); *see also* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 472 (1897) (claiming that the doctrine of bargained-for consideration "is merely historical" in that it arises from contract law reflecting commercial practice).

136. *See* Samuel Williston, *Contracts* § 23 (rev. ed. 1936) (stating that contract law is "founded upon the fundamental principle of the security of business transactions").

137. *See, e.g.*, Reuben M. Benjamin & A.J. Messing, *Principles of the Law of Contract, passim* (2d ed. 1911) (one of the last classical contract law commercial treatises).

138. *See, e.g.*, Insurance Co. v. Young's Adm'r, 90 U.S. 85, 106–8 (1874) ("This court has no power to make . . . an agreement . . . . The requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority.").

139. *See supra* note 138.

contract model for courts to take into account contextual fairness considerations unrelated to the marketplace.[141] It was only deemed appropriate for courts to impose their perceptions of fairness on parties in the area of tort law, a completely separate common-law construct in which the state, rather than each party, is the source of law.[142]

The theoretical foundation for the traditional breach-of-promise action is the premise that engaged parties enter into contracts when they, in essence, exchange promises to marry.[143] As contract law became more closely associated in the nineteenth century with market-exchange transactions, the breach-of-promise action became somewhat anomalous. Critics of the action charged that basing recovery for breach of nuptial promises on contract theory was tantamount to imposing the morals of business on personal relationships.[144] Judges provided additional fodder for critics by administering the action in ways that departed from approaches taken in contract cases involving commercial parties.[145] For example, a specific charge leveled against the breach-of-promise action was that, as administered by courts, it smacked in many cases more of tort than of contract,[146] a serious accusation at a time there was supposed to be a strict separation between the two great realms of common-law liability.[147] In support of this particular claim, challengers noted that in many jurisdictions, the damages available to victims of a breached promise to marry exceeded those that would be awarded under a purely contractual theory of recovery.[148] Likewise, in many instances, the

140. *See generally* Sian E. Provost, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law*, 73 Tex. L. Rev. 629, 631 (1995) (noting that classical contract law provided for setting aside coerced contracts).

141. *See* Robert L. Palmer, *When Law Fails: Ethics, Commerce, and Tales of Value*, 2 S. Cal. Interdisciplinary L.J. 245, 261 (1993) (noting that classical contract law "had nothing to say about the basic fairness of the deal").

142. Grant Gilmore, *The Death of Contract* 35, 43–50 (1974) (discussing the classical division between contract and tort).

143. *See supra* part I.A.

144. *See* Grossberg, *supra* note 3, at 52–53 (quoting critic who lamented that breach-of-promise action was causing engagements to be looked upon "as a matter of business alone"); Wright, *supra* note 53, at 367 (stating that, by virtue of the breach-of-promise action, "human hearts are a subject of merchandise, and agreements to marry a matter of trade and dicker").

145. *See supra* parts I.B–C.

146. *See supra* note 60 and accompanying text.

147. See *supra* note 142 and accompanying text.

148. See *supra* notes 49, 53–55 and accompanying text.

evidentiary rules employed by courts in breach-of-promise actions differed from those applied in ordinary contract actions.[149]

Ironically, the same courts that developed the breach-of-promise action have been chastised in other quarters for having been too rigid in the way they administered general contract law. In retrospect, the breach-of-promise action can be viewed, to some degree, as a harbinger of modern (so-called "neoclassical") contract law. Under the neoclassical approach, contract law is no longer perceived as being rigidly separated from tort law.[150] Frequently, standards grounded in community norms of decency, fairness, and reasonableness replaced the rigid rules that often characterized classical contract law.[151] Prominent examples of this trend are the resurgence of the doctrine of unconscionability[152] and the broad recognition of a general duty of good faith and fair dealing.[153] Moreover, in applying these fairness considerations, modern courts are more willing to adapt legal standards to take into account the nature of the relationship between contracting parties.[154] Standards of behavior imposed by contract law tend to be more exacting, for example, when parties are involved in long-term relationships (in contrast to the prototypical one-shot market exchange).[155] And, when parties are involved in special relationships of trust and confidence, courts will often impose full-

149. *See supra* notes 61–66 and accompanying text.

150. *See* Farnsworth, *supra* note 45, § 3.6, at 118–21 (noting that modern contract law can be viewed as imposing liability on a promisor who "through fault induced the [promisee] to believe that there was a contract"); *see also* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 Hofstra L. Rev. 443, 445 (1987) (stating that modern contract law often "affords a remedy" for negligent promissory behavior).

151. Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 Wis. L. Rev. 1373, 1389 (noting that the reliance theory of contracts permits courts to infuse contracts with community values); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 Geo. Wash. L. Rev. 183, 194 (1994) (commenting that "[m]odern contract law . . . recognizes that persons contemplating or engaged in contractual relationships may be held responsible if they harm others in ways that offend community standards of decency and fairness").

152. *See generally* Provost, *supra* note 140, at 631–33 (noting that the doctrine of unconscionability permits the invalidation of contracts resulting from unequal bargaining power); Williams, *supra* note 151, at 203–04 (citing general elements of unconscionability and describing the doctrine as "a paradigmatic example of the behavior of contracting parties being openly and explicitly subjected to community standards of fairness and decency").

153. Williams, *supra* note 151, at 206 (discussing duty of good faith and fair dealing as another prime example of "contractual morality").

154. *See Critical Approaches*, *supra* note 134, at 829, 858–60 (noting that the modern law's protection of reasonable expectations and reliance interests "represents . . . the free assumption by social beings of the responsibility for others with whom they interact").

155. *See* Weitzman, *supra* note 98, at 243–44.

fledged fiduciary duties upon them.[156] Since (as some courts have recognized) engaged parties are in a special relationship of trust and confidence,[157] it would be consistent with this general trend for the law to attach some quantum of liability to the breach of a nuptial promise.

Classical contract law presupposed a world in which all of the actors played on a level playing field and were, therefore, able to fend for themselves without the need for state intervention.[158] Neoclassical contract law on the other hand, rooted in the social realities of the twentieth century, is characterized by changes intended to redress some of the inequities perceived to arise when parties in contractual relationships have unequal power.[159] Nevertheless, the breach-of-promise action shows that courts of the late nineteenth and early twentieth centuries, foreseeing their neoclassical counterparts, were willing to relax the strictures of classical contract law in a category of cases where they believed, based on the social realities of the time, that parties were not usually on equal footing.[160] In this instance, courts reformulated common-law contract principles to cast the breach-of-promise action in terms that acknowledged the social inequality of women and the extent to which they were vulnerable when nuptial promises were broken.[161]

This focus on the harm caused by breaches of promises to marry is also in keeping with a doctrinal shift that has taken place in modern contract law. Many of the changes wrought by neoclassical contract law are intended to protect the reliance interests of the parties.[162] Reliance on a promise occurs when a promisee, presuming that a promise will be honored, takes action that she otherwise would not have taken or refrains

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156. *See* Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Rises from the Ashes of the Bad Faith Tort*, 27 Loy. L.A. L. Rev. 483, 485, 493 (1994) (explaining that the modern reliance theory of contracts is premised upon the existence of a (quasi) fiduciary relationship between the promisor and promisee).

157. *See, e.g.*, White v. Prenzler, 131 N.E.2d 540, 543 (Ill. 1956); Weitzman, *supra* note 98, at 344–45.

158. *See* Williston, *supra* note 134, at 366–67.

159. *See* Feinman, *supra* note 151, at 1389 (noting that modern contract law makes it possible to redress various inequities); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 763 (1983) (observing that modern contract law protects "people from themselves by limiting their capacity to make enforceable agreements of various kinds").

160. *See* Grossberg, *supra* note 3, at 38 (contending that the historical breach-of-promise action illustrates "judicial recognition of the gap between the law's theoretical assumption of contracting equality between men and women and the reality of feminine powerlessness").

161. *See id.*

162. *See, e.g.*, Marefield Meadows, Inc. v. Lorenz, 427 S.E.2d 363, 365 (Va. 1993) (stating that parties are "entitled" to rely on the contractual behavior of another); Williams, *supra* note 151, at 198–201.

from taking action she otherwise would have taken.[163] A promisee's reliance interest, in that case, can be viewed as a type of harm that foreseeably results when a promise is made and broken.[164] Modern contract law's concern with protecting the reliance interest manifests itself not only through developments related to bargain contract (the lineal descendant of classical contract law),[165] but also through the emergence of promissory estoppel as an independent theory of obligation.[166]

One of the traditional objections to basing breach-of-promise recovery on contract principles was that doing so threatened to impose the morals of business on interpersonal relationships.[167] But, as previously demonstrated, the courts that developed the breach-of-promise action did not rigidly inject wholesale into the engagement context the rules of classical contract law developed in cases involving commercial parties.[168] The fear of subjecting engaged or married couples to the "morals of the marketplace" was once also used by courts as grounds for invalidating antenuptial agreements.[169] Many courts today are more receptive to antenuptial agreements, however, reasoning that neoclassical contract doctrines such as unconscionability introduce standards of fair play into intimate relationships that encourage parties to act responsibly.[170] Similarly, as part IV will demonstrate, liability appropriately imposed under promissory estoppel can encourage responsible behavior by parties who have made promises to marry, without opening the door to abuses associated with the traditional breach-of-promise action.

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163. *See Second Restatement*, *supra* note 22, § 90 (describing reliance as action or forbearance induced by a promisee); Farnsworth, *supra* note 45, § 2.19, at 97–98 (stressing that reliance "cannot consist of action or forbearance that would have occurred in any event").

164. Farnsworth, *supra* note 45, § 2.19, at 102.

165. *See Second Restatement*, *supra* note 22, § 71 (stating modern variant of the bargained-for consideration requirement); Williams, *supra* note 151, at 198–201 (detailing developments in bargain-contract theory related to the protection of reliance interests).

166. *See generally* Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L. Rev. 472, 508–36 (1983).

167. *See supra* note 144 and accompanying text.

168. *See supra* notes 158–161 and accompanying text.

169. *See* Weitzman, *supra* note 98, at 243.

170. *See* Weitzman, *supra* note 98, at 347–59. Professor Weitzman further argues that, in light of the protections provided by neoclassical contract doctrines, courts should continue to expand the application of principles of modern contract law to personal relationships. *Id.* at 227–54.

IV. A PROMISSORY-ESTOPPEL MODEL FOR IMPOSING LIABILITY FOR BREACHES OF PROMISES TO MARRY

A. Promissory Estoppel, Section 90, and the Breach-of-Promise Action

At about the time state legislatures began enacting the first wave of heartbalm statutes, the drafters of the *Restatement of Contracts* (*First Restatement*) revolutionized contract law by detailing in section 90[171] a general reliance-based theory of obligation that has become popularly known as promissory estoppel.[172] American jurisdictions have embraced section 90 with an alacrity that has made it, in the words of Professor E. Allan Farnsworth, the *First Restatement*'s "most notable and influential rule."[173] In a slightly revised format, section 90 is incorporated in the *Restatement (Second) of Contracts* (*Second Restatement*):

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
>
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.[174]

As is the case with the traditional breach-of-promise action,[175] section 90 can be characterized as a hybrid of contract and tort principles.[176]

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171. Section 90 of the *First Restatement* states: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Restatement of Contracts* § 90 (1932) [hereinafter *First Restatement*].

172. Professor Williston's invocation of the term "promissory estoppel" in his legendary treatise is generally regarded as the springboard for the popular use of the term. *See* 1 Samuel Williston, *The Law of Contracts* § 139 nn.23–24 (1st ed. 1920); Farnsworth, *supra* note 45, § 2.19, at 95 n.23; Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and The Restatement (Third) of Contracts*, 73 Iowa L. Rev. 659, 668 n.75 (1988).

173. Farnsworth, *supra* note 45, § 2.19, at 95. *See also* Charles L. Knapp, *Reliance in the Revised* Restatement*: The Proliferation of Promissory Estoppel*, 81 Colum. L. Rev. 52, 53 (1981) (describing section 90 as "perhaps the most radical and expansive development of this century in the law of promissory liability").

174. *Second Restatement*, *supra* note 22, § 90.

175. *See supra* notes 53–55 and accompanying text.

Section 90 is contractual in the sense that it provides for a promisee to be given a remedy when a promise that satisfies certain requirements is breached.[177] Yet, promissory estoppel also can be analogized to the imposition of tort liability for negligence: we are, as pointed out above, essentially holding the promisor responsible for the foreseeable harm (reasonably expected reliance) caused by her actionable conduct (promise making and promise breaking).[178] Moreover, reflecting promissory estoppel's roots in equity,[179] section 90 ties both the recognition of liability and the consequent award of damages to considerations of justice,[180] thereby openly inviting courts to take into account all relevant fairness and policy considerations in determining whether their decisions advance the interests of justice under the circumstances in which particular promises are made.[181]

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176. *See* Farnsworth, *supra* note 45, § 2.19, at 102; Barnett & Becker, *supra* note 150, at 445–46 (noting that promissory estoppel provides a bridge between contract and tort law).

177. *See Second Restatement*, *supra* note 22, § 1 (defining a contract as "a promise . . . for the breach of which the law gives a remedy"). *But see, e.g.*, Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) (stating that the "effect" of promissory estoppel "is to imply a contract in law where none exists in fact"); sources cited *infra* note 179 (noting that some courts consider promissory estoppel to be equitable rather than contractual).

178. Farnsworth, *supra* note 45, § 2.19, at 102; Williams, *supra* note 151, at 195. *See also* John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 6-1, at 273 (3d ed. 1987) (emphasizing importance of the role of injury as theoretical basis for enforcing promise under promissory estoppel).

179. *See Second Restatement*, *supra* note 22, § 90 cmt. a (stating that promissory estoppel is an extension of equitable estoppel); Farnsworth, *supra* note 45, § 2.19, at 95 (describing process by which promissory estoppel evolved from equitable estoppel). Some courts consider promissory estoppel to be equitable rather than contractual. *See, e.g.*, Swerhun v. General Motors, 812 F. Supp. 1218, 1222 (M.D. Fla. 1993) (describing promissory estoppel as "an equitable remedy"); Division of Labor Law Enforcement v. Transpacific Transp. Co., 137 Cal. Rptr. 855, 859 (Cal. Ct. App. 1977) (referring to "the equitable doctrine of promissory estoppel").

180. *Second Restatement*, *supra* note 22, § 90 (providing that promise "is binding if injustice can be avoided only by [its] enforcement" and that any "remedy granted for breach may be limited as justice requires").

181. *See Second Restatement*, *supra* note 22, § 90 cmt. b (delineating some of the fairness considerations relevant to determining the extent to which enforcement is necessary to avoid injustice). Section 90's call to justice is necessarily open-ended. The pertinent fairness considerations, as well as the relative weight to be accorded them, will necessarily vary in different contexts. *See id.*; Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (ruling that a court applying section 90 may, but is not required to, take into account the impact of the decision on polices underlying the First Amendment). For a discussion of the policy considerations relevant to determining the damages that should be awarded for breach of a promise to marry, see *infra* part IV.B.

When promissory estoppel first gained prominence, reliance was viewed essentially as a substitute for consideration:[182] having induced the promisee's reliance, the promisor was estopped from asserting that the promisee provided no consideration for the promise.[183] By allowing a promise to be enforced on the basis of unbargained-for reliance, section 90 marks a radical departure from the market-exchange paradigm that was at the heart of classical contract law.[184] Accordingly, shortly after the adoption of section 90, some courts felt that the application of the doctrine should be limited to situations in which promises had been made gratuitously.[185] The proponents of this view felt that it was inappropriate to use promissory estoppel when parties were bargaining with one another, that is, when the promisor was seeking consideration in exchange for her promise.[186]

The *First Restatement*, however, placed no explicit limitations on the sphere of section 90 vis-à-vis the bargain requirement of section 75.[187] In applying section 90, many courts have not restricted themselves solely to situations involving gratuitous promises.[188] Even when parties contemplate bargain relationships in cases like *Drennan v. Star Paving Co.*,[189] courts nevertheless have used promissory estoppel as a basis for

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182. *See* Knapp, *supra* note 173, at 53 & n.12. Some courts still view promissory estoppel as being a consideration substitute. *See, e.g.*, State Bank of Standish v. Curry, 476 N.W.2d 635, 637 (Mich. Ct. App. 1991) (stating that "[p]romissory estoppel substitutes for the consideration necessary to form a contract in cases where there are no mutual promises"), *rev'd in part on other grounds*, 500 N.W.2d 104 (Mich. 1993).

183. *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898); Farnsworth, *supra* note 45, § 2.19, at 94–95 (discussing *Ricketts*).

184. *See* Farnsworth, *supra* note 45, § 2.19, at 94–96; Gilmore, *supra* note 142, at 66, 72; Knapp, *supra* note 173, at 53.

185. *See, e.g.*, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 345–46 (2d Cir. 1933) (Hand, J.); Gilmore, *supra* note 142, at 66, 130 n.150.

186. *See, e.g.*, *Gimbel Bros.*, 64 F.2d at 345–46; Gilmore, *supra* note 142, at 66, 130 n.150.

187. *Compare First Restatement*, *supra* note 171, § 75 (describing bargain requirement) *with id.* § 90 (describing reliance-based liability). *See* Gilmore, *supra* note 142, at 64, 70–72 (discussing open relationship in the *First Restatement* between section 90 and the bargain principle); Knapp, *supra* note 173, at 53 (noting that section 90 in the *First Restatement* was not expressly limited to situations where it served as a substitute for consideration).

Section 71 of the *Second Restatement* is the analog to section 75 of the *First Restatement*. *See Second Restatement*, *supra* note 22, § 71 (stating that consideration must be bargained for). The comments to section 90 in the *Second Restatement*, however, appear to contemplate its being used in situations where parties are in a bargain relationship. *See Second Restatement*, *supra* note 22, § 90 cmts. b, e; Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. Chi. L. Rev. 903, 907 n.16 (1985).

188. *See* Farber & Matheson, *supra* note 187, at 907 & nn.16–18.

189. 333 P.2d 757 (Cal. 1958).

rendering bids (which are offers) by subcontractors irrevocable when general contractors rely on them in a substantial manner.[190] In other scenarios, courts have used promissory estoppel to protect the reliance interests of parties who contemplated, but failed to enter into, contractual relationships.[191] Furthermore, courts routinely address the possibility of recovery under either bargain contract or promissory estoppel, particularly in situations in which recovery under bargain theory is barred for some reason.[192]

Even though engaged parties may be considered to have entered into bargain-contracts, an examination of cases involving prospective employment-at-will relationships illustrates why it would, nevertheless, be appropriate for a court to use promissory estoppel to grant relief for the breach of a nuptial promise. Each of the cases involves a plaintiff and a defendant who exchanged promises to enter into an at-will employment relationship on some later date.[193]

Typically, the plaintiff proceeded to rely on the defendant's promise of employment by resigning her current position, among other things, only to be devastated when the defendant denied her the opportunity to

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190. *Id.* at 764. For a description of exactly how the Supreme Court of California applied promissory estoppel to render subcontractor's bid irrevocable, *see* Williams, *supra* note 151, at 200. *See also* Metzger & Phillips, *supra* note 166, at 513–21 (discussing generally *Drennan* and other subcontractor bid cases). The rule of *Drennan* is generalized in section 87(2) of the *Second Restatement*. *See Second Restatement*, *supra* note 22, § 87(2).

191. *See, e.g.*, Elvin Assocs. v. Franklin, 735 F. Supp. 1177 (S.D.N.Y. 1990) (ruling that popular entertainer was liable for damages incurred by plaintiff in reliance on her oral assurances, even though an agreement was never finalized); Hoffman v. Red Owl Stores, 133 N.W.2d 267 (Wis. 1965) (holding franchisor liable for prospective franchisee's damages incurred in reliance on oral assurances, even though negotiations collapsed). *See also* Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2d Cir. 1989) (recognizing that promissory estoppel might serve as a basis for requiring parties to negotiate in good faith); Farnsworth, *supra* note 45, § 3.26, at 206–08 (discussing *Red Owl*).

192. *See, e.g.*, Cohen v. Cowles Media Co., 457 N.W.2d 199, 203–05 (Minn. 1990) (considering possibility of recovery under promissory estoppel, even though court held there was no valid bargain contract because parties lacked "intent to contract"), *rev'd on other grounds*, 501 U.S. 663 (1991); Farber & Matheson, *supra* note 187, at 908 & nn.19–20 (noting that courts often bypass bargain contract analysis and rely "instead on promissory estoppel even when no apparent barrier exists to [bargain contract] recovery"); Metzger & Phillips, *supra* note 166, at 512 & nn.260–63 (noting, among other things, that bargain contract and promissory estoppel counts are often plead in the alternative and considered separately by courts).

193. *See* Ravelo v. County of Hawaii, 658 P.2d 883 (Haw. 1983); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981); Hunter v. Hayes, 533 P.2d 952 (Colo. Ct. App. 1975). *See also* Bower v. AT&T Techs., 852 F.2d 361, 363–65 (8th Cir. 1988) (ruling promissory estoppel applicable to promise to rehire on at-will basis employees whose positions were phased out). *But see* White v. Roche Biomedical Labs, 807 F. Supp. 1212, 1217–20 (D.S.C. 1992) (declining to follow *Grouse*), *aff'd*, 998 F.2d 1011 (4th Cir. 1993).

begin work.[194] A bargain-contract approach to these cases is complicated by the at-will nature of the contemplated employment relationships.[195] In theory, the defendant, if it had allowed the prospective employee to begin work, could have fired her immediately with impunity.[196] Thus, as one court recognized, the real harm incurred by the disappointed employee is not the frustration of her expectations[197] with regard to the prospective job, but the losses she incurred "in quitting the job [she] held."[198] In these situations, courts have turned to promissory estoppel to award damages based on the extent of the plaintiff's reliance interest.[199]

Under modern no-fault divorce statutes, either party to a marriage has, in essence, the right to end it at any time.[200] Modern marriages are therefore tantamount to contractual relationships that are terminable at will,[201] and exchanges of promises to marry can be likened to exchanges of promises to enter into at-will employment arrangements. By reference, the cases discussed in the previous paragraph establish that the basis for granting a remedy for the breach of a nuptial promise should not be the aggrieved party's expectancy, but the costs incurred by the aggrieved party in relying on a broken nuptial promise. It follows, then, that section 90 may appropriately be applied in cases involving broken promises to marry.

In part IV.B, section 90 is employed in a systematic re-examination of the damages traditionally awarded at common law when a promise to marry is broken. In jurisdictions that retain the breach-of-promise action, only the Washington Supreme Court, in *Stanard v. Bolin,*[202] has

194. In *Grouse*, the plaintiff also declined a job offer from another employer in reliance on the defendant's promise of employment. 306 N.W.2d at 115–16. Similarly, in *Ravelo*, the prospective employee's wife relied on the promise by quitting her job. 658 P.2d at 885. The *Ravelo* court ruled that the wife's reliance interest was also protected under section 90. *Id.* at 887–88.

195. *See Grouse*, 306 N.W.2d at 116.

196. *Id.*; *Ravelo*, 658 P.2d at 886 (noting that Ravelo was a "probationary employee").

197. Because of the at-will nature of the prospective employment relationship, the plaintiff's expectation interest could not be measured with reasonable certainty, a prerequisite to the recovery of expectation damages for breach of a bargain contact. *See Second Restatement, supra* note 22, § 352 (requiring that damages be proved with reasonable certainty). *See supra* part IV.B.1 (concluding that expectation damages should not be available for breach of a promise to marry).

198. *Grouse*, 306 N.W.2d at 116.

199. *See id.*; *Ravelo*, 658 P.2d at 887–88; Hunter v. Hayes, 533 P.2d 952, 953–54 (Colo. Ct. App. 1975).

200. Posner, *supra* note 123, at 264; Coombs, *supra* note 39, at 3–4 n.15.

201. Posner, *supra* note 123, at 264 (noting that "no-fault divorce converts a marriage that produces no children into a contract of marriage terminable at will").

202. 88 Wash. 2d 614, 565 P.2d 94 (1977).

attempted a comparable review of the damages available for breach of a nuptial promise.[203] The *Stanard* court approached the breach-of-promise action as a sort of common-law pariah, describing it at one point as being "quasi-contract, quasi-tort."[204] With the emergence of promissory estoppel, however, it is no longer necessary for courts to recognize a separate breach-of-promise action. Through thoughtful application of the liability principles set out in section 90, courts can bring the treatment of promises to marry into the mainstream of common-law jurisprudence.

B. Damages for Breach of Promise To Marry Under Section 90

This part of the Article uses section 90 to re-evaluate the major types of damages awarded under the traditional breach-of-promise action.[205] In the course of this review, conclusions are drawn about the extent, if any, to which a particular type of recovery remains appropriate in the late twentieth century, given that damages under section 90 should be "limited as justice requires."[206] The latter directive is particularly important because, as will be illustrated, it enables courts to give proper consideration to contemporary social attitudes and the goals of modern contract law.[207] Again, for the reasons that follow, the liability of parties who breach promises to marry should be measured by, and limited to, the reliance costs reasonably incurred by the party to whom they were engaged.

1. Expectation Damages

Under the traditional breach-of-promise action, a jilted party was entitled, among other things, to damages aimed at compensating her for the loss of the financial and social position she would have been in had the marriage taken place.[208] In jurisdictions that have not legislatively abolished the breach-of-promise action, only one court to date has ruled that expectation damages should not be available to a party aggrieved by a breached promise to marry. In *Stanard v. Bolin*,[209] the Washington

203. *See infra* notes 209–13, 242–43 and accompanying text.

204. 88 Wash. 2d at 622, 565 P.2d at 98.

205. *See supra* part I.B (detailing damages awarded by courts in breach-of-promise cases).

206. *Second Restatement*, *supra* note 22, § 90.

207. *See supra* note 181 and accompanying text (emphasizing that, in awarding damages under section 90, courts should take into account a broad range of fairness considerations).

208. *See supra* part I.B.

209. 88 Wash. 2d 614, 565 P.2d 94 (1977).

Supreme Court justified its denial of expectation damages recovery (while leaving the action otherwise intact) by emphasizing that society no longer views marriages as "property transactions."[210] It is true that marriages are no longer broadly perceived in American society as appropriate instruments for building financial coalitions between families.[211] With the triumph of the norm of companionate marriage, people nowadays presumably become engaged and marry for love.[212] But, in and of itself, this consideration does not present a sufficiently clear and compelling basis for disallowing expectation damages in cases involving broken nuptial promises. After all, there is no rule of modern contract law that limits liability for broken promises to those that constitute "property transactions."[213] Using promissory estoppel, modern contract theory, and some of the considerations previously mentioned in this Article, one can develop a richer and fuller explanation than is given in *Stanard* for denying expectation damages to someone who has been aggrieved by a breached promise to marry.

Even though a promisee's reliance provides the theoretical basis for enforcing a promise under promissory estoppel, it does not necessarily follow that reliance, rather than expectation, damages should be awarded in all such cases.[214] Indeed, Professor Williston, the reporter of the *First Restatement*, believed that any promise determined to be binding under section 90 should be enforced as made; that is, expectation damages should be awarded.[215] He consequently grafted into the original version of section 90 a requirement that reliance be "definite and substantial,"[216] lest a promisee's trivial acts of reliance give rise to a claim for full-blown expectation damages.[217] The drafters of the *Second Restatement*,

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210. *Id.* at 620, 565 P.2d at 97. *See supra* notes 76–80 and accompanying text (discussing the fact that, when the breach-of-promise action first gained prominence, marriages were often arranged affairs based on financial settlements).

211. 88 Wash. 2d at 620, 565 P.2d at 97.

212. *See supra* notes 79–80. *But see supra* note 130 (noting that financial and social considerations may still play an indirect role in determining whether many people fall in love).

213. *Cf. Second Restatement, supra* note 22, § 71 (imposing requirement that promise be supported by bargained-for consideration, but not explicitly requiring an exchange of property); *id.* § 90 (basing recovery on reasonably expected "action or forbearance").

214. *See* Farnsworth, *supra* note 45, § 2.19, at 100–01; Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 Yale L.J. 111, 129–30 (1991).

215. Farnsworth, *supra* note 45, § 2.19, at 99–100; Yorio & Thel, *supra* note 214, at 116–23.

216. *First Restatement, supra* note 171, § 90.

217. *See* Farnsworth, *supra* note 45, § 2.19, at 97 n.29. Moreover, when a promisor can reasonably expect a promise to induce definite and substantial reliance, she should seriously reflect before making it. *See* Yorio & Thel, *supra* note 214, at 124.

however, felt differently: since the basis of enforcement was a promisee's reliance, they reasoned, a court should be given the discretion to limit damages to the promisee's reliance interest—the cost she incurred by relying on the breached promise.[218] Therefore, in the *Second Restatement*, the drafters open the door to partial enforcement of a promise by deleting from section 90 the requirement that reliance be "definite and substantial"[219] and by adding thereto the provision allowing remedies to be "limited as justice requires."[220] Despite this revision, however, recent analyses show that courts continue to award expectation damages in most cases decided under section 90.[221]

However, in instances where expectation damages cannot be measured with reasonable certainty, there is general agreement among commentators that an award of reliance damages under promissory estoppel is appropriate.[222] The cases involving a prospective employer's anticipatory breach of a promise of at-will employment fit this pattern.[223] As shown, courts in these cases have recognized that the prospective employee's expectancy cannot be calculated because of the at-will nature of the employment contract into which the parties entered.[224] Nevertheless, they have deemed it appropriate to award reliance damages to the prospective employee.[225]

Since no-fault divorce statutes have essentially rendered modern marriage the equivalent of an at-will contract, the expectancy of a party aggrieved by a broken promise to marry is also incapable of measurement with reasonable certainty.[226] By analogy, then, reliance

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218. *Second Restatement*, *supra* note 22, § 90 cmt. d; Farnsworth, *supra* note 45, § 2.19, at 100–01; Farber & Matheson, *supra* note 187, at 909; Knapp, *supra* note 173, at 55–58.

219. *First Restatement*, *supra* note 171, § 90.

220. *Second Restatement*, *supra* note 22, § 90.

221. *See* Farber & Matheson, *supra* note 187, at 909; Yorio & Thel, *supra* note 214, at 131–32.

222. *See* Farnsworth, *supra* note 45, § 2.19, at 101 & n.43; Barnett & Becker, *supra* note 150, at 478–81; Yorio & Thel, *supra* note 214, at 149–50.

223. *See supra* part IV.A.

224. *See supra* note 197 and accompanying text.

225. *See supra* notes 198–99 and accompanying text.

226. *See supra* note 197. Since under a no-fault regime a "man can marry on Monday and divorce on Tuesday," Professor Coombs argues that in modern society "damages for a mere broken engagement would make no sense." Coombs, *supra* note 39, at 3–4 n.15. Again, however, an analogy to the cases involving anticipatory repudiations of promises of at-will employment is useful. In Grouse v. Group Health Plan, 306 N.W.2d 114 (Minn. 1981), the court stated that the plaintiff "had a right to assume he would be given a good faith opportunity to perform his duties to the [defendant's] satisfaction . . . once he was on the job." *Id.* at 116. Apparently, therefore, the *Grouse* court would still have awarded the plaintiff reliance damages under section 90 had the defendant waited and fired plaintiff soon after he commenced performance. Under such circumstances, the

(rather than expectation) damages should be awarded under promissory estoppel for breach of a promise to marry.[227]

Further support for denying recovery of expectation damages in this context can be marshalled by analyzing broken promises to marry from a market perspective. One of the components of the reliance interest is the injured party's "forbearance"[228]—that is, those opportunities she has foregone by relying on a promise.[229] In a competitive market setting, those foregone opportunities will include any opportunity the aggrieved party might have had to enter into a contract with someone other than the breaching party, on terms comparable to those contained in the breached contract.[230] When this is the case, the best way to provide full protection to an aggrieved party's reliance interest is to award expectation

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defendant would still not have afforded the plaintiff "a good faith opportunity to perform his duties to the [defendant's] satisfaction." *Id.*

By analogy, if a party were to marry someone on Monday and, without cause, were to divorce them on Tuesday, the promise to marry has been effectively breached. Implicit in a promise to marry is that, if parties go through with the wedding ceremony, each party will give the other a good faith opportunity to make the marriage work. Many courts apply modern divorce statutes in ways that protect divorcing parties' reliance interests. *See* Brinig & Carbone, *supra* note 121, at 870–72. Therefore, in the sham marriage described by Professor Coombs, a divorce court should enter an order that fully protects the reliance interest of the aggrieved spouse, including expenditures wasted on the wedding ceremony.

Boyd v. Boyd, 39 Cal. Rptr. 400 (Cal. Ct. App. 1964), presented a situation similar to Professor Coombs' scenario. The plaintiff alleged that the defendant left her two days after marrying her. *Id.* at 401. As a result of having gone through the ceremony, she lost her eligibility to receive two governmental stipends. *Id.* The court recognized that, even though the defendant participated in the wedding ceremony, the gist of the plaintiff's complaint was that he breached his promise to marry her. *Id.* at 402. As the court observed: "A breach of promise is a failure to do what one promises to do. Whether the defendant makes a promise 'of marriage' or 'to marry,' he contracts not only to undergo a marriage ritual but also to fulfill matrimonial obligations and expectations." *Id.* Unfortunately for the plaintiff in *Boyd*, the court found that, although she had a claim for breach of a promise to marry, it was barred by the California heartbalm statute. *Id.* at 402–05.

227. By contrast, in the nineteenth and early twentieth centuries, the law considered marriage to be a lifetime commitment. *See supra* notes 119–20 and accompanying text. Therefore, it was theoretically possible to calculate the expectation interest of a woman aggrieved by the breach of promise to marry: she was entitled to damages that would put her in the financial and social position she would have been in had she become married and remained married. *See supra* notes 121–22 and accompanying text. Through the breach-of-promise action, an engaged woman, in essence, was granted the rights of a spouse. *See* Coombs, *supra* note 39, at 3–4 n.15.

228. *See Second Restatement*, *supra* note 22, § 90.

229. Edward J. Murphy & Richard E. Speidel, *Studies in Contract Law* 245–46 (4th ed. 1991); Brinig & Carbone, *supra* note 121, at 870–71; L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 Yale L.J. 52, 373 (1936).

230. *See* Fuller & Perdue, *supra* note 229, at 60–61; Brinig & Carbone, *supra* note 121, at 871 & n.72.

damages.[231] It is for this reason that expectation damages are generally awarded for breach of a bargain contract.[232]

Marriage can itself be viewed as a contract,[233] and the choices that people make with regard to marriage can be subjected to a market analysis.[234] It follows then, that the case for awarding expectation damages would be more compelling if it could be convincingly argued that parties aggrieved by breached nuptial promises should be compensated for the possibility that they may have passed up other marital opportunities.[235] Under conditions prevalent in the late twentieth century, this argument cannot be made persuasively. In most cases today, a jilted party's access to the marriage market will not be substantially compromised as a result of having been aggrieved by a breached promise to marry.[236] Today, a party who is capable of attracting another mate at the time she enters into an ill-fated engagement generally should not be significantly less able to do so as a result of the termination of that engagement.

Admittedly however, this may not have been true under the conditions that prevailed in the nineteenth and early twentieth centuries. As earlier noted, the jurists that developed the breach-of-promise action appear to have been motivated, in part, by a belief that broken engagements often severely damaged the prospects of women in a marriage market that highly valued female youth and virginity.[237] The dilemma of these women was further exacerbated by their limited access to the employment markets of that earlier time.[238] Under these conditions, the award of expectation damages to parties aggrieved by broken nuptial promises would be justified.

In applying section 90, a court might also take into consideration the fact that the availability of expectation damages, to a certain degree,

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231. *See* Murphy & Speidel, *supra* note 229, at 246; Fuller & Perdue, *supra* note 229, at 61; Brinig & Carbone, *supra* note 121, at 871–72.

232. *See* Murphy & Speidel, *supra* note 229, at 246; Fuller & Perdue, *supra* note 229, at 61; Brinig & Carbone, *supra* note 121, at 872.

233. *See generally* Weitzman, *supra* note 98, at 1–134 (setting out terms of the traditional marriage contract).

234. *See generally* Gary S. Becker, *A Treatise on the Family* 66–92 (1981) (conducting economic analysis of mating in marriage markets).

235. *Cf.* Brinig & Carbone, *supra* note 121, at 873 (stating that, earlier in our history, "a [married] traditional woman's most important loss was the opportunity to have married another").

236. *See supra* notes 125–26 and accompanying text.

237. *See supra* notes 115–17, 161 and accompanying text.

238. *See supra* note 114.

actually validated the perception that damage awards in breach-of-promise cases were usually excessive and facilitated "blackmail" by unscrupulous plaintiffs.[239] If promissory estoppel were to be used to limit recovery to an aggrieved party's reliance interest, however, possibilities for that kind of abuse would be significantly curtailed.

2. *Damages for Emotional Anguish and Humiliation*

The availability of damages for emotional anguish and humiliation is another controversial feature of breach-of-promise litigation.[240] Over the last twenty years, there have been several reported cases that explicitly confirm the continued availability of these types of damages in jurisdictions that retain the breach-of-promise action in some form.[241] In two of those cases, courts have extensively discussed their rulings. The Washington Supreme Court ruled in *Stanard v. Bolin*[242] that damages for mental anguish and humiliation would continue to be available to breach-of-promise plaintiffs at common law on grounds that these types of damages were "foreseeable" consequences of the breach of a promise to marry.[243] Again, in *Wildey v. Springs*,[244] a 1994 case interpreting the

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239. *See supra* part I.C.

240. *See supra* part I.B. Judges and commentators use a variety of different terms to describe emotional anguish and humiliation. Emotional anguish, for example, may sometimes be called "mental anguish," "mental distress," "emotional distress," or "psychological injury." Sometimes humiliation may be referred to as "loss of reputation." In modern society, a breach of a promise to marry probably does not cause the stigmatic injury that it once may have when people were less mobile and communities were more closely knit. Accordingly, one must believe today that the primary component of humiliation (or loss of reputation) is psychological. Without regard to the labels used by a particular court or commentator, the ensuing discussion will treat emotional anguish and humiliation as being similar psychological phenomena.

241. *See* Wildey v. Springs, 840 F. Supp. 1259, 1267–68 (N.D. Ill. 1994), *rev'd on other grounds*, 47 F.3d 1475 (7th Cir. 1995); Glass v. Wiltz, 551 So. 2d 32, 32–34 (La. Ct. App. 1989) (ruling that damages for mental anguish and humiliation are recoverable under Louisiana law, but finding plaintiff's proof to be inadequate); Menhusen v. Dake, 334 N.W.2d 435, 436–37 (Neb. 1983) (refusing to reconsider availability of damages for mental suffering and humiliation when breach-of-promise action was barred by parties' cohabitation); Bradley v. Somers, 322 S.E.2d 665, 666–67 (S.C. 1984) (discussing continued viability of traditional breach-of-promise action, including availability of emotional distress damages, in South Carolina); Kuhlman v. Cargile, 262 N.W.2d 454, 459–60 (Neb. 1978) (noting continued availability of damages for mental suffering and humiliation caused by breach of promise to marry, but ruling that plaintiff's evidence was inadequate to support her claim with regard to these elements); Stanard v. Bolin, 88 Wash. 2d 614, 620–21, 565 P.2d 94, 97–98 (1977). *Wildey* and *Stanard* are discussed in the ensuing text.

242. 88 Wash. 2d 614, 565 P.2d 94 (1977).

243. *Id.* at 620–21, 565 P.2d at 97–98. The Washington Supreme Court sanctioned the award of damages for emotional anguish and humiliation under a tort theory. *Id.* at 620, 565 P.2d at 97. The award of these types of damages on a foreseeability basis, however, can be squared with contract

Illinois Breach of Promise Act,[245] a federal district court sustained a jury verdict that awarded a plaintiff $118,000 for the mental pain and suffering she went through when the defendant broke off an engagement.[246] The district court ruled that, for purposes of the Illinois statute, the plaintiff's psychological injuries constituted "actual damages" caused by the defendant's breach of the nuptial promise.[247]

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theory. *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (1854); Sullivan v. O'Connor, 296 N.E.2d 183, 188–89 (Mass. 1973); *Second Restatement, supra* note 22, § 353 (requiring that damages for emotional disturbance be foreseeable as "a particularly likely result" of a breach of contract). For a recent discussion of the recoverability of emotional distress damages for breach of contract, see Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 Suffolk U. L. Rev. 935 (1992). However, some courts are unwilling to apply the foreseeability framework in a contract context with respect to the award of damages for emotional anguish. *See* Farnsworth, *supra* note 45, § 12.17, at 934–35. Professor Whaley has suggested that the failure of these courts to pursue a foreseeability analysis is often grounded in "sloppy analysis, bad policy, and results that are indefensible using a 'person on the street' fairness test." Whaley, *supra*, at 954. Nevertheless, for the unique policy reasons explored in the text, courts should not award emotional-anguish damages for the breach of a promise to marry.

244. 840 F. Supp. 1259 (N.D. Ill. 1994), *rev'd*, 47 F.3d 1475 (7th Cir. 1995). See *infra* note 247 for details about the decision by the Court of Appeals for the Seventh Circuit that reversed the district court's decision on grounds unrelated to the focus of discussion in the ensuing text.

245. Ill. Comp. Stat. Ann. ch. 740, §§ 15/1–15/5.

246. *Wildey*, 840 F. Supp. at 1266–69. The jury award included a provision of $25,000 to cover the medical expenses attendant to the treatment of plaintiff's mental anguish. *Id.* at 1268–69.

247. The Illinois Breach of Promise Act limits damages recoverable for "breach of promise or agreement to marry . . . to the actual damages sustained as a result of the injury complained of." Ill. Comp. Stat. Ann. ch. 740, § 15/2. Some confusion with regard to the breadth of this provision arises, however, because the statute's statement of purpose contains an assertion that "the award of monetary damages . . . is ineffective as a recompense for genuine mental or emotional distress." *Id.* § 15/1. Relying on Smith v. Hill, 147 N.E.2d 321, 325 (Ill. 1958), the district court in *Wildey* concluded that this general assertion in the statement of purpose did not bar recovery of damages for mental anguish caused by breach of a promise to marry. 840 F. Supp. at 1267. These damages are recoverable in an Illinois breach-of-promise case, the district court concluded, "as long as they are meant to compensate the plaintiff for actual damages suffered and are not meant to punish the defendant or inflate the recovery." *Id.*

The language in the statement of purpose in the Illinois Breach of Promise Act tracks similar language used in the statements of purpose of a number of state statutes that abolished the breach-of-promise action altogether, thus betraying the fact that the original version of the Illinois statute likewise provided for the abolition (rather than the limitation) of the action. In Heck v. Schupp, 68 N.E.2d 464 (Ill. 1946), the Illinois Supreme Court invalidated the original version of the statute because it was at odds with a provision of the Illinois Constitution that required "every person" to be given "a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation." *Id.* at 466. In further justification of its decision, the Illinois Supreme Court opined that a complete abolition of the breach-of-promise action would have the effect of placing "a premium on the violation of moral law, making those who violate the law a privileged class, free to pursue a course of conduct without fear of punishment even to the extent of a suit for damages." *Id.* In response to the decision in *Heck*, the Illinois legislature in 1947 enacted the current version of Illinois Breach of Promise Act, which limited the scope of recoverable damages and also added a

Notwithstanding the fact that emotional anguish and humiliation may be actual and foreseeable consequences of a broken promise to marry, damages for emotional anguish and humiliation should not be awarded to breach-of-promise plaintiffs under promissory estoppel. Since section 90 directs that the remedy for breach be limited "as justice requires,"[248] a court applying section 90 should take into account the particular setting in which a promise was made and all policy considerations relevant to an award of a particular type of damages.[249] With regard to matters such as emotional distress and humiliation, the setting in which promises to marry are made should be differentiated from other situations in which promises have been breached. In a typical situation, emotional anguish results from the breach of the promise. However, in situations involving breaches of promises to marry, emotional distress may result from both

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rather stringent notice requirement. *See* Ill. Comp. Stat. Ann. ch. 740, § 15/2 (limiting damages recovery to "actual damages"); *id.* § 15/4–15/5 (imposing notice requirement).

After the district court's decision in *Wildey*, a group in the Illinois House of Representatives proposed new legislation, H.B. 4055 (1994), for the complete abolition of the breach-of-promise action in the state. The proposed statute died, however, because of renewed concerns about the constitutionality of abolishing the action and fears that the statute was, in effect, "special legislation relating to a recent case." Ill. Legis. Info. Sys., HB 4055 (1994).

In early 1995, the Court of Appeals for the Seventh Circuit reversed the district court's opinion in *Wildey* on grounds unrelated to the determination that damages for mental anguish constituted actual damages for purposes of the Illinois Breach of Promise Act. Wildey v. Springs, 47 F.3d 1475 (7th Cir. 1995). In light of the antipathy that the Illinois legislature felt for the breach-of-promise action in 1947, the court of appeals concluded that it would have intended for the notice requirement imposed by the Illinois Breach of Promise Act to be construed strictly. *Id.* at 1485–89. The suit, accordingly, was dismissed on grounds that plaintiff's notice was defective in that it failed to state "the date upon which the promise or agreement to marry was made." Ill. Comp. Stat. Ann. ch. 740, § 15/4.

Since the court of appeals disposed of *Wildey* on the issue of notice, it did not address the district court's conclusion that damages for mental anguish constituted actual damages for purposes of the Illinois Breach of Promise Act. As a matter of straight statutory interpretation, the district court undoubtedly is correct. Money, according to the statute's statement of purpose, may be ineffective recompense for "genuine mental or emotional distress." Ill. Comp. Stat. Ann. ch. 740, § 15/1. On the other hand, how could "genuine mental or emotional distress" not qualify as "actual damages"? The failure of the Illinois legislature to amend the statute after considering the district court's ruling in *Wildey*, moreover, gives rise to an inference of legislative acquiescence to that ruling. To the extent, however, the reach of the Illinois Breach of Promise Act is to be measured by reference to the hostile attitudes prevailing in the Illinois legislature in 1947 (as the court of appeals suggests in *Wildey*), one can argue that the members of that body wanted to exclude mental-anguish damages (despite their poor choice of language). *See* Vann v. Vehrs, 633 N.E.2d 102, 104 (Ill. App. Ct. 1994) (suggesting in dictum that Illinois legislature in Breach of Promise Act intended to abolish "damages for mental and emotional distress").

248. Section 90 dictates that a court limit the remedy granted for breach "as justice requires." *Second Restatement, supra* note 22, § 90.

249. *See supra* part IV.A.

the breach as well as the performance of the promises.[250] Indeed, the emotional distress which may be caused if the marriage takes place could, in fact, be substantially greater than would be caused by the broken engagement. In that instance, the heartbreak a jilted party suffers as a consequence of a broken nuptial promise most likely will be more than offset by the emotional trauma that would later accompany the break up of the ensuing marriage, at which time the parties' investment, emotional and otherwise, in the relationship is likely to be greater. Presumably, by not subjecting a prospective mate to the emotional devastation that would probably accompany the subsequent broken marriage, the party who breaches a promise to marry acts responsibly.[251]

Given this consideration, an award of damages for emotional anguish and humiliation would be inconsistent with two basic policies underlying section 90 and general contract law. The first policy is that an award of damages should not place an aggrieved party in a better position than that party would have been in had the promise been honored.[252] If compensated for the emotional anguish caused by a breach of a nuptial promise, a promisee is decidedly better off than she would be if the promisor kept the promise and, consequently, exposed her to comparable or greater emotional anguish in the course of the probable disintegration of the ensuing marriage.[253] The second policy militating against such an award of damages is the common-law's encouragement of acts of mitigation. To the extent practicable, parties should take affirmative steps to avoid damages that reasonably can be avoided.[254] In the unique

250. *See* Wright, *supra* note 53, at 373–74.

251. *See also infra* part IV.B.3 (acknowledging that, in some respects, the breach of a promise to marry may be analogized to an "efficient breach").

252. *See* Farnsworth, *supra* note 45, § 12.8, at 874–75 (describing general principle); *id.* § 12.16, at 930 (concluding general principle applies to awards of reliance damages).

253. Of course, under modern no-fault divorce statutes, one cannot recover damages for the emotional anguish that accompanies the break-up of a marriage. *Cf.* 1 Clark, *supra* note 1, § 13.1, at 698–701 (describing evolution from divorce statutes focusing on marital wrongs to statutes that consider fault irrelevant). A possible response to the arguments raised in these two paragraphs of the text is that, by disallowing recovery of damages for emotional anguish, we reward a party who breaches a nuptial promise because that party might have acted in bad faith to undermine the marriage had it ensued. *See* Wright, *supra* note 53, at 373. If the breaching party truly has fallen out of love, however, even a good-faith effort, in all probability, will not be enough to save the ensuing marriage.

254. *Second Restatement*, *supra* note 22, § 350; Farnsworth, *supra* note 45, § 12.12, at 896–902. Technically, the mitigation requirement of section 350 applies to parties aggrieved by the breach of a particular promise. *Second Restatement*, *supra* note 22, § 350. In the unique context of broken nuptial promises, however, it would be appropriate for courts applying section 90 to impose a similar mitigation requirement on breaching parties.

context of broken promises to marry, the breaching party can be viewed as having taken steps to mitigate emotional-anguish damages.[255] By avoiding an ill-advised marriage, the breaching party, in effect, "saves" a prospective mate from suffering subsequent emotional turmoil.[256]

Accordingly, even though emotional anguish and humiliation may be foreseeable consequences of the breach of a promise to marry, justice does not require, on balance, that an aggrieved party be compensated for those injuries under section 90. There should, however, be common-sense limitations placed on the extent to which a promisor is shielded by promissory estoppel from responsibility for the foreseeable emotional consequences of her actions. After all, the underlying justification for not awarding these damages is that, if we give due consideration over time to the net emotional toll exacted by breached nuptial promises, breaching parties arguably act responsibly by ending engagements. An approach based on promissory estoppel, therefore, would not preclude an aggrieved party from appropriate tort recovery of emotional-anguish damages in cases where a promise to marry is breached in an especially cruel manner. A breaching party whose conduct verges on being tortious should be held fully responsible for the resulting emotional devastation.[257] Therefore, a promisee should be able to recover for emotional anguish if she can prove that the promisor knowingly lied in making the promise to marry[258] or breached the promise in such a contemptible fashion as intentionally to inflict emotional anguish on the promisee beyond that which would be caused by a breach under ordinary circumstances.[259]

3. *Punitive Damages*

By awarding punitive damages, courts in jurisdictions that retain the traditional breach-of-promise action make their most overt, and most

255. *See* Wright, *supra* note 53, at 373–74.

256. *See id.*

257. *Cf. Second Restatement, supra* note 22, § 355 (providing for recovery of punitive damages if the "conduct constituting the breach is also a tort for which punitive damages are recoverable").

258. *See* Note, *supra* note 2, at 1783–97.

259. *See* Richard C. Ninneman & David L. Walther, Comment, *Abolition of Breach of Promise in Wisconsin—Scope and Constitutionality*, 43 Marq. L. Rev. 341, 360–61 (1960). For a case that presents allegations approaching the threshold of the standard suggested in the text, see Ferraro v. Singh, 495 A.2d 946, 947–48 (Pa. Super. Ct. 1985) (describing allegations that plaintiff's betrothed left the country to marry someone else without informing plaintiff).

indefensible, departure from established contract doctrine.[260] In the late twentieth century, courts continue to be consistently reluctant to award punitive damages in actions based on bargain contract or promissory estoppel.[261] Economic theorists justify the courts' distaste for awarding punitive damages in contracts cases by arguing that, in a market setting, breaches of contract are often efficient.[262] By this, they mean that the breaching party has made a determination that the resources that otherwise would be devoted to the breached contract can yield a greater return (even after compensating the injured promisee for her losses) if reallocated to some other purpose.[263] These breaches of contract ought not be discouraged, the theorists continue, because they promote one of contract law's main goals—the movement of societal assets to their most efficient uses.[264] Courts, accordingly, should avoid awarding damages in excess of those actually sustained by an injured promisee; awarding such damages would deter the socially beneficial consequences of these "efficient breaches."[265] By analogy, those who breach promises to marry arguably act in a socially responsible manner to the extent they prevent ensuing marriages that would be loveless and/or destined for failure.[266] These breaching parties also may be characterized as making a determination that they can maximize their utility (happiness) by deploying elsewhere the resources they otherwise would have brought to the marriage.

Consequently, it would also be inappropriate to "punish" a breach of a promise to marry by requiring a promisor to pay damages in excess of those actually sustained by a promisee, unless the conduct constituting the breach of contract is also tortious.[267] If the promisor knowingly lied when she made the promise to marry or breached the promise in an egregious manner that clearly evinced an intention to induce emotional

260. *See supra* part I.B.

261. *See* Farnsworth, *supra* note 45, § 12.8, at 874–75 (describing punitive damages as damages in excess of those needed to compensate injured party); *id.* § 12.16, at 930 (concluding that awards of reliance damages should not exceed those needed to compensate the injured party).

262. *See* Patton v. Mid-Continent Sys., 841 F.2d 742, 750–51 (7th Cir. 1988) (Posner, J.) (applying efficient-breach theory to justify a denial of punitive damages); Farnsworth, *supra* note 45, § 12.3, at 846–47 (describing efficient-breach hypothesis).

263. *See* Farnsworth, *supra* note 45, § 12.3, at 847; Murphy & Speidel, *supra* note 229, at 1037.

264. *See* Farnsworth, *supra* note 45, § 12.3, at 847–48.

265. *Id.*

266. *See supra* part I.C.

267. *Second Restatement*, *supra* note 22, § 355; Farnsworth, *supra* note 45, § 12.8, at 875–76. A similar exception should be recognized with respect to the recovery of emotional-anguish damages caused by breach of a promise to marry. *See supra* part IV.B.2.

distress beyond that ordinarily caused by the breach of such a promise, a court might appropriately award punitive damages in tort.[268] Promissory estoppel would not preclude such an award.

4. *Reliance Damages*

For reasons that will be further elaborated in this subpart, this Article concludes that reliance damages are the only type of remedy available under the traditional breach-of-promise action that justice today would require to be awarded under section 90.[269] As earlier noted, reliance occurs when a promisee, presuming that a promise will be honored, takes action she otherwise would not have taken or refrains from taking action she otherwise would have taken.[270] In order to capture the dual aspects of reliance, the drafters of section 90 opted to speak in terms of the "action or forbearance" foreseeably induced by a promise.[271] Generally, therefore, reliance damages can be broken into two basic components: (1) the value of actions affirmatively and foreseeably taken in reliance on a promise;[272] and (2) the value of the opportunities the promisee foreseeably refrained from pursuing in reliance on a promise.[273]

With respect to nuptial promises, the value of steps that a promisee might affirmatively and foreseeably take in reliance on the promise generally will be measured by expenditures made in anticipation of the impending marriage on matters such as rings, wedding announcements, facilities rental charges, priests, ministers or rabbis, bridal gowns, photographers, florists, caterers, and musicians.[274] Since expenditures on

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268. *See supra* notes 258–59 and accompanying text.

269. *See also supra* parts IV.A, IV.B.1 (discussing how an award of reliance damages under section 90 is appropriate when at-will nature of a promise renders expectation interest incalculable). As earlier noted, it was indefensible under the traditional breach of promise action to allow recovery of reliance damages on top of expectation damages. *See supra* note 49.

270. *See Second Restatement, supra* note 22, § 90.

271. *Second Restatement, supra* note 22, § 90.

272. *See, e.g.*, Murphy & Speidel, *supra* note 229, at 245 (noting that reliance interest includes "out of pocket" expenditures).

273. *See supra* note 174.

274. See Bradley v. Somers, 322 S.E.2d 665, 666 (S.C. 1984) (detailing preparations taken by plaintiff); Stanard v. Bolin, 88 Wash. 2d 614, 619, 565 P.2d 94, 96–97 (1977) (discussing range of preparations that might be taken for a wedding). For a detailed discussion of costs associated with getting married, see Fields & Fields, *supra* note 131, *passim*.

In light of the general requirement that one act to avoid damages to the extent practicable, an aggrieved party, of course, would not be able to recover expenses described in this and the ensuing paragraph to the extent they are refundable or otherwise can be mitigated. *See Second Restatement, supra* note 22, § 350. A court awarding reliance damages also should be careful to reduce any

the average wedding in this country total more than $15,000,[275] providing legal protection for these costs is far from a token gesture. In some cases, section 90 provides protection for foreseeable acts of reliance on a promise by third persons,[276] even those who might not qualify as beneficiaries of the actionable promise.[277] Accordingly, the parents or guardians of a party aggrieved by breach of a promise to marry might be allowed recovery under section 90 to the extent they have incurred, on behalf of their son or daughter, any of the expenses itemized above. In essence, for purposes of section 90, their expenditures on matters directly related to the wedding ceremony or reception should be treated as if they were made by their son or daughter.[278] Under section 90, moreover, an aggrieved party should be able to recover the net value of any costs she foreseeably incurred in preparing to live with the breaching party in a marital home.[279]

The value of a promisee's forbearance might include, in appropriate cases, the foreseeable net loss of income sustained as a consequence of leaving employment in anticipation of a prospective marriage[280] or legal rights foregone in preparation for an ensuing marriage (such as alimony or other rights under a divorce decree).[281] For the reasons detailed in part IV.B.1, however, a party aggrieved by the breach of a nuptial promise

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recovery by the amount of any benefits retained by the aggrieved party as a result of acts of reliance by either party to the engagement. *See* Farnsworth, *supra* note 45, § 12.16, at 929 n.7.

275. *See supra* note 132 and accompanying text.

276. *Second Restatement*, *supra* note 22, § 90.

277. *See id.* § 90 cmt. c; Ravelo v. County of Hawaii, 658 P.2d 883, 887–88 (Haw. 1983) (holding that, when defendant breached a promise of at-will employment, section 90 also would allow protection of the reliance interest of the prospective employee's wife).

278. *Cf. Second Restatement*, *supra* note 22, § 90, cmt. c., illus. 7 (expenditures by aggrieved party's husband and aunt are treated like those by the aggrieved party).

279. *See* Stanard v. Bolin, 88 Wash. 2d 614, 619, 565 P.2d 94, 97 (1977) (noting that an aggrieved party's recovery might include expenses incurred in purchasing a house or buying furniture). These costs also might encompass, in an appropriate case, travel and moving expenses incurred by the promisee.

280. *See* 1 Clark, *supra* note 1, § 1.4, at 18 & n.10. *See also* Dukker v. Gidwitz, No. 94 L 04606 (Ill. Cir. Ct. Cook County filed 1994) (alleging relinquishment of job in Texas to move to Illinois); Beverlin v. Hartz, No. 93 L 11729 (Ill. Cir. Ct. Cook County filed 1993) (alleging relinquishment of employment in California to move to Illinois). *Cf. supra* notes 193–99 and accompanying text (discussing cases allowing plaintiffs to recover net loss of income when they rely on promises to enter into at-will employment contracts).

281. *Cf.* Boyd v. Boyd, 39 Cal. Rptr. 400 (Cal. Ct. App. 1964) (ruling heartbalm statute bars claim by plaintiff based on allegation that she relied on nuptial promise by relinquishing her right to receive certain government stipends); Dukker v. Gidwitz, No. 94 L 04606 (Ill. Cir. Ct. Cook County filed 1994) (alleging that, after extensive discussion with defendant, plaintiff relinquished her rights under a divorce decree by moving from Texas to Illinois in reliance on a promise to marry).

should not be able to recover damages for the loss of opportunity to marry others.

In comment b to section 90, the drafters of the *Second Restatement* suggested that, in deciding the extent to which justice requires enforcement of a promise, courts should look at, among other things, the degree to which the cautionary goal of contract law is met in a particular setting.[282] In a commercial setting, consideration plays a cautionary role by alerting a promisor that, before making a particular promise, she should consider it seriously.[283] Similarly, under the scheme of section 90, a promisor is alerted to the seriousness with which a promise should be taken by the degree to which it is likely to induce substantial reliance.[284] As shown in the preceding paragraphs, promises to marry are inherently likely to induce significant steps of reliance.

One salutary benefit of using section 90 to redress breaches of nuptial promises would be that it provides appropriate incentives for parties to take these promises seriously before making them and initiating an extensive cycle of reliance. Under section 90, liability will be a function of the timing and cumulative effect of steps of reliance. Since these steps of reliance usually will unfold gradually, promises to marry provide a particularly appropriate context for reliance to play a cautionary role. In most cases, the only significant act of reliance that might have taken place when a nuptial promise is made is the gift of an engagement ring.[285] Under a reliance-based approach, accordingly, there usually will be an extended period in an engagement during which a party may withdraw from the relationship with little or no liability.[286] But, inevitably, the hardship imposed by a decision to breach a nuptial promise will be more extensive the longer one waits to end an engagement. Therefore, as the wedding ceremony draws near and steps of reliance increase in number and significance, reliance-based liability will behoove a party who is having second thoughts about an impending marriage to discuss her

282. *Second Restatement, supra* note 22, § 90 cmt. b.

283. *See* Yorio & Thel, *supra* note 214, at 113 & n.13.

284. *Id.* at 124, 126–28.

285. *See* Cahners Research, *supra* note 132, at 5 (noting that 76% of respondents received or expected to receive an engagement ring immediately upon becoming engaged).

286. During the early stages of most engagements, the only significant liability imposed on the parties might be to return in restitution the engagement ring or other gifts conferred by the parties on one another in contemplation of the planned marriage. *See generally* Perovich, *supra* note 93, at 581–88.

irresolution with her betrothed as soon as possible.[287] One would suspect, for example, that rarely will a party who is not already secretly wavering commit the most serious of all betrayals of confidence—standing up a prospective mate at the altar on the day of the ceremony.[288] Indeed, by encouraging honest and forthright communication of uncertain feelings early in an engagement, recovery geared to the reliance interest might permit many relationships to be salvaged (through counseling, for example, when problems are brought honestly to the forefront) that might not be saved if a party procrastinated and abruptly ended the engagement close to or at the wedding ceremony. In short, reliance-based liability would encourage responsibility, honesty, and forthrightness, values that are likely to enhance the overall stability of interpersonal relationships headed towards marriage.[289] To the extent that promisors are shielded from virtually all liability, they will be less inclined to take promises to marry seriously. A goal of the law should be to teach and encourage people to act responsibly.[290] Heartbalm statutes, however, subvert this goal by trivializing the consequences of certain promises that the state should encourage to be taken seriously.

Comment b to section 90 also provides that, in setting damages to be awarded for breach of a promise, a court should consider the extent to which the evidentiary goal of contract law is met in a given setting.[291] Generally, in a commercial setting, consideration fulfills this goal by furnishing evidence of the parties' intent to be bound.[292] By providing some proof that a promise was in fact made, a promisee's reliance on a

287. In two cases, plaintiffs made unsuccessful attempts to avoid heartbalm statutes by arguing that defendants' failures to disclose their changes of heart in a timely manner should give rise to tort liability. *See* Ferraro v. Singh, 495 A.2d 946, 949 (Pa. Super. Ct. 1985) (arguing that tort claim by plaintiff, whose betrothed allegedly married someone else without informing her, was based on defendant's "lack of communication with her"); Waddell v. Briggs, 381 A.2d 1132, 1134 (Me. 1978) (alleging that defendant tortiously failed to disclose his intention not to attend wedding ceremony).

288. *See* Bradley v. Somers, 322 S.E.2d 665 (S.C. 1984) (holding defendant liable for damages when he informed prospective bride of his change of mind at the church on the day of the wedding); Waddel v. Briggs, 381 A.2d 1132 (Me. 1978) (ruling that defendant who failed to show up for the wedding was protected by heartbalm statute).

289. *Cf.* Larson, *supra* note 34, at 438 (arguing that broad recognition of tort of sexual fraud will enhance the quality of sexual relationships by "creating and supporting expectations of fairness and honesty between sexual partners").

290. Williams, *supra* note 151, at 188.

291. *Second Restatement*, *supra* note 22, § 90 cmt. b.

292. *See* Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 665–66 (Minn. 1960); 1 Arthur L. Corbin, *Corbin on Contracts* § 111, at 496 (1963).

promise can also play an important evidentiary role.[293] Accordingly, in cases in which a promisee's reliance is highly corroborative of the making of a promise, many modern courts permit a promissory-estoppel exception to provisions of the Statute of Frauds.[294] In these cases, the courts recognize that, when it is sufficiently probative of an alleged promise, reliance can substitute for the writing otherwise required by the Statute of Frauds.[295]

Although arguably exaggerated, one of the charges repeatedly leveled against the traditional breach-of-promise action was that courts applied lax evidentiary standards which sometimes allowed alleged promises to marry to be proved with fraudulent testimony.[296] Another principal advantage of reliance-based liability, then, is that it will significantly curtail opportunities for perjury in this context, because the very acts of reliance that provide the basis of recovery will also tend to prove that the promise to marry was, in fact, made by a defendant. For example, it is customary for an engagement ring to be given to a prospective bride.[297] In many cases, the conferral of the engagement ring will be the first significant act of reliance by either party.[298] When conferred and accepted, the engagement ring constitutes especially compelling evidence that both parties have made promises to marry. In addition, acts such as ordering bridal gowns, renting halls, hiring photographers, and ordering wedding announcements are not usually done by persons who do not intend to marry. Moreover, the names of the prospective bride and groom will be used in the course of making these very public arrangements. Reliance-based enforcement of promises to marry would make it exceedingly difficult to hale innocent defendants into court (or to blackmail them) on the basis of fraudulently alleged promises to marry.

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293. *See* Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1287 (7th Cir. 1986) (noting that reliance "adds something in the way of credibility to the mere say-so of one party"); Yorio & Thel, *supra* note 214, at 159 & n.332.

294. *See Second Restatement, supra* note 22, § 139; Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 Vand. L. Rev. 1383 (1983).

295. *See Second Restatement, supra* note 22, § 139(2)(c) (emphasizing that courts take into account the extent to which reliance "corroborates evidence of the making and terms of the promise").

296. *See supra* part I.C.

297. *See* Cahners Research, *supra* note 132, at 5 (showing that 98% of engaged brides had received, or expected to receive, an engagement ring). Interestingly, conferring engagement rings on prospective brides was not a convention in this country prior to the 1930s. Brinig, *supra* note 114, at 203.

298. *See supra* note 133 and accompanying text.

The imposition of reliance-based liability in relation to a breached nuptial promise can also be squared with another tenet of modern contract theory: the proposition that most parties who have not explicitly agreed to an allocation of a particular risk would prefer that it be allocated to the party in the best position to avoid the loss associated with that risk.[299] Generally, the party who breaches a promise to marry is in the best position to avoid the loss caused by the breach since that party could have refrained from making a nuptial promise until she was more certain of her decision to enter into marriage.[300] Again, the allocation of reliance losses to the breaching party is appropriate.

As observed in part IV.B.3 of this Article, economic theorists commend the refusal of courts to award punitive damages in contracts cases because such awards discourage efficient breaches. The fact that efficient breaches are socially beneficial, however, is not deemed to absolve breaching parties of all liability; they still must answer to aggrieved parties for damages actually caused by their breaches.[301] By analogy, even though a decision not to enter into an ill-fated marriage may be of some social benefit, parties who breach promises to marry nonetheless should be answerable to injured parties for the harm—the reliance—caused by breached nuptial promises.

Indeed, of the arguments against the traditional breach-of-promise action, there is only one that still might warrant some hesitation in awarding reliance damages under section 90 for breaches of nuptial promises. It can be argued that the imposition of any level of liability for broken promises to marry is to be shunned for fear of creating incentives for people to enter into loveless and unstable marriages rather than face possible lawsuits.[302] As a practical matter, when recovery is limited to the aggrieved party's reliance interest, as proposed in this Article, it is hard to imagine a party choosing to enter into a bad marriage simply to avoid being held liable for reliance damages. Moreover, the limitations on recovery that I propose make it unlikely that unscrupulous plaintiffs will

299. *See* Richard A. Posner, *Economic Analysis of Law* 93–94 (4th ed. 1992); Barnett & Becker, *supra* note 150, at 479.

300. *Cf.* Barnett & Becker, *supra* note 150, at 479–80 (arguing that employer who extends a promise of at-will employment is in the best position to avoid the loss caused by anticipatory breach of that promise, because it can refrain from making the promise until a final decision has been made).

301. *See* Farnsworth, *supra* note 45, § 12.3, at 847; Murphy & Speidel, *supra* note 229, at 1037.

302. *See supra* part I.C.

be able to use breach-of-promise suits brought under section 90 as tools of extortion.[303]

V. BREACH OF PROMISE TO MARRY AND PROTECTION OF THE RELIANCE INTEREST IN JURISDICTIONS WITH AND WITHOUT HEARTBALM STATUTES

For the reasons elaborated in part IV, there is no sound policy basis for disallowing the recovery of reliance damages caused by breach of a promise to marry. Interestingly, several prominent, early critics of the traditional breach-of-promise action would not object to this conclusion; they argued for the reformation of the breach-of-promise action in ways that, by and large, would have left intact protection of an aggrieved party's reliance interest.[304] Indeed, shortly after the enactment of the first heartbalm statutes, one of those critics specifically cautioned against interpreting the statutes to bar an aggrieved party from appropriate relief under promissory estoppel.[305]

Over recent years, a recurring issue in jurisdictions that abolished the breach-of-promise action has been whether (and, if so, to what extent) heartbalm statutes permit courts to award reliance damages to parties wronged by broken nuptial promises.[306] Unfortunately, in the cases

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303. *See supra* part IV.B.1.

304. *See* McCormick, *supra* note 1, § 111, at 405–06 (advocating only the elimination of expectation and punitive damages); Feinsinger, *supra* note 3, at 1000 (arguing that heartbalm statutes should not bar recovery "on ordinary principles of tort, promissory estoppel or quasi-contract"); Kane, *supra* note 91, at 71 (contending that a statute rejected by the New York legislature that would have limited recovery "to actual expenses paid or incurred in contemplation of the marriage" would have been desirable and effectual).

305. Feinsinger, *supra* note 3, at 1000.

306. *See* Snider v. Keenan, No. 92-J-39, 1994 Ohio App. LEXIS 535, at *1–3 (Ohio Ct. App. Feb. 11, 1994) (ruling that heartbalm statute barred recovery of financial loss incurred as a result of a promise to marry); Self v. Haddix, No. 9844, 1987 WL 12226 (Ohio Ct. App. June 2, 1987) (holding that heartbalm statute barred recovery of expenses incurred in preparation for wedding); Bruno v. Guerra, 549 N.Y.S.2d 925 (N.Y. Sup. Ct. 1990) (ruling that heartbalm statute barred recovery of $28,000 expended in preparation for wedding); Aronow v. Silver, 538 A.2d 851, 856 (N.J. Super. Ct. Ch. Div. 1987) (holding heartbalm statute precluded recovery of various wedding expenses); Ferraro v. Singh, 495 A.2d 946, 947–49 (Pa. Super. Ct. 1985) (denying recovery of expenditures made in anticipation of wedding); Piccininni v. Hajus, 429 A.2d 886, 888 (Conn. 1980) (stating that heartbalm statute barred recovery for expenditures made in anticipation of the wedding); Waddell v. Briggs, 381 A.2d 1132 (Me. 1978) (heartbalm statute held to bar recovery for monetary loss caused by breach of promise to marry); Boyd v. Boyd, 39 Cal. Rptr. 400 (Cal. Ct. App. 1964) (ruling that heartbalm statute barred action to recover damages in respect of government benefits foregone in reliance on nuptial promise).

In the *Self*, *Bruno*, *Aronow*, and *Waddell* cases, parents of the plaintiffs also sought to recover reliance expenditures made in preparation for the weddings. If these courts had been willing to

addressing this issue, courts have uniformly refused to protect the reliance interests of aggrieved plaintiffs.[307] In doing so, several courts have frankly acknowledged that their rulings may be unfair to these plaintiffs, but felt themselves constrained by the sweeping language that legislatures used in the pertinent heartbalm statutes.[308] As the court lamented in *Ferraro v. Singh*,[309] "the law does not provide a remedy for every wrong; some wrongs are simply not legally cognizable wrongs."[310]

To avoid the proscription of heartbalm statutes, the great majority of courts have employed either restitution or conditional gift theory to interpret heartbalm legislation as permitting equitable recovery of gifts one has given a former betrothed in contemplation of a marriage that does not take place.[311] Generally, for purposes of recovery under this rule, it does not matter which of the parties is responsible for the break up of an engagement.[312] Nevertheless, when confronted with the issue, most courts in heartbalm jurisdictions recognize one notable exception to this general gift recovery rule: a party who breaches a nuptial promise is barred from recovering an engagement ring conferred on the other party.[313] This exception demonstrates that, even in most jurisdictions that abolished the breach-of-promise action, courts have found a way to voice an enduring conviction that parties who dishonor promises to marry have committed wrongs for which they should be answerable, at least to some extent.

The problem with the approach taken by these courts, however, is that they end up imposing liability in a helter-skelter fashion that often bears

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recognize a promissory-estoppel exception to their states' heartbalm statutes, a strong case could be made for allowing parents or guardians to recover expenditures directly related to the wedding ceremony or reception. *See supra* part IV.B.4.

307. *See supra* note 306.

308. *See Ferraro*, 495 A.2d at 949–50; *Boyd*, 39 Cal. Rptr. at 403–04.

309. 495 A.2d 946 (Pa. Super. Ct. 1985).

310. *Id.* at 950.

311. *See* Perovich, *supra* note 93, at 588–95. The net result of this rule, of course, is indirectly to provide limited protection for a party's reliance expenditures to the extent they are used to buy these gifts. Under this rule, however, the bulk of wedding-related expenditures cannot be protected when a promise to marry is broken; by virtue of breaching the nuptial promise, a party avoids receiving the benefit of those expenditures. *See* Bruno v. Guerra, 549 N.Y.S.2d 925, 926 (N.Y. Sup. Ct. 1990).

In some cases, heartbalm statutes have been explicitly amended to direct courts to allow recovery of gifts given in contemplation of marriage. *See* Perovich, *supra* note 93, at 588, 591–93.

312. *See* Perovich, *supra* note 93, at 601–02, 604–06 (donor entitled to recover engagement ring if engagement is dissolved by agreement or if donee is at fault for ending engagement).

313. *See id.* at 602–04. *But see* Aronow v. Silver, 538 A.2d 851, 852 (N.J. Super. Ct. Ch. Div. 1987) (acknowledging majority rule, but electing to adopt minority position).

little relation to the damages actually caused by breach of a particular promise to marry. Pursuant to social custom, engagement rings usually are given only by men to women.[314] Women and their families, on the other hand, often bear a disproportionate share of the expenses related to the wedding ceremony. In heartbalm jurisdictions, therefore, there is the potential for gender-biased results when courts apply a rule of law that, for the most part, penalizes only men[315] who breach promises to marry (but then, in turn, limits their liability to the extent they may have invested in an engagement ring). In a prototypical situation, if a man breaches a promise to marry early in the engagement period, the value of the engagement ring probably will greatly exceed the value of the prospective bride's reliance interest, thereby giving her a windfall. Conversely, if the man's breach of promise occurs late in the engagement period, the value of the ring may be significantly less than the value of the prospective bride's reliance interest, thereby undercompensating her. The engagement ring constitutes, in effect, a form of court-imposed liquidated damages for the breach of a promise to marry. However, as is the case with a liquidated-damages clause agreed to by parties to a contract, a court's provision for damages should be deemed objectionable if, as shown here, it does not bear a reasonable relationship to a promisee's actual or anticipated damages.[316]

In jurisdictions that have abolished the breach-of-promise action, a preferable course of action would be for courts to acknowledge a promissory-estoppel exception to the heartbalm statutes and, in accordance with this Article, award reliance damages to any party aggrieved by breach of a nuptial promise. But, given the precedents described earlier,[317] courts appear unlikely to recognize a reliance-based exception to the heartbalm statutes. This is the case even though, as demonstrated in this Article, the recognition of such an exception would not lead to any of the evils historically associated with the traditional breach-of-promise action.[318] A glimmer of hope, however, is provided by the fact that, as far as can be gathered from a search of the cases, no

314. *See* Brinig, *supra* note 114, at 203.

315. I am assuming for present purposes, of course, that a party is not "penalized" in a real sense if a court, pursuant to the general rule, requires him or her to return a gift made in contemplation of marriage. Therefore, a woman who breaches a promise to marry and, accordingly, has to return an engagement ring has not in this sense been penalized.

316. *See Second Restatement*, *supra* note 22, § 356; Farnsworth, *supra* note 45, § 12.18, at 935–38.

317. *See supra* note 306.

318. *See supra* part IV.B.

plaintiff who has sought an award of reliance damages has explicitly argued that promissory estoppel provides a basis for circumventing the applicable heartbalm statute.[319] Accordingly, especially in jurisdictions that consider promissory estoppel an equitable theory of recovery,[320] there remains a possibility that courts might be receptive to an argument that they should recognize a promissory-estoppel exception to heartbalm legislation.

On the other hand, in jurisdictions that have not legislatively abolished the breach-of-promise action, courts ought to bring promises to marry within the mainstream of their common-law jurisprudence, by recognizing that promissory estoppel provides the best theoretical framework for assessing the optimal level at which to impose liability for breaches of promises to marry. Then, following the analysis in this Article, these courts should limit an injured party's recovery for breach of a nuptial promise to an award of reliance damages.

In both heartbalm and breach-of-promise action states, given troublesome case law precedent, state legislatures, rather than the courts, are probably the most promising venues in which to advocate reliance-based protection for those harmed by breached promises to marry. A number of decades have passed since the enactment of the first heartbalm statutes in the 1930s. At the time they were enacted, promissory estoppel was only beginning to emerge as a broadly recognized theory of liability.[321] Moreover, as previously noted, the heartbalm statutes were, in large part, inspired by misogynistic attitudes rather than a dispassionate evaluation of the overall fairness of the breach-of-promise action.[322] As we approach a new millennium, the time is ripe for legislatures in heartbalm jurisdictions to reconsider the extent to which it is appropriate to shield people from bearing responsibility for the harm caused by broken nuptial promises. To the extent they are persuaded by the analysis in this Article, these legislatures would amend heartbalm statutes to permit reliance-based recovery. They should do this either by making clear that the heartbalm statutes are not a bar to promissory estoppel or by including specific language in the heartbalm statutes consistent with the reliance-based approach advocated herein.

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319. Although the court in Boyd v. Boyd, 39 Cal. Rptr. 400 (Cal. Ct. App. 1964), mentioned promissory estoppel in passing, it did not directly address the doctrine's implications vis-à-vis the California heartbalm statute. *Id.* at 404 n.3.

320. *See supra* note 179 and accompanying text.

321. *See supra* part IV.A.

322. *See supra* notes 89–91 and accompanying text.

CONCLUSION

Despite more than a century of debate, no consensus has been reached in this society regarding the proper approach to breaches of promises to marry. This Article uses the common-law framework of promissory estoppel to propose an optimal solution that is not currently recognized in any American jurisdiction: parties who breach promises to marry should bear responsibility for their conduct, but only to the extent they have induced reliance by those to whom they were formerly engaged.