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# Intimacy and Economic Exchange

Jill Elaine Hasday



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# INTIMACY AND ECONOMIC EXCHANGE

*Jill Elaine Hasday*

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## INTIMACY AND ECONOMIC EXCHANGE

*Jill Elaine Hasday\**

*The current legal debate about the regulation of economic exchange between intimates mistakenly assumes that the law does not countenance such exchange to any notable extent. This assumption is so widely held that it unites otherwise disparate anticommodification and pro-market scholars. Both groups agree that the law maintains a strict boundary between economic exchange and intimacy, and disagree only on whether to applaud or criticize that boundary. Both overlook or underemphasize the degree to which the law already permits economic exchange within intimate relationships.*

*The current debate's focus on whether the law should enforce economic exchanges between intimates misses at least three critical questions: how the law already regulates such exchanges, for what purposes, and with what consequences. One of the primary ways that the law constitutes an intimate relation as intimate — recognizes its dignity and distinguishes it from other relationships — is by regulating how economic resources are exchanged within the relationship. But efforts to denote the sanctity of intimate relationships through the regulation of economic exchange appear to systematically perpetuate and exacerbate distributive inequality for women and the poor. These distributive consequences suggest a need to reexamine and reform how the legal system establishes the specialness of an intimate relationship. This Article begins that project.*

### INTRODUCTION

Legal scholars are currently engaged in an intense, but misdirected, debate about whether the law should sanction economic exchange within intimate relationships, such as relationships between spouses, unmarried sexual partners, or parents and their children. This debate operates on the mistaken premise that the law does not countenance economic exchange between intimates to any notable extent.

Indeed, that premise shapes the two main camps in the existing discussion about how the law governing intimate relationships should regulate economic exchange, the exchange of money or economic assets. One side of the debate applauds the law's decision to keep economic exchange out of intimacy. This anticommodification position argues that legalized "commodification" — legally sanctioned and regulated economic exchange — has no place in intimate relationships, and advocates maintaining the legal separation between economic exchange and intimacy. The other side of the debate criticizes the law's

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decision to keep economic exchange out of intimacy. This pro-market position argues for the legalized commodification of intimate relationships, contending that economic exchange in intimate relationships can be a source of freedom and equality for intimates.

Both the anticommodification and pro-market positions are grounded on a fundamental misconception about the actual state of the law. Both positions overlook or underemphasize the degree to which the law *already* permits economic exchange within intimate relationships. The relevant legal question is not, and has never been, whether intimates will exchange economic assets; it is when they will do so, how, why, in what forms, and to what ends. Economic exchange is not foreign to intimate relations, either as a matter of first principles or as a positive matter of legal regulation. One of the primary ways that the law constitutes intimate relations *as intimate* is by regulating how economic resources are exchanged within them.

This does not mean that intimate relationships can simply be reduced to a series of legalized economic exchanges, as the old feminist claim that marriage is legalized prostitution or more recent law and economics work might have it. The legal connection between intimate relationships and economic exchange is more subtle and complex than such a flattening notion can suggest. The law's regulation of economic exchange between intimates, which restricts but does not bar economic transfers, helps to define and construct the legal understanding of intimacy, and to mark the dignity and specialness of intimate relations. Phrased another way, the legal regulation of economic exchange between intimates produces intimacy and not just commodification.

This Article explores the legal regulation of economic exchange in marriage, nonmarital sexual relationships, and parent-child relationships. In doing so, it emphasizes the distinction between legal and social exchange. Economic assets circulate widely between intimates as a matter of social practice and customary understandings, but that does not mean that legal title, legal claim, or legal rights to those assets circulate as well. It is worth remembering that the field of social practice is different from the domain of legally enforceable rights, even if the legal system frequently follows social practice and helps construct social practice.

The social practices shaping the exchange of economic assets between intimates are one way in which intimacy is created. Within these social practices, economic exchange between intimates frequently takes the form of what we might call structured altruism. Economic exchange between intimates is not wholly spontaneous and involves bargaining as well as altruism. But economic exchange between intimates is spontaneous compared to other economic exchanges, marking a relationship differently.

The legal system also attempts to mark intimate relations as different, in part by claiming that they are separate from the market. The

law ostentatiously refuses to enforce certain kinds of economic exchange between intimates, while then diverting or channeling that exchange into other vehicles for securing material needs. Indeed, the legal system regularly acts on the unexamined conviction that the prohibition on certain kinds of exchange relations between intimates is an important mechanism through which the law preserves the distinctiveness and specialness of intimate relationships.

In fact, the law preserves something of enormous social value by insisting in its regulation of economic exchange between intimates on distinctions — between marriage and prostitution, for example, or between adopting a child and purchasing one — rather than accepting conflation. Differentiation is an important function of the law and can be valid and legitimate. At the same time, legal methods of differentiation that are suitable under some social conditions and circumstances may be unsuitable under others. In particular, the law's pursuit of expressive interests through the regulation of economic exchange between intimates is appropriately reconsidered and reformed when it sustains persistent status inequality or distributive injustice.

At present, legal efforts to denote the sanctity of intimate relationships by regulating and restricting the exchange of economic resources within them appear to systematically perpetuate and exacerbate distributive inequality for women and poorer people. The law's impulse to mark the dignity of intimate relationships should be affirmed. But the distributional consequences of this impulse suggest a need to rethink how the law marks the significance of intimate relations, in ways that will help those people who now tend to be deprived by legal acts of social sanctification. This Article begins that project.

## I. CONTEMPORARY ACCOUNTS OF THE LEGAL RELATIONSHIP BETWEEN INTIMACY AND ECONOMIC EXCHANGE

Many of our existing accounts of the legal regulation of economic exchange between intimates fit into one of two traditions. The first tradition, which adopts what might be termed the *anticommodification* position, contends that economic exchange, or “commodification,” is inappropriate within intimate relations and should not be legally enforced. This tradition wants to protect intimate relations from the invasion of legally sanctioned economic exchange. The second tradition, which adopts what might be termed the *pro-market* position, asserts that economic exchange in intimate relations can be a source of equality and liberty for intimates, and argues that the law should facilitate and promote such economic exchange. This tradition wants to introduce legally sanctioned economic exchange into intimate relations.

The two traditions have diametrically opposed normative commitments. One criticizes the prospect of legalized commodification within

intimate relations; the other endorses it. But both traditions essentially agree on their positive description of the current state of the law: that legalized commodification has not yet entered into intimate relations in a notable way, although it threatens or promises to do so soon. On the anticommodification side, Michael Walzer identifies marital and parental rights as spheres in which “monetary exchanges are blocked, banned, resented, conventionally deplored.”<sup>1</sup> Elizabeth Anderson warns of a newfound threat to the “parental norms” now governing “the ways we allocate and understand parental rights and responsibilities over children”: “the encroachment of the market into the sphere of reproductive labor.”<sup>2</sup> Scholars adopting a pro-market position, in turn, report “the existing law’s refusal or, at best, reluctance, to enforce” economic agreements between intimates,<sup>3</sup> and explain “that women’s key problem” in the family “has been too little commodification.”<sup>4</sup>

Both traditions overlook or understate the degree to which legally regulated and sanctioned economic exchange already exists within intimate relationships. As we will see, the crucial issue for the law has never been whether the legal system will regulate and sanction economic exchange between intimates; it is *how* the law will regulate and sanction this economic exchange, when, why, in what forms, and for what purposes.

This is not to say that the law reduces intimate relations to just economic exchanges, as a third tradition in describing the legal regulation of economic exchange between intimates would assert. The contention, for instance, that marriage is a form of legalized prostitution has roots in both feminist arguments from the nineteenth and twentieth centuries,<sup>5</sup> and the law and economics literature of more recent

<sup>1</sup> MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97 (1983); *see also id.* at 101–03.

<sup>2</sup> ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 189 (1993).

<sup>3</sup> LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 281 (1998).

<sup>4</sup> JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 118 (2000).

<sup>5</sup> *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1427–33 (2000) (describing nineteenth-century debates over marital rape in which feminists argued that marriage was a form of legalized prostitution); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 306–10 (1992) (describing nineteenth-century debates over abortion in which feminists argued that marriage was a form of legalized prostitution). Kathleen Barry offered a twentieth-century version of the claim:

Marriage and prostitution . . . are, in fact, the primary institutions through which sex is conveyed and in which female sexual slavery is practiced. Sex is purchased through prostitution and legally acquired through marriage; in both as well as outside each, it may be seized by force.

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years.<sup>6</sup> But the relationship between law, economic exchange, and intimate relations is more complicated, multifaceted, and subtle than such reductionist claims suggest.

The legal regulation of economic exchange between intimates does not simply produce commodification. It produces intimacy as well. One of the central ways that the law marks the intimacy of a relationship — recognizes its dignity and establishes its distinctiveness from other relationships — is by regulating how economic resources are exchanged within the relationship. The legal regulation of economic exchange between intimates, which controls but does not prohibit exchange, helps to create and maintain the legal understanding of intimacy.

## II. THE DISTINCTION BETWEEN SOCIAL AND LEGAL EXCHANGE

Revealing such features of the legal system will require us to examine the law's regulation of economic exchange in marriage, nonmarital sexual relationships, and parenthood. Before we do that, however, it is important to draw a distinction between *social exchange* and *legal exchange*.

By the social exchange of economic assets between intimates, I mean the exchange of economic assets between intimates that occurs as a matter of social practice and customary understandings. This exchange can take the form of discrete transactions in which specified assets are transferred or can occur over time as assets go back and forth within the context of a relationship.

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Marriage, as an institution of legalized love, presumes sex as a duty, a wife's responsibility. Regardless of the mutuality of feeling that may exist when two people enter marriage, it is often the case that after the original basis for relationship breaks down, men still assume sex as their automatic right.

KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 230 (1979); *see also* SIMONE DE BEAUVOIR, *THE SECOND SEX* 555–56 (H.M. Parshley ed. & trans., Vintage Books 1989) (1949) (“Viewed from the standpoint of economics, [the prostitute’s] position corresponds with that of the married woman. . . . For both the sexual act is a service; the one is hired for life by one man; the other has several clients who pay her by the piece.”).

<sup>6</sup> Richard Posner has presented a classic version of the claim in law and economics literature that marriage is a form of legalized prostitution:

In describing prostitution as a substitute for marriage in a society that has a surplus of bachelors, I may seem to be overlooking a fundamental difference: the “mercenary” character of the prostitute’s relationship with her customer. The difference is not fundamental. In a long-term relationship such as marriage, the participants can compensate each other for services performed by performing reciprocal services, so they need not bother with pricing each service, keeping books of account, and so forth. But in a spot-market relationship such as a transaction with a prostitute, arranging for reciprocal services is difficult. It is more efficient for the customer to pay in a medium that the prostitute can use to purchase services from others.

RICHARD A. POSNER, *SEX AND REASON* 131 (1992).

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By the legal exchange of economic assets between intimates, I mean the exchange of economic assets between intimates that is recognized and regulated by law. This exchange can also assume the form of a discrete event or a series of ongoing transactions.

Social and legal exchange are related, with each informing the other. The law often follows social practice and simultaneously helps shape social practice. But there are crucial differences between social and legal exchange. Social exchange is not enforced by the legal system and involves no transfer of legal right or entitlement. Legal exchange is enforced by the legal system and hinges on the transfer of legal right or entitlement. The law, moreover, does not always abide by social practices and customary understandings. Intimates may be constantly exchanging economic assets as a matter of social practice and individual negotiation. Money and goods may be flowing, for example, between husbands and wives, and between parents and children. Yet legal title, claim, or right to those assets is not necessarily circulating as well. The agreements intimates make between themselves may be unenforceable in a court of law, and this unenforceability may in turn influence the frequency and nature of such agreements.

At present, we have a much richer account of the social exchange of economic assets between intimates. The anthropological literature on gift exchange, for instance, demonstrates how the social practices governing the exchange of economic assets between intimates can be a significant part of what marks a relationship as intimate and differentiates it from other relationships. As this work has shown, the social exchange of economic assets between intimates often assumes the form of what one could term *structured altruism*. A classic definition of altruism might be that it is a spontaneous act done selflessly for the welfare of another. Structured altruism, however, is neither entirely spontaneous nor entirely selfless. Anthropologists have discovered that many economic assets are exchanged between intimates in the form of gifts. This practice of gift exchange, though, involves at least implicit bargaining and self-interest in addition to altruism. Most gifts are given under some degree of social compulsion and with the expectation of receiving something of equivalent or greater value in return. The reciprocation of gifts — whether in the form of material goods and services or social rewards, such as higher social status — is virtually obligatory as a matter of social practice.<sup>7</sup> Nonetheless, gift exchange is

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<sup>7</sup> See, e.g., PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 4 (1964) (“A person for whom another has done a service is expected to express his gratitude and return a service when the occasion arises.”); MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES 3 (W.D. Halls trans., W.W. Norton 1990) (1950) (“In Scandinavian civilization, and in a good number of others, exchanges and contracts take place in the form of presents; in theory these are voluntary, in reality they are given and reciprocated obligato-



spontaneous relative to alternate forms of economic exchange, such as exchange specified and enforced by legal contract or legal code. It marks a relationship differently, signifying and helping to establish the closeness of the connection between the giver and the recipient.

Viviana Zelizer's sociological investigations similarly reveal that the social practices surrounding monetary transfers between intimates are an important means by which the nature of an intimate relationship is identified and enacted.<sup>8</sup> Zelizer has done fascinating work analyzing how people think of their monetary transfers within "erotically tinged" relationships differently, and treat them differently, depending on their understanding of the precise nature of the relationship at issue.<sup>9</sup> So, for instance, a person who transfers money to his sexual partner might understand that money to be a form of compensation if he considers his partner a prostitute, and the money to be a gift if he considers his partner a girlfriend. This person, moreover, is likely to employ all sorts of "symbols, rituals, practices, and physically distinguishable forms of money" to indicate which of his monetary transfers should be understood as compensation, which should be understood as a gift, and which should be understood as something else, such as an entitlement.<sup>10</sup> In so doing, he uses his monetary transfers to denote the specific nature of his various intimate relationships.<sup>11</sup>

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rily."); *id.* at 14 ("[E]verything – food, women, children, property, talismans, land, labour services, priestly functions, and ranks – is there for passing on, and for balancing accounts."); Mary Douglas, *Foreword* to *id.* at vii, ix ("There are no free gifts; gift cycles engage persons in permanent commitments that articulate the dominant institutions."); C.A. Gregory, *Gifts*, in 2 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 524, 524 (John Eatwell et al. eds., 1987) ("Anthropologists stress that while gifts appear to be voluntary, disinterested and spontaneous, they are in fact obligatory and interested.")

<sup>8</sup> See VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 3 (2005) ("[A]ll of us use economic activity to create, maintain, and renegotiate important ties — especially intimate ties — to other people."); Viviana A. Zelizer, *Intimate Transactions*, in *THE NEW ECONOMIC SOCIOLOGY: DEVELOPMENTS IN AN EMERGING FIELD* 274, 274 (Mauro F. Guillén et al. eds., 2002) ("Transfers of money, far from occurring in an impersonal world, regularly depend on and define intimate social relations.")

<sup>9</sup> Viviana A. Zelizer, *The Purchase of Intimacy*, 25 *LAW & SOC. INQUIRY* 817, 818–19 (2000).

<sup>10</sup> *Id.* at 819.

<sup>11</sup> See *id.* at 842 ("[T]he view of Differentiated Ties claims that monetary transfers and intimate relations, including sexual ties, coexist in a wide variety of contexts and relationships, each relationship marked by a distinctive form of payment. More generally, this alternative approach argues that people pour unceasing effort into distinguishing qualitatively different social relationships — including their most intimate ties — from each other by means of well-marked symbols, rituals, and social practices."); see also ZELIZER, *supra* note 8, at 41 ("[This book's] analysis of connected lives shows that across a wide range of intimate relations, in the provision of personal care, and in the complexities of household life, people manage the mingling of economic activity and intimacy by creating, enforcing, and renegotiating extensive differentiation among social ties, their boundaries, and their appropriate matching with commercial media and transactions of production, consumption, and distribution.")

This anthropological and sociological work, however, focuses on social practices and customary understandings, rather than on the legal exchange of economic assets between intimates. For example, Zelizer has insightfully explored the social practices that shape the economic assets wives are allowed to control in marriage as a matter of customary understandings. She reports that most married couples do not treat their income as an undifferentiated whole. Instead, they carefully earmark and designate specific parts of their income for specific purposes under a specific family member's control, often after considerable bargaining.<sup>12</sup> These social practices are important, and they help structure the circulation of economic assets and access to wealth in marriage. But although economic assets may be circulating to wives as a matter of social practice and individual negotiation, this does not mean that wives also have legally enforceable claims to those economic assets.

The subject of the *legal exchange* of economic assets between intimates remains underexplored, and it is to this subject that we now turn.

### III. THE LEGAL EXCHANGE OF ECONOMIC ASSETS BETWEEN INTIMATES

Like many of our social practices, the legal system is also eager to differentiate intimate relations from other relationships. One prominent way that the law attempts this differentiation is by contending that intimate relations occupy a sphere of life removed from the market. The law conspicuously refuses to enforce specific kinds of economic exchange between intimates, while then sanctioning other economic exchanges that respond to intimates' material needs. Indeed, it is a tenet of our legal system that prohibiting certain forms of economic exchange between intimates is a crucial means by which the law recognizes the differences between relationships and preserves the specialness and dignity of intimate relations.

Consider the law governing economic exchange in marriage, non-marital sexual relationships, and parenthood.

#### A. Marriage

The law loudly denies enforcement to a variety of economic exchanges between husbands and wives. Courts explain that enforcing these exchanges would inappropriately insert the market into marital relations and, in so doing, undermine the distinctiveness and the dignity of marriage.

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<sup>12</sup> See VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 40-66 (1994); see also ZELIZER, *supra* note 8, at 218-21.

For example, interspousal contracts for domestic services are unenforceable.<sup>13</sup> In these contracts, one spouse agrees to perform household labor for the other spouse in exchange for monetary or other economic compensation. Some of the explanations that courts offer for their refusal to enforce such contracts reason in terms of the law governing market transactions.<sup>14</sup> Courts contend, for instance, that interspousal contracts for domestic services are unenforceable because each spouse owes a preexisting duty to provide domestic services to the other and thus supplies no consideration in contracting to perform those services.<sup>15</sup> However, another theme in the case law, increasingly prominent in recent years, holds that it is contrary to public policy to have market relations in the family and to apply the law governing market transactions to interspousal agreements. Courts declare that enforcing interspousal contracts for domestic services would violate the norms of love that are supposed to govern marital relations, norms that assertedly require wholly altruistic exchange. They stress that they are upholding the separation between marriage and the market to respect and safeguard the specialness of the marital relation. Spouses cannot “be treated just like any other parties haggling at arm’s length,” courts explain.<sup>16</sup> To enforce interspousal contracts for domestic services would be “to place the marriage relation on too much of a commercial basis, and to treat the marital relation as any other business

<sup>13</sup> See, e.g., *Mays v. Wadel*, 236 N.E.2d 180, 183 (Ind. App. 1968) (“It is the law of this State that between husband and wife, while they are living together as such in a common household, that there can be no express or implied contract for compensation or payment for any services or acts performed or rendered in and about the home by either of them in the common support of that household.”); cases cited *infra* notes 15–18; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2197 n.248 (1994) (collecting cases).

<sup>14</sup> See Siegel, *supra* note 13, at 2198–2206 (discussing the “contractarian and anticontractarian justifications” that courts advance for refusing to enforce interspousal contracts for domestic services).

<sup>15</sup> See *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) (“Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case.”); *Dep’t of Human Res. v. Williams*, 202 S.E.2d 504, 507 (Ga. Ct. App. 1973) (“The services undertaken by the wife, which were not sufficient consideration, were ‘ordinary household duties.’”); *State v. Bachmann*, 521 N.W.2d 886, 888 (Minn. Ct. App. 1994) (“Bachmann has an obligation to care for her children regardless of whether she is paid to do so.”); *Church v. Church*, 630 P.2d 1243, 1250 (N.M. Ct. App. 1981) (“Under Virginia law a wife has a duty to provide household services to her husband and the husband has a duty to support his wife. . . . Having a duty to provide the services of a wife, those services are not a basis for relief for fraud, or breach of contract, or for an equitable award based on unjust enrichment.” (citing *Hall v. Stewart*, 116 S.E. 469 (Va. 1923))); *Kuder v. Schroeder*, 430 S.E.2d 271, 273 (N.C. Ct. App. 1993) (“Under the law of this State, there is a personal duty of each spouse to support the other, a duty arising from the marital relationship, and carrying with it the corollary right to support from the other spouse. So long as the coverture endures, this duty of support may not be abrogated or modified by the agreement of the parties to a marriage.” (citation omitted)).

<sup>16</sup> *Borelli*, 16 Cal. Rptr. 2d at 20.

association, whereby each expects to obtain material advantage from the marriage. This is not, in our opinion, the true concept of the relation.”<sup>17</sup> “[E]ven if few things are left that cannot command a price, marital support remains one of them.”<sup>18</sup>

Interspousal contracts about sex are also unenforceable. The case law on this subject is much less developed than the jurisprudence on interspousal contracts for domestic services. But in denying enforcement to an interspousal contract about sex, a court has again emphasized the need to differentiate marriage from other relationships and preserve its uniqueness. The court held that sex is one of the “marital obligations” that spouses cannot agree to “repeal or amend,” and explained that this inability to alter obligations by contract distinguishes marriage from other, commercial relations between people who might “agree to live in the same building,” such as “domestic employer-employee, or landlord-tenant.”<sup>19</sup>

The same effort to set marriage apart from other relationships and affirm its importance is visible in the many cases that refuse to treat human capital as marital or community property subject to distribution at divorce. In these divorce cases, one spouse has helped the other spouse acquire significant human capital by, for instance, financing the other spouse’s professional education, and the supporting spouse now claims an interest in the value of the professional degree or other human capital.<sup>20</sup> The courts that hold that human capital is not marital or community property to be valued and divided at divorce sometimes use the language of economics to explain their decisions, contending that human capital is too hard to appraise, too speculative in value, and too ephemeral in nature.<sup>21</sup> But as frequently, these courts insist

<sup>17</sup> *Dade v. Anderson*, 439 S.E.2d 353, 356 (Va. 1994) (quoting *Alexander v. Kuykendall*, 63 S.E.2d 746, 747 (Va. 1951)) (internal quotation mark omitted).

<sup>18</sup> *Borelli*, 16 Cal. Rptr. 2d at 20; see also *In re Estate of Lord*, 602 P.2d 1030, 1031 (N.M. 1979) (“It is the policy of this state to foster and protect the marriage institution. It is not the policy of the state to encourage spouses to marry for money.”).

<sup>19</sup> *Favrot v. Barnes*, 332 So. 2d 873, 875 (La. Ct. App.), *rev’d in part on other grounds*, 339 So. 2d 843 (La. 1976).

<sup>20</sup> See, e.g., *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (“The case at bar presents the common situation where one spouse has foregone the immediate enjoyment of earned income to enable the other to pursue an advanced education on a full-time basis. Typically, this sacrifice is made with the expectation that the parties will enjoy a higher standard of living in the future. Because the income of the working spouse is used for living expenses, there is usually little accumulated marital property to be divided when the dissolution occurs prior to the attainment of the financial rewards concomitant with the advanced degree or professional license.”).

<sup>21</sup> See *Wisner v. Wisner*, 631 P.2d 115, 122 (Ariz. Ct. App. 1981) (“[E]ducation is an intangible property right, the value of which, because of its character, cannot properly be characterized as property subject to division between the spouses.”); *In re Marriage of Olar*, 747 P.2d 676, 679–80 (Colo. 1987) (en banc) (“The Maryland Court of Appeals noted that . . . the future enhanced income resulting from a professional degree is a ‘mere expectancy.’ The New Jersey Supreme Court stated that ‘[a] professional license or degree represents the opportunity to obtain an amount of

that the best way to recognize and uphold the specialness of the marital relationship is by refusing to reason about the exchanges between husbands and wives in economic terms. Courts contend that a legal regime that recognized human capital as marital or community property divisible at divorce would reduce marriage to an economic relation and an economic bargain. It would treat spouses “as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other’s professional training, expecting a dollar for dollar return.”<sup>22</sup> It “would diminish the individual personalities of the husband and wife to economic entities and reduce the institution of marriage to that of a closely held corporation.”<sup>23</sup>

Yet while the law of marriage directs attention to its refusal to enforce certain economic transactions between husbands and wives, it does not deny legal recognition to all forms of economic exchange within marriage. Instead, the law enforces economic exchanges within marriage selectively. It establishes that spouses’ material needs may be met in some ways, but not others. This legal practice is meant to recognize the distinctive nature of marriage. It also, of course, creates and determines the nature of the marital relationship at the same time.

The economic exchanges that the law upholds within marriage tend to share one or two characteristics. First, courts tend to understand these exchanges as recognizing the joint interests of husbands and wives, rather than promoting the separate, and potentially conflicting, interests of one spouse against the other. Second, the sanctioned economic exchanges tend not to take the form of direct, specific

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money only upon the occurrence of highly uncertain future events.’ . . . We agree with this analysis, and therefore reaffirm our holding . . . that an educational degree is not marital property.” (alteration in original) (citation omitted) (quoting *Archer v. Archer*, 493 A.2d 1074, 1079 (Md. 1985); *Mahoney v. Mahoney*, 453 A.2d 527, 531 (N.J. 1982)); *Mahoney*, 453 A.2d at 531–32 (“A professional license or degree is a personal achievement of the holder. It cannot be sold and its value cannot readily be determined. A professional license or degree represents the opportunity to obtain an amount of money only upon the occurrence of highly uncertain future events. . . . The value of a professional degree for purposes of property distribution is nothing more than the possibility of enhanced earnings that the particular academic credential will provide. . . . The amount of future earnings would be entirely speculative.”); *Hoak v. Hoak*, 370 S.E.2d 473, 476–77 (W. Va. 1988) (“[T]he value of a professional degree is the value of the enhanced earning capacity of the degree-holder. Not only is that value speculative, but also it represents money or assets earned *after* dissolution of the marriage.” (footnote omitted)); *DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980) (“We cannot agree . . . that equity is served by attempting to place a dollar value on something so intangible as a professional education, degree, or license.”).

<sup>22</sup> *DeWitt*, 296 N.W.2d at 767.

<sup>23</sup> *Pyeatte v. Pyeatte*, 661 P.2d 196, 207 (Ariz. Ct. App. 1982); *see also Mahoney*, 453 A.2d at 533 (“Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, ‘marriage is a shared enterprise, a joint undertaking . . . in many ways it is akin to a partnership.’” (omission in original) (quoting *Rothman v. Rothman*, 320 A.2d 496, 501 (N.J. 1974)); *Hoak*, 370 S.E.2d at 478 (“Marriage is not a business arrangement, and this Court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household.”).

transfers — of this compensation for that work — and in this way bear less resemblance to prototypical economic transfers in the market.

The doctrine of necessities, for instance, provides that one spouse has no right to sue the other spouse directly for support, but does have a marital support right that is enforceable through third parties. Under the doctrine, if one spouse purchases a necessity from a third party, such as a merchant or a hospital, the third party may sue the other spouse for payment. As a practical matter, the doctrine of necessities enforces economic exchanges between spouses. The doctrine gives each spouse a legally enforceable right to receive support from the other spouse in return for marital services rendered over the course of the relationship. The courts upholding this doctrine, however, stress its compatibility with the notion that a married couple should be treated as a unit before the law. Indeed, the doctrine of necessities makes the debt of one spouse the debt of the other, while prohibiting direct interspousal litigation. As courts endorsing the doctrine of necessities explain, the doctrine benefits “the institution of marriage” by recognizing that “marriage involves shared wealth, expenses, rights, and duties.”<sup>24</sup> The doctrine upholds the “view that ‘marriage is a shared enterprise, a joint undertaking,’”<sup>25</sup> and thus “flows from the nature of the marital relationship itself.”<sup>26</sup>

Similarly, a person whose spouse is injured by a third party may sue the third party for the loss of marital consortium and obtain damages for injuries to the marital relationship, including the loss or diminishment of marital sex.<sup>27</sup> The marital consortium doctrine means

<sup>24</sup> N.C. Baptist Hosps., Inc. v. Harris, 354 S.E.2d 471, 474 (N.C. 1987).

<sup>25</sup> Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003, 1010 (N.J. 1980) (quoting *Rothman*, 320 A.2d at 501); see also *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1152 (R.I. 1994) (“We embrace the New Jersey court’s characterization of a modern marriage as a ‘shared enterprise, a joint undertaking . . .’” (quoting *Jersey Shore Med. Ctr.-Fitkin Hosp.*, 417 A.2d at 1010)).

<sup>26</sup> *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 5 (Ind. 1993).

<sup>27</sup> See, e.g., *Schreiner v. Fruit*, 519 P.2d 462, 465 (Alaska 1974) (“A claim for relief for loss of consortium provides a means of recovery for an injury not otherwise compensable. It should be recognized as ‘compensating the injured party’s spouse for interference with the continuance of a healthy and happy marital life.’” (quoting *Millington v. Se. Elevator Co.*, 239 N.E.2d 897, 900 (N.Y. 1968))); *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 684 (Cal. 1974) (in bank) (“The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, affection, society, sexual relations, solace and more.” (quoting *Millington*, 239 N.E.2d at 899) (internal quotation marks omitted)); *Lacy v. G.D. Searle & Co.*, 484 A.2d 527, 532 (Del. Super. Ct. 1984) (“Generally, damages for loss of consortium . . . encompass loss of society, companionship, affection, and sexual relations.”); *Olsen v. Bell Tel. Labs., Inc.*, 445 N.E.2d 609, 613 (Mass. 1983) (“Consortium includes the companionship, affection, and sexual enjoyment of one’s spouse.”); *Nicholson v. Hugh Chatham Mem’l Hosp., Inc.*, 266 S.E.2d 818, 819 (N.C. 1980) (“[T]he essence of consortium today has become the mutual right of a husband and wife to the society, companionship, comfort and affection of one another. Unquestionably, this society and companionship includes a sexual component.” (citations omitted)); *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230, 231 (Ohio 1970) (“‘Consortium’ consists of society, ser-

that when a married person is injured, that injured person is not entitled to receive all the monetary compensation the tortfeasor pays for the injury. Some of the compensation will go to the injured person's spouse, who is entitled to be paid for being unable to have sex with the injured person. This willingness to direct some of the compensation the tortfeasor pays to the injured person's spouse as economic compensation for the loss or diminishment of marital sex stands in stark contrast to the courts' refusal to enforce interspousal contracts about marital sex.<sup>28</sup> Yet the marital consortium doctrine does not allow direct suits between spouses that would transfer money directly from one spouse to the other for the loss of sex.<sup>29</sup> Instead, the marital consortium doctrine allows each spouse to bring suit against the third party tortfeasor. In this posture, courts hold that monetary compensation for the loss of sexual services in marriage is appropriate, explaining that money "is the only known means" of compensation that the legal system has available.<sup>30</sup> In fact, courts reason that the right to sue for the loss of consortium, which is available to spouses but often unavailable

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vices, sexual relations and conjugal affection which includes companionship, comfort, love and solace."); *Peeples v. Sargent*, 253 N.W.2d 459, 471 (Wis. 1977) ("Consortium involves a broad range of elements such as love, companionship, affection, society, sexual relations, and the right of support or the performance of marital services, any one of which is sufficient to constitute a cause of action." (quoting *Schwartz v. Milwaukee*, 195 N.W.2d 480, 484 (Wis. 1972)) (internal quotation marks omitted)).

<sup>28</sup> See *supra* text accompanying note 19.

<sup>29</sup> See *Cook v. Hanover Ins. Co.*, 592 N.E.2d 773, 775 (Mass. App. Ct. 1992) ("We are not aware of a case in any jurisdiction which has allowed one spouse to sue the other for loss of consortium.")

<sup>30</sup> *Rodriguez*, 525 P.2d at 682 (quoting *Millington*, 239 N.E.2d at 902) (internal quotation marks omitted); see also *Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 264 (Conn. 1979) ("The difficulty of assessing damages for loss of consortium is not a proper reason for denying the existence of such a cause of action inasmuch as the 'logic of [that reasoning] would also hold a jury incompetent to award damages for pain and suffering.'" (alteration in original) (quoting *Millington*, 239 N.E.2d at 902)); *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555, 563 (Mass. 1973) ("The marital interest is quite recognizable and its impairment may be definite, serious, and enduring, more so than the pain and suffering or mental or psychic distress for which recovery is now almost routinely allowed in various tort actions. The valuation problem here may be difficult but is not less manageable."); *Clouston*, 258 N.E.2d at 234 ("The argument is likewise made that a loss of consortium, exclusive of loss of services, is not measurable by a jury and, therefore, such an action should not be allowed to a wife. Yet, in the recognized action for loss of consortium based upon an intentional tort, this question must be presented to and decided by the jury, whether a husband or a wife brings the action."); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978) ("It has been argued that the deprived spouse's loss of consortium is an injury that is too indirect to be compensated because the elements involved are too intangible or conjectural to be measured in pecuniary terms by a jury. We do not agree, for to do so would mean that a jury would also be incompetent to award damages for pain and suffering. The character of harm to the intangible or sentimental elements is not illusory. The loss of companionship, emotional support, love, felicity, and sexual relations are real, direct, and personal losses. It is recognized that these terms concern subjective states which present some difficulty in translating the loss into a dollar amount. The loss, however, is a real one requiring compensation . . ." (citations omitted)).

to people in other relationships, acknowledges the specialness of the marital relationship, which one consortium decision has called “the primary familial interest recognized by the courts.”<sup>31</sup>

In addition, prenuptial and postnuptial agreements about property distribution are enforceable. Husbands and wives have wide-ranging authority to contract about how to distribute their property during marriage and at divorce. Prenuptial and postnuptial agreements about property distribution can obviously be a tremendous source of conflict both when negotiated and when enforced, and they were originally unenforceable at common law as contrary to public policy.<sup>32</sup> But modern courts contend that prenuptial and postnuptial agreements about property distribution may actually encourage marriage (if the parties are not already married) and facilitate the stableness of a marital relationship in an era in which no-fault divorce is available and divorce rates are high. As these courts explain, “without the ability to order their own affairs as they wish, many people may simply forgo marriage for more ‘informal’ relationships.”<sup>33</sup> Once a couple is married, moreover, “a contract which defines the expectations and re-

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<sup>31</sup> *Whittlesey*, 572 S.W.2d at 666; *see also Lacy*, 484 A.2d at 532 (“The spouse who asserts loss of consortium need not have any physical proximity to the site of the injury because the enveloping status which arises from that marriage status qualifies the spouse to assert the action. This status contrasts with even other family relationships, such as that of parent and child, where no comparable cause of action exists and each non-spouse family member must meet the ‘zone of danger’ test.”); *Nicholson*, 266 S.E.2d at 822–23 (“If a loss of consortium is seen not only as a loss of service but as a loss of legal sexual intercourse and general companionship, society and affection as well, by definition any damage to consortium is limited to the legal marital partner of the injured. Strangers to the marriage partnership cannot maintain such an action, and there is no need to worry about extension of proximate causation to parties far removed from the injury.” (footnote omitted)).

<sup>32</sup> *See Brooks v. Brooks*, 733 P.2d 1044, 1048 (Alaska 1987) (“The traditional common law view was that prenuptial agreements in contemplation of divorce . . . were inconsistent with the sanctity of marriage and the state’s interest in preserving marriage and maintaining the financial security of divorced persons.”); *Posner v. Posner*, 233 So. 2d 381, 382 (Fla. 1970) (“It has long been the rule in a majority of the courts of this country and in this State that contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy.”); *Scherer v. Scherer*, 292 S.E.2d 662, 664 (Ga. 1982) (“In the past, there has been virtually unanimous agreement in all jurisdictions that prenuptial agreements purporting to settle alimony in the event of a future divorce are void ab initio as against public policy since they were considered to be in contemplation of divorce.” (quoting Robert O. Davies, *Validity of Prenuptial Contracts Which Fix Alimony*, 14 GA. ST. B.J. 18, 18 (1977)) (internal quotation marks omitted)); *Bratton v. Bratton*, 136 S.W.3d 595, 599–600 (Tenn. 2004) (“Although postnuptial agreements were void and of no effect under the common law, most states to address the issue have now determined such agreements to be valid.”).

<sup>33</sup> *Brooks*, 733 P.2d at 1050; *see also Newman v. Newman*, 653 P.2d 728, 731 (Colo. 1982) (en banc) (“Undeniably, some marriages would not come about if antenuptial agreements were not available. This may be increasingly true due to the frequency of marriage dissolutions in our society, and the fact that many people marry more than once.”).



sponsibilities of the parties promotes rather than reduces marital stability.”<sup>34</sup>

A spouse also has a right to alimony at divorce, if she can demonstrate need, an inability to support herself, and that the wealthier spouse can afford to pay the alimony after meeting his own needs.<sup>35</sup> Alimony is an economic exchange of services rendered in marriage for support after marriage, but in a number of ways it does not resemble typical economic exchanges in the market. A key feature of alimony is that it is not based on anything specific the recipient did during marriage, except be married and (sometimes) not be at fault for the divorce.<sup>36</sup> Alimony does not assume the form of a direct and exact

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<sup>34</sup> *Valid v. Valid*, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972); see also *In re Marriage of Dawley*, 551 P.2d 323, 333 (Cal. 1976) (in bank) (“Neither the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage.”); *Newman*, 653 P.2d at 732 (“[S]uch planning brings a greater stability to the marriage relation by protecting the financial expectations of the parties, and does not necessarily encourage or contribute to dissolution.”); *In re Marriage of Boren*, 475 N.E.2d 690, 694 (Ind. 1985) (“Two of the significant changes in the institution of marriage and marriage laws in recent years are the increase in the number of divorces and the implementation of ‘no-fault’ divorce laws. A natural consequence of the increased number of divorces is the increased incidence of subsequent marriages. As more and more persons, especially those who are older and have children from previous marriages, enter into subsequent marriages, they may wish to protect their property interests for the benefit of themselves and/or their children. Such agreements can only promote or facilitate marital stability by settling the expectations and responsibilities of the parties.”); *In re Estate of Beat*, 130 N.W.2d 739, 746 (Wis. 1964) (“In upholding the validity of this . . . postnuptial agreement we are embracing a policy that favors marriage and works for its stability.”).

<sup>35</sup> See *Noah v. Noah*, 491 So. 2d 1124, 1127 (Fla. 1986) (“[T]he primary standards to be used in fashioning an equitable alimony award are the needs of one spouse and the ability of the other to pay.”); *In re Marriage of Hochleutner*, 633 N.E.2d 164, 168 (Ill. App. Ct. 1994) (“Section 504(a) further provides that maintenance may be paid from the income or property of the other spouse after consideration of all the relevant factors including, among others, such things as the income and property of each party; the needs of each party; the present and future earning capacity of each party; any impairment of a party having foregone or delayed education due to the marriage; the time necessary to enable the party seeking maintenance to acquire appropriate education, training and employment; the standard of living established during the marriage; the duration of the marriage; the age, physical and emotional condition of both parties; and any other factor that the court expressly finds to be just and equitable.”); *Heins v. Ledis*, 664 N.E.2d 10, 16 (Mass. 1996) (“An award of alimony is improper absent a finding of financial need on the part of the recipient spouse.”); *Perlberger v. Perlberger*, 626 A.2d 1186, 1203 (Pa. Super. Ct. 1993) (“Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor’s ability to pay.”); *Ramsbottom v. Ramsbottom*, 542 A.2d 1098, 1100 (R.I. 1988) (“This court has consistently held that alimony is considered a rehabilitative tool designed to provide economic support for a dependent spouse and is based upon need.”); *Roberts v. Roberts*, 835 P.2d 193, 198 (Utah Ct. App. 1992) (“The trial court must consider three factors in fixing a reasonable alimony award to the receiving spouse: [1] the financial conditions and needs of the receiving spouse; [2] the ability of the receiving spouse to produce a sufficient income; and [3] the ability of the supporting spouse to provide support.”).

<sup>36</sup> See *Burns v. Burns*, 847 S.W.2d 23, 27 (Ark. 1993) (“Fault is not a factor in deciding whether to award alimony unless it relates to need or the ability to pay. The fault of the wife in this case is not relevant to the decision to award alimony to her. The ability of a party to pay and

transfer of payment for labor. A spouse does not have to perform any particular work to receive alimony, and even if she does undertake significant labor for her spouse during marriage, she will not necessarily receive alimony at divorce. Instead, her current situation must satisfy requirements, such as need and the inability to provide for her own support, that are much more loosely connected to work completed within and outside of marriage. As courts note, “[a]limony is not a matter of right.”<sup>37</sup> Alimony has status rather than contract as its model.

In sum, the law of marriage is centrally concerned with distinguishing marriage from other relationships. It is confident, moreover, that one of the best ways to differentiate marriage is to proclaim marriage’s separation from the market and to refuse enforcement to certain economic exchanges between husbands and wives. The law of marriage prominently denies recognition to some interspousal economic exchanges, while simultaneously enforcing other economic exchanges that the legal system understands to be more compatible with the distinctiveness and specialness of the marital relationship.

### *B. Nonmarital Sexual Relationships*

The law governing nonmarital sexual relationships also devotes enormous energy to differentiating between relationships. It too operates on the assumption that a critical way to establish the worth and dignity of an intimate relation is to stress the relation’s detachment from the market and to prohibit some forms of economic exchange between intimates.

Most notably, courts are intent on distinguishing nonmarital sexual relationships from prostitution and so ardently declare their refusal to enforce contracts between unmarried sexual partners that use sex as consideration. In reviewing any contract between unmarried sexual

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the need of the other party are primary factors to be considered in awarding alimony.” (citation omitted); *Ianitelli v. Ianitelli*, 502 N.W.2d 691, 692 (Mich. Ct. App. 1993) (per curiam) (“A divorce court has the discretion to award alimony . . . ‘as it considers just and reasonable’ in light of all the circumstances. The court should consider the length of the marriage, the parties’ ability to pay, their past relations and conduct, their ages, needs, ability to work, health, and fault, if any.” (citation omitted) (quoting *Demman v. Demman*, 489 N.W.2d 161, 163 (Mich. Ct. App. 1992))); *Wood v. Wood*, 495 So. 2d 503, 506 (Miss. 1986) (“Even in cases where the wife has been guilty of fault justifying granting the husband a divorce, alimony, if allowed at all, should be reasonable in amount, commensurate with the wife’s accustomed standard of living, minus her own resources, and considering the ability of the husband to pay.”); *Kover v. Kover*, 278 N.E.2d 886, 889 (N.Y. 1972) (“In addition to ‘the length of time of the marriage [and] the ability of the wife to be self supporting’ . . . the courts have indicated a number of other circumstances to be taken into account in fixing alimony. These include the husband’s financial resources and the established standard of living of the parties; the age and health of the parties and, to a limited extent, their conduct.” (citations omitted)).

<sup>37</sup> *Friedlander v. Friedlander*, 494 P.2d 208, 211 (Wash. 1972) (en banc).

partners, a court will first sever any aspect of the contract based on the exchange of sexual services for economic compensation. If the sexual aspect of the contract cannot be severed, the contract will not be enforced.<sup>38</sup> Courts contend that severing the sexual aspect of a contract between unmarried sexual partners is necessary in order to differentiate the nonmarital sexual relationship from prostitution: “[A]dults who voluntarily live together and engage in sexual relations . . . cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason.”<sup>39</sup> At the same time, courts assume that the sexual aspect of a contract between unmarried sexual partners can often be severed. Courts reason that if the law took the view that the sexual aspect of a contract between unmarried sexual partners can never be severed — that a sex-for-money exchange is an inextricable part of any contract between unmarried sexual partners — that would mean that the law classifies and treats relationships between unmarried sexual partners

<sup>38</sup> See *Cook v. Cook*, 691 P.2d 664, 669 (Ariz. 1984) (en banc) (“If the agreement is independent, in the sense that it is made for a proper consideration, it is enforceable even though the parties are in a meretricious relationship. That relationship will not prevent enforcement of the agreement unless the relationship is the consideration for the agreement.”); *Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976) (in bank) (“[A] contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services . . .”); *Tyranski v. Piggins*, 205 N.W.2d 595, 596 (Mich. Ct. App. 1973) (“Professor Corbin and the drafters of the Restatement of Contracts both write that . . . bargains in whole or in part in consideration of an illicit relationship are unenforceable . . .”); *Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980) (“New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not ‘part of the consideration of the contract.’” (footnote omitted) (citations omitted) (quoting *Rhodes v. Stone*, 17 N.Y.S. 561, 562 (Gen. Term 1892))); *Suggs v. Norris*, 364 S.E.2d 159, 162 (N.C. Ct. App. 1988) (“[A]greements regarding the finances and property of an unmarried but cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements.”); *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976) (in banc) (“We are not validating an agreement in which the only or primary consideration is sexual intercourse. The agreement here contemplated all the burdens and amenities of married life.”); *Watts v. Watts*, 405 N.W.2d 303, 311 (Wis. 1987) (“Courts have generally refused to enforce contracts for which the sole consideration is sexual relations, sometimes referred to as ‘meretricious’ relationships. Courts distinguish, however, between contracts that are explicitly and inseparably founded on sexual services and those that are not. This court, and numerous other courts, have concluded that ‘a bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain.’” (footnote omitted) (citation omitted) (quoting *In re Estate of Steffes*, 290 N.W.2d 697, 709 (Wis. 1980))).

<sup>39</sup> *Marvin*, 557 P.2d at 116; see also *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1331 (Ind. Ct. App. 1980) (“Our most recent criminal code does not attempt to proscribe sexual conduct between consenting adults in private (see Ind.Code 35-42-4-2), although it does still proscribe acts of prostitution (Ind.Code 35-45-4-2). Thus, any contract in which sexual services serve as consideration are [sic] unenforceable and void as against public policy. However, even though such part of a contract may be void, courts may excise the illegal segment and enforce the other provisions.”).

as if they are always relations of prostitution, which they are not. To the contrary, the distinction between nonmarital sexual relationships and prostitution is exactly what the law strives to maintain. As one court explained, “[t]o equate the nonmarital relationship of today to [prostitution] is to do violence to an accepted and wholly different practice.”<sup>40</sup>

But while courts emphasize the difference between nonmarital sexual relationships and the market relations of prostitution, the law does uphold a variety of economic exchanges between unmarried sexual partners. One feature that the sanctioned economic exchanges have in common is that courts believe that these exchanges recognize, respect, and even reinforce appropriate distinctions between relationships, especially the distinction between nonmarital sexual relationships and marriage.

For instance, courts enforce contracts between unmarried sexual partners for the exchange of property or money. Courts note that enforcing such contracts protects the people who have made and relied upon the contracts.<sup>41</sup> But courts stress that the enforceability of nonmarital contracts for property or monetary exchange preserves the distinction between marriage and nonmarital sexual relationships because it creates a set of rules for governing the property and monetary transactions of unmarried sexual partners that is different from the rules that control the distribution of money and property within marriage. Stated in the most general terms, the law governing marriage automatically establishes economic interconnections between spouses and

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<sup>40</sup> *Marvin*, 557 P.2d at 122; see also *Kozlowski v. Kozlowski*, 403 A.2d 902, 909 (N.J. 1979) (Pashman, J., concurring) (“In recent years, cohabitation between unmarried adults has become an increasingly prevalent phenomenon. To label such conduct as ‘meretricious’ — that is, as akin to prostitution — would ignore the realities of today’s society. It is likely true that all such understandings between nonmarital partners involve in some way a mutual sexual relationship or at least contemplate its existence. This, however, does not make their conduct the equivalent of prostitution — whatever might be one’s view as to its ‘morality.’”); *Morone*, 413 N.E.2d at 1156 n.2 (“Much of the case law speaks of such a relationship as ‘meretricious’. Defined as ‘Of or pertaining to a prostitute; having a harlot’s traits’ (Webster’s Third New International Dictionary Unabridged, p. 1413), that word’s pejorative sense makes it no longer, if it ever was, descriptive of the relationship under consideration, and we, therefore, decline to use it.”).

<sup>41</sup> See *Cook*, 691 P.2d at 670 (“The rule of non-enforcement thus favors the strongest, the most unscrupulous, the one better prepared to take advantage or the more cunning of the cohabitants. We do not believe this rule to be equitable or good public policy. We think the better rule is simply that valid agreements made by the parties will be enforced according to the intent of the parties.”); *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984) (“We recognize that the state has a strong public policy interest in encouraging legal marriage. We do not, however, believe that policy is well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple’s acquisitions.”); *Watts*, 405 N.W.2d at 311 (“While not condoning the illicit sexual relationship of the parties, many courts have recognized that the result of a court’s refusal to enforce contract and property rights between unmarried cohabitants is that one party keeps all or most of the assets accumulated during the relationship, while the other party, no more or less ‘guilty,’ is deprived of property which he or she has helped to accumulate.”).

then gives spouses some contractual ability to alter those interconnections through, for example, prenuptial or postnuptial agreements about property distribution.<sup>42</sup> Unmarried sexual partners, in contrast, have to contract if they wish to establish legally enforceable economic interconnections. The rules that automatically govern a marital relation do not bind or protect them. As courts explain, enforcing contracts between unmarried sexual partners for property or monetary exchange does not give those partners “the benefit of community property rights, since these rights derive solely from the marital relationship.”<sup>43</sup> Unmarried sexual partners may be able to contract about money and property, but “[t]he rights and obligations that attend a valid marriage simply do not arise where the parties choose to cohabit outside the marital relationship.”<sup>44</sup>

Similarly, contracts between unmarried sexual partners for domestic services are enforceable. Here, too, courts insist that upholding contracts between unmarried sexual partners preserves the distinction between marriage and nonmarital sexual relationships because unmarried sexual partners are not governed by the rules regulating marriage.<sup>45</sup> Indeed, as courts observe, the enforceability of contracts between unmarried sexual partners for domestic services contrasts sharply with the law’s refusal to enforce such contracts between spouses.<sup>46</sup> Courts also assert that enforcing nonmarital contracts for domestic services preserves incentives to marry. They explain that the opposite rule, refusing to enforce such contracts, would give an unmarried partner who receives but does not perform domestic services a strong incentive to remain unmarried, because then he could avoid incurring both contractual obligations to pay for domestic services and the financial obligations associated with marriage. As these courts reason, “[a] harsh, *per se* rule that the contract and property rights of unmarried cohabiting parties will not be recognized might actually en-

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<sup>42</sup> See *supra* text accompanying notes 32–34.

<sup>43</sup> *Cook*, 691 P.2d at 668.

<sup>44</sup> *Boland v. Catalano*, 521 A.2d 142, 145 (Conn. 1987).

<sup>45</sup> See, e.g., *Carroll v. Lee*, 712 P.2d 923, 929 (Ariz. 1986) (en banc) (“This opinion does not discourage or shake the foundation of marriage in this state. . . . This Court recognizes that community property rights derive solely from the marital relationship, and the law will not give non-marital cohabiting parties the benefit of community property.” (citations omitted)).

<sup>46</sup> See *Watkins v. Watkins*, 192 Cal. Rptr. 54, 56 (Ct. App. 1983) (“*Sonnicksen* represents an application of the rule that ‘a married woman cannot contract with her husband with respect to domestic services which are incidental to [the] marital status, since such contracts are against public policy.’ . . . [T]he complaint [here] alleges an implied agreement based on activities, assurances and services rendered prior to marriage, not during marriage. Since the implied agreement, as pleaded, does not require that domestic services be rendered during the marriage for consideration, the rule of *Sonnicksen* . . . is inapposite.” (first alteration in original) (footnote omitted) (quoting *Brooks v. Brooks*, 119 P.2d 970, 972 (Cal. Dist. Ct. App. 1941)) (citing *In re Sonnicksen’s Estate*, 73 P.2d 643 (Cal. Dist. Ct. App. 1937))); *supra* text accompanying notes 13–18.

courage a partner with greater income potential to avoid marriage in order to retain all accumulated assets, leaving the other party with nothing.”<sup>47</sup>

Like the law of marriage, the law on nonmarital sexual relationships is determined to uphold the distinctions between different kinds of relationships and certain that one of the most effective means of accomplishing this differentiation is to accentuate and reinforce the separation between intimate and market relations. The law regulating unmarried sexual partners conspicuously denies enforcement to some economic exchanges between intimates in order to stress and preserve the distinction between nonmarital sexual relationships and prostitution, while simultaneously sanctioning other economic exchanges that the courts understand to accord with, or even advance, appropriate differentiation between nonmarital sexual relationships and marriage.

### C. Parenthood

The same pattern holds in the law of parenthood, the final body of law that we will examine in this Part. This body of law is also fiercely committed to differentiating between relationships and convinced that one of the best ways to distinguish and respect an intimate relation is to insist upon and expand the distance between intimacy and economics. The law of parenthood seeks to promote the specialness and dignity of the parent-child relation by stressing its removal from the market and refusing to enforce certain economic transactions.

Most prominently, the law prohibits selling and buying children. Courts reason that such transactions ignore the child’s best interests and may be contrary to the interests of the selling and receiving parents as well.<sup>48</sup> Courts emphasize, moreover, that selling and purchasing children violates the norms of love that should govern parenthood, norms assertedly opposed to economic exchange. They take as given

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<sup>47</sup> *Watts v. Watts*, 405 N.W.2d 303, 312 (Wis. 1987); see also *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (in bank) (“The argument that granting remedies to the nonmarital partners would discourage marriage must fail; as *Cary* pointed out, ‘with equal or greater force the point might be made that the pre-1970 rule was calculated to cause the income producing partner to avoid marriage and thus retain the benefit of all of his or her accumulated earnings.’” (quoting *In re Marriage of Cary*, 109 Cal. Rptr. 862, 866 (Ct. App. 1973))).

<sup>48</sup> See *In re Baby M*, 537 A.2d 1227, 1241–42 (N.J. 1988) (“The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. Furthermore, the adoptive parents may not be fully informed of the natural parents’ medical history. Baby-selling potentially results in the exploitation of all parties involved.” (footnote omitted) (citations omitted)); *In re Adoption of Paul*, 550 N.Y.S.2d 815, 816 (Fam. Ct. 1990) (warning that a parent selling her child may be motivated by “the promise of financial gain” rather than “concern for the best interests of her child”).

that prohibiting the introduction of market transactions into the realm of parenthood recognizes and protects the specialness of the parent-child relationship. As a court explained, “[t]here are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was ‘voluntary’ did not mean that it was good or beyond regulation and prohibition.”<sup>49</sup> “There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life.”<sup>50</sup>

Yet while the law of parenthood loudly declares the separation between the parent-child relation and the market, the law simultaneously enforces a variety of economic exchanges in this context. The legally sanctioned economic exchanges tend to take one of two forms. First, some of these economic exchanges are subject to controls and restrictions meant to establish that they are not a means of selling or purchasing a child. Second, some of the sanctioned economic exchanges are necessary or very useful in a legal regime that wants private individuals rather than the state to bear the primary responsibility for children’s material needs.

For example, adoptive parents may pay for adoption expenses and services and for the birth mother’s living and medical expenses. As a practical matter, the line between such legal payments related to adoption and the prohibited purchase of a child may blur. But a multitude of statutes and judicial decisions carefully specify which forms of payment are permitted and which prohibited in an effort to mark and preserve the distinction between paying for an adoption and paying for a child.<sup>51</sup>

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<sup>49</sup> *Baby M*, 537 A.2d at 1249.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., CAL. PENAL CODE § 273 (West 1999) (“(a) It is a misdemeanor for any person or agency to pay, offer to pay, or to receive money or anything of value for the placement for adoption or for the consent to an adoption of a child. This subdivision shall not apply to any fee paid for adoption services provided by the State Department of Social Services, a licensed adoption agency, adoption services providers, . . . or an attorney providing adoption legal services. (b) This section shall not make it unlawful to pay or receive the maternity-connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, as long as the payment is not contingent upon placement of the child for adoption, consent to the adoption, or cooperation in the completion of the adoption.”); FLA. STAT. ANN. § 63.212(1) (West 2005) (“It is unlawful for any person: . . . (c) To sell or surrender, or to arrange for the sale or surrender of, a minor to another person for money or anything of value or to receive such minor child for such payment or thing of value. If a minor is being adopted by a relative or by a step-parent, or is being adopted through an adoption entity, this paragraph does not prohibit the person who is contemplating adopting the child from paying . . . the actual prenatal care and living expenses of the mother of the child to be adopted, or from paying . . . the actual living and medical expenses of such mother for a reasonable time, not to exceed 6 weeks, if medical needs require such support, after the birth of the minor.”); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West Supp. 2005) (“A person or persons who have filed or intend to file a petition to adopt a child under the

Similarly, many states prohibit recipient parents from paying a surrogate mother for serving as a surrogate and surrendering her rights to the child.<sup>52</sup> However, some states provide that the recipient parents may transfer money to the surrogate mother in the form of living expenses, medical expenses, and the like.<sup>53</sup> These limitations on pay-

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Adoption Act shall be permitted to pay the reasonable living expenses of the biological parents of the child sought to be adopted . . . . 'Reasonable living expenses' means the reasonable costs of lodging, food, and clothing for the biological parents during the period of the biological mother's pregnancy and for no more than 30 days after the birth of the child. The term does not include expenses for lost wages, gifts, educational expenses, or other similar expenses of the biological parents." (footnote omitted)); *Kingsley v. State*, 744 S.W.2d 191, 193 (Tex. App. 1987) ("None of the payments to [the birth mother] were to reimburse her for legal or medical expenses which she incurred. It is an essential element of the exception provided in section 25.06(b)(3) that the payment must be a reimbursement for legal and medical expenses incurred. A review of the record in this case reveals that some payments to [the birth mother] were for taxi rides, maternity clothes, gasoline, electricity, rent, groceries, cigarettes, and cosmetics; such items are not 'legal or medical expenses.' Certainly, it would be incredulous to suggest, for example, that the phrase 'legal or medical expenses incurred by a person for the benefit of the child' would include payments for cosmetics or cigarettes for the pregnant mother.").

<sup>52</sup> See, e.g., D.C. CODE § 16-402 (2001) ("(a) Surrogate parenting contracts are prohibited and rendered unenforceable in the District. (b) Any person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration, or otherwise violates this section, shall be subject to a civil penalty not to exceed \$10,000 or imprisonment for not more than 1 year, or both."); KY. REV. STAT. ANN. § 199.590(4) (LexisNexis 1998) ("A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. A person, agency, institution, or intermediary shall not receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void."); LA. REV. STAT. ANN. § 9:2713 (2005) ("A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy. B. 'Contract for surrogate motherhood' means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child."); MICH. COMP. LAWS ANN. § 722.859 (West 2002) ("(1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation. (2) A participating party . . . who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 or imprisonment for not more than 1 year, or both. (3) A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both."); NEB. REV. STAT. § 25-21,200 (1995) ("(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child. (2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.").

<sup>53</sup> See, e.g., FLA. STAT. ANN. § 63.212(1) ("It is unlawful for any person: . . . (h) To contract for the purchase, sale, or transfer of custody or parental rights in connection with any child, in connection with any fetus yet unborn, or in connection with any fetus identified in any way but not yet conceived, in return for any valuable consideration. Any such contract is void and unenforceable as against the public policy of this state. However, fees, costs, and other incidental payments



ment are intended to establish that surrogacy contracts are not vehicles for selling a child. Indeed, the states that enforce some surrogacy contracts are focused on differentiating these contracts from child selling. A number of courts, for instance, articulate various objections to surrogacy contracts,<sup>54</sup> but announce that the contracts will nonetheless be

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made in accordance with statutory provisions for adoption, foster care, and child welfare are permitted, and a person may agree to pay expenses in connection with a preplanned adoption agreement as specified below, but the payment of such expenses may not be conditioned upon the transfer of parental rights.”); *id.* § 742.15(4) (“As part of the contract, the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intraparturial, and postparturial periods.”); NEV. REV. STAT. ANN. § 126.045(3) (LexisNexis 2004) (“It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract.”); N.H. REV. STAT. ANN. § 168-B:25(V) (2002) (“[A surrogacy contract must provide that any] fees shall be limited to: (a) Pregnancy-related medical expenses, including expenses related to any complications occurring within 6 weeks after delivery and expenses related to the medical evaluation; (b) Actual lost wages related to pregnancy, delivery and postpartum recovery, if absence from employment is recommended in writing by the attending physician; (c) Health, disability and life insurance during the term of pregnancy and 6 weeks thereafter; (d) Reasonable attorney’s fees and court costs; and (e) Counseling fees and costs associated with the nonmedical evaluations, and home studies for the surrogate and her husband, if any.”); N.Y. DOM. REL. LAW § 123(1) (McKinney 1999) (“No person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration, except for: (a) payments in connection with the adoption of a child . . . ; or (b) payments for reasonable and actual medical fees and hospital expenses for artificial insemination or in vitro fertilization services incurred by the mother in connection with the birth of the child.”); VA. CODE ANN. §§ 20-156, 20-162(A) (2004) (“‘*Compensation*’ means payment of any valuable consideration for services in excess of reasonable medical and ancillary costs. . . . ‘*Reasonable medical and ancillary costs*’ means the costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable post partum period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy. . . . A provision in the contract providing for compensation to be paid to the surrogate is void and unenforceable.”); WASH. REV. CODE ANN. §§ 26.26.210(1), 26.26.240 (West 2005) (“‘*Compensation*’ means a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother, and the payment of reasonable attorney fees for the drafting of a surrogate parentage contract. . . . A surrogate parentage contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy.”); W. VA. CODE ANN. § 48-22-803(e) (LexisNexis 2004) (“This section does not prohibit the payment or receipt of the following: . . . (3) Fees and expenses included in any agreement in which a woman agrees to become a surrogate mother.”).

<sup>54</sup> See, e.g., *R.R. v. M.H.*, 689 N.E.2d 790, 797 (Mass. 1998) (“Other conditions might be important in deciding the enforceability of a surrogacy agreement, such as a requirement that (a) the mother’s husband give his informed consent to the agreement in advance; (b) the mother be an adult and have had at least one successful pregnancy; (c) the mother, her husband, and the intended parents have been evaluated for the soundness of their judgment and for their capacity to carry out the agreement; (d) the father’s wife be incapable of bearing a child without endangering her health; (e) the intended parents be suitable persons to assume custody of the child; and (f) all parties have the advice of counsel.”); *Baby M.*, 537 A.2d at 1246-47 (“The surrogacy contract

enforceable if the surrogate mother receives no payment beyond living and medical expenses and has the opportunity to change her mind about relinquishing the baby after the baby's birth.<sup>55</sup> Sometimes courts completely invalidate contracts that do not satisfy these criteria.<sup>56</sup> Sometimes courts hold that they will enforce surrogacy contracts that provide for additional payment to the surrogate mother, but only on the condition that the surrogate mother refuses or returns the payment.<sup>57</sup>

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guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents.”); *id.* at 1247 (“The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father’s right no greater than the mother’s.”); *id.* (“[T]here is no counseling, independent or otherwise, of the natural mother, no evaluation, no warning.”); *id.* at 1248 (“[T]he natural father and adoptive mother . . . know little about the natural mother, her genetic makeup, and her psychological and medical history. Moreover, not even a superficial attempt is made to determine their awareness of their responsibilities as parents.”); *id.* (“Worst of all, however, is the contract’s total disregard of the best interests of the child.”).

<sup>55</sup> See *R.R.*, 689 N.E.2d at 797 (“We recognize that there is nothing inherently unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife. We suspect that many such arrangements are made and carried out without disagreement. If no compensation is paid beyond pregnancy-related expenses and if the mother is not bound by her consent to the father’s custody of the child unless she consents after a suitable period has passed following the child’s birth, the objections we have identified in this opinion to the enforceability of a surrogate’s consent to custody would be overcome.”); *Baby M.*, 537 A.2d at 1235 (“We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a ‘surrogate’ mother, provided that she is not subject to a binding agreement to surrender her child.”); *id.* at 1240 (“Our law prohibits paying or accepting money in connection with any placement of a child for adoption. *N.J.S.A.* 9:3-54a. Violation is a high misdemeanor. *N.J.S.A.* 9:3-54c. Excepted are fees of an approved agency (which must be a nonprofit entity, *N.J.S.A.* 9:3-38a) and certain expenses in connection with childbirth. *N.J.S.A.* 9:3-54b.”).

<sup>56</sup> See *R.R.*, 689 N.E.2d at 796 (“The statutory prohibition of payment for receiving a child through adoption suggests that, as a matter of policy, a mother’s agreement to surrender custody in exchange for money (beyond pregnancy-related expenses) should be given no effect in deciding the custody of the child.”); *Baby M.*, 537 A.2d at 1234 (“We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. . . . [W]e void both the termination of the surrogate mother’s parental rights and the adoption of the child by the wife/stepparent. We thus restore the ‘surrogate’ as the mother of the child.”).

<sup>57</sup> See *In re Adoption of Paul*, 550 N.Y.S.2d 815, 818–19 (Fam. Ct. 1990) (“Accordingly, only if Elizabeth will swear under oath before this Court that she has not and will not request, accept or receive the \$10,000 promised to her in exchange for surrender of her child, can this Court accept such surrender and terminate her parental rights. Only if she is free of the intimidation inherent in her contractual commitment to give up her child and the inducement of a \$10,000 gain, can Elizabeth’s surrender of her parental rights be truly voluntary and motivated exclusively by Paul’s best interests. Should Elizabeth sincerely believe that her son’s best interests alone require such surrender, without the inducement of financial reward to her, an affidavit to that effect, duly sworn and executed, should be submitted to this Court so that a date may be scheduled for her appearance. In addition, . . . the proposed adoptive parents must also provide sworn affidavits evidencing their intent not to pay or give any compensation or thing of value to any party in exchange for the child.”).

In addition to sanctioning economic exchanges limited in ways designed to establish that they are not a means of selling or purchasing a child, the law of parenthood enforces other economic exchanges that are either essential or highly useful to a legal order that seeks to place the primary responsibility for children's material needs on individual parents instead of the state. Parents, for instance, have a legal obligation to support their children financially until the age of majority, and a person may be stripped of his legal status as a parent if he fails without cause to provide financial support to his child.<sup>58</sup> When parents are unavailable to care for their children, they may and sometimes (to avoid child neglect) must hire child care workers to perform that work. Parents may recoup some of their financial investment in their children by employing them, and parent-employers are exempt from many federal and state laws limiting child labor.<sup>59</sup>

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<sup>58</sup> See *In re R.H.N.*, 710 P.2d 482, 486 (Colo. 1985) (en banc) ("Once a court has determined in the context of a stepparent adoption proceeding that termination and adoption would be in the best interests of the child, the court must then consider whether . . . the child is 'available for adoption' because the natural parent failed to provide reasonable support without cause."); *In re Adoption of B.L.P.*, 728 P.2d 803, 805 (Mont. 1986) ("A parent cannot voluntarily become unemployed, fail to pay court ordered child support, and retain parental rights."); *Holodook v. Spencer*, 324 N.E.2d 338, 342 (N.Y. 1974) ("Of the many duties arising from the parent-child relation, only very few give rise to legal consequences for their breach. Parents are obligated in accordance with their means to support and maintain their children — i. e., to furnish adequate food, clothing, shelter, medical attention and education. A parent's failure to observe minimum standards of care in performing these duties entails both remedial sanctions, such as the forfeiture of custody, and criminal sanctions."); *In re Adoption of Lay*, 495 N.E.2d 9, 10 (Ohio 1986) (per curiam) ("[A] total absence of court-ordered support payments for the statutorily mandated one-year period, which we undisputedly have in the case *sub judice*, certainly satisfies the requirements set forth in R.C. 3107.07 for adoption without consent if such nonpayment occurred without justifiable cause."); *In re Adoption of Blevins*, 695 P.2d 556, 560 (Okla. Ct. App. 1984) ("Since the states may be sustained in enforcing financial support obligations of parents with respect to their children, the question is whether § 60.6(3) finds a correct balance in its provision permitting adoption without consent of a parent who has been found to wilfully fail, refuse or neglect to contribute to the support as ordered by the court. We think it does.")

<sup>59</sup> A child working for his parent on the parent's farm is not protected by federal minimum wage and maximum hour requirements, see 29 U.S.C. § 213(a)(6)(B) (2000), by the federal ban on child labor before the age of twelve, see *id.* § 213(c)(1)(A), or by the federal prohibition on employing children under sixteen in "particularly hazardous" occupations, *id.* § 213(c)(2); see also ARK. CODE ANN. § 11-6-104 (2002) ("No child under the age of fourteen (14) years shall be employed or permitted to work in any remunerative occupation in this state, except that during school vacation, children under fourteen (14) years may be employed by their parents or guardians in occupations owned or controlled by them."); CAL. LAB. CODE § 1394(a) (West 2003) ("[Nothing in this article shall prohibit or prevent t]he employment of any minor at agricultural, horticultural, viticultural, or domestic labor during the time the public schools are not in session, or during other than school hours, when the work performed is for or under the control of his parent or guardian and is performed upon or in connection with premises owned, operated or controlled by the parent or guardian. However, nothing herein shall permit children under schoolage to work at these occupations, while the public schools are in session."); S.D. CODIFIED LAWS § 60-12-3 (2004) ("No child under sixteen years of age may be employed at any time in any occupation dangerous to life, health, or morals, nor may any child be in any manner exploited by any employer. . . . This section does not apply to minors employed by their parents . . .").

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The law of parenthood, like the law governing marriage and non-marital sexual relationships, is intent on distinguishing intimate relationships and certain that one of the most effective strategies for accomplishing this differentiation is to contend that the intimate relationship is far removed from the world of economics. Here, too, the law draws attention to its refusal to enforce certain economic exchanges, while simultaneously sanctioning other economic exchanges to secure the material needs of intimates. Indeed, as we have observed, the law assumes with predictable regularity that one of the crucial ways to establish and uphold the unique worth and dignity of an intimate relationship is to proclaim the relationship's separation from the market and to prohibit some forms of economic exchange between intimates.

#### IV. THE DISTRIBUTIVE CONSEQUENCES OF THE LEGAL REGULATION OF ECONOMIC EXCHANGE BETWEEN INTIMATES AND THE POSSIBILITIES FOR REFORM

##### *A. The Law's Distributive Consequences*

The law regulating economic exchange between intimates seeks to protect something of tremendous importance when it insists upon maintaining distinctions between relationships. Differentiation is a legitimate and highly valuable role for the law to perform. As we have seen, there is an enormous societal interest in recognizing what is different and special about intimate relationships as compared to other relationships.

Yet legal means of differentiation that are appropriate in some circumstances and situations may be inappropriate elsewhere. In particular, the law's attempts to advance expressive interests through the regulation of economic exchange between intimates should be reexamined and reformed when this regulation perpetuates persistent status inequality or distributive injustice.

At the moment, legal efforts to mark the specialness of intimate relationships by limiting or prohibiting economic exchange within them appear to have systematically adverse distributional consequences for women and poorer people, maintaining and increasing distributive inequality. One likely reason seems to be the background assumptions that legal efforts to protect intimacy make about the nature of intimate relationships. When regulating an intimate relationship, the law can presume that the relationship is between equals. From this perspective, when one intimate transfers money, property, or services to another intimate, the starting premise about that transfer should be that it is compensation for equally valuable money, property, or services that the other intimate has provided or will provide, either in a discrete transaction or over the course of a relationship. Alternatively,

the law can presume in regulating an intimate relationship that the relationship is asymmetrical, with one intimate a provider and the other a dependent. From this perspective, any money, property, or services that the provider transfers to the dependent are transferred because of the provider's altruism and the dependent's need, and any money, property, or services the dependent supplies are less valuable than what the dependent receives.

The law frequently presumes dependency in regulating economic exchange between even adult intimates. More specifically, the law's strategies for affirming the distinctiveness of intimacy appear to steadily assume that women — including relatively poor women — need not be compensated for their activities. On this view, women can be deprived of a direct claim to economic assets based on their own activities because they will be supported by other people. In the process, the law helps produce the situation it purports only to describe, making self-support more difficult and enhancing the need to rely on others.

For instance, the law's refusal to enforce interspousal contracts for domestic services is meant to promote the dignity and distinctiveness of the marital relation by declaring its separation from the market.<sup>60</sup> Originally, this refusal to enforce interspousal contracts for domestic services was sex-specific. Judges in the nineteenth century were intent on maintaining a system of common law coverture that insisted upon and ensured a wife's subordination and dependency in marriage.<sup>61</sup> To this end, judges enforced a husband's ownership of his wife's domestic labor and kept him free from any obligation to compensate his wife for her labor.<sup>62</sup> The modern refusal to enforce interspousal contracts for domestic services is facially sex-neutral.<sup>63</sup> Yet all the available evidence indicates that women still perform significantly disproportionate amounts of domestic labor within marriage.<sup>64</sup> The legal doctrine de-

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<sup>60</sup> See *supra* text accompanying notes 13–18.

<sup>61</sup> William Blackstone's definition of coverture was by far the most influential. He explained:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

WILLIAM BLACKSTONE, 1 COMMENTARIES \*430. For modern discussions of common law coverture, see ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800–1861*, at 5–24 (1987), and Hasday, *supra* note 5, at 1389–92.

<sup>62</sup> See Siegel, *supra* note 13, at 2168–96.

<sup>63</sup> See *supra* text accompanying notes 13–18.

<sup>64</sup> See, e.g., SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* 7 (1985) (“[T]he total time spent by married women on household labor is substantial and remains so regardless of most household or biographical characteristics. Contemporary aggregate time estimates range from approximately 30 to

nying enforcement to interspousal contracts for domestic labor disproportionately deprives women of the right to receive compensation for their labor. Of course, some women may receive more in the marital support their husbands choose to provide than they would receive if they had a legal right to be paid for their domestic work. But other women might be better off economically if they had a right to negotiate payment for household labor. The refusal to enforce interspousal contracts for domestic services, moreover, ensures that more wives receive their economic assets in the form of provided support (social exchange) rather than legally negotiated compensation (legal exchange) and in this way helps perpetuate married women's dependence on their husbands. The refusal to enforce interspousal contracts for domestic services still assumes and helps entrench a marital structure in which wives, including wives who work only in the home, can be denied a right to compensation for their domestic labor because they are supposed to be supported rather than earn their own support.

The legal regulation of economic exchanges related to parenthood, in turn, appears to disproportionately injure poorer people, especially poorer women. Many states, for example, prohibit or restrict surrogate mothers from receiving payment.<sup>65</sup> These bans or limitations on payment are intended to establish that surrogacy contracts are not a form of child selling, and in this way to uphold the worth and dignity of the parent-child relation. But the available evidence suggests that surro-

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60 hours per week for wives' contributions to household labor. These estimates mean that, on the average, wives contribute about 70% of the total time that all members spend on household work."); BETH ANNE SHELTON, *WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE* 66-67 (1992) ("Married men spend only 52.5% as much time on household labor as married women . . . . [A]mong married respondents, men do over twenty fewer hours of household labor in a week than women."); Suzanne M. Bianchi et al., *Is Anyone Doing the Housework?: Trends in the Gender Division of Household Labor*, 79 *SOC. FORCES* 191, 198 (2000) ("The proportion of [house]work that husbands are reported to have done in recent years ranges from about 25% to 40%, depending on measurement criterion and the range of tasks defined as housework." (citations omitted)); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 *J. MARRIAGE & FAM.* 1208, 1212 (2000) ("[W]ives spend two or three times as many hours on housework as their husbands." (citations omitted)).

<sup>65</sup> See *supra* text accompanying notes 52-57.

gate mothers typically occupy a relatively low socioeconomic status.<sup>66</sup>

<sup>66</sup> See OFFICE OF TECH. ASSESSMENT, U.S. CONG., INFERTILITY: MEDICAL AND SOCIAL CHOICES 268 (1988) ("Preliminary psychological and demographic studies . . . as well as surrogate matching service reports to OTA demonstrate that women who have volunteered to be surrogates are distinctly less well educated and less well off than those who hire them . . ."). Compare *id.* at 269-70 ("Those seeking to hire a surrogate mother are generally well off and well educated. Overall, agencies reported that approximately 64 percent of their clients have a household income over \$50,000, with an additional 28 percent earning \$30,000 to \$50,000 per year. One-third of the services reported that at least half of their clients have been to graduate school, and another third reported that at least 80 percent of their clients have been to graduate school. Overall, the services reported that at least 37 percent of their clients are college-educated, and another 54 percent have attended graduate school."), and HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 89, 91 (1994) ("[T]he couples as a group are upper-middle-income, educated professionals, in their late thirties and early forties. . . . [A]ll of the couples in my sample are Caucasian, as are the majority of couples who choose surrogacy. Of the nine adoptive mothers for whom financial data were available, three, or 33 percent, earned less than \$30,000 and six, or 67 percent, earned more than \$30,000 per year. Six of the eight interviewed husbands (75 percent) and seven out of twelve husbands for whom financial data were available (58 percent) earned \$75,000 a year or more. The average combined family income is in excess of \$100,000."), with OFFICE OF TECH. ASSESSMENT, *supra*, at 273 ("OTA asked surrogate matching agencies to describe some of the characteristics of the women who had passed through their screening procedures and were waiting to be hired as surrogate mothers. . . . Overall, agencies reported that fewer than 35 percent of the women had ever attended college, and only 4 percent had attended any graduate school. Agencies draw the bulk of the surrogates from the population earning \$15,000 to \$30,000 per year (approximately 53 percent), with 30 percent earning \$30,000 to \$50,000 per year, and at most 5 percent earning more than \$50,000. Six agencies reported no women earning less than \$15,000 per year who were currently waiting to be hired as surrogates, partly due to the fact that some agencies will not accept surrogates who are on welfare or who are not 'financially independent.' Overall, agencies reported that approximately 13 percent of the women had household incomes of less than \$15,000 per year."), RAGONÉ, *supra*, at 6, 54-55 ("The quantifiable data collected from [twenty-eight] formal surrogate interviews reveal that surrogates are predominantly white, working class, of Protestant or Catholic background; approximately 30 percent are full-time homemakers, married, with an average of three children, high school graduates, with an average age of twenty-seven years. . . . Surrogates who are employed outside the home tend to work in the service sector. The average family income of married surrogates is \$38,700. Unmarried surrogates' income level ranges from \$16,000 to \$24,000."), David MacPhee & Kathy Forest, *Surrogacy: Programme Comparisons and Policy Implications*, 4 INT'L J.L. & FAM. 308, 311 (1990) ("Sixty women who had contracted to be surrogate mothers were contacted through two different programmes. Of those who completed the study (7 per cent of the total US surrogate population), 29 were from a surrogacy programme in Michigan (66 per cent return) and 12 were from a programme in California (75 per cent return). . . . On average, these women . . . had at least a high-school education ( $M = 13.3$  yrs.), [and] lived in a household where one or both adults were clerical or blue-collar workers . . ."), Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 117 (1983) ("I have interviewed more than 225 white women applying for surrogate motherhood . . . . Of the first 50 applicants, slightly more than 20 (40%) were unemployed at the time of the interviews or were receiving some form of financial aid or both. Almost 60% (N=30) of the applicants were working or had a working spouse; each family's total income ranged from \$6,000 to \$55,000 (actual 1980 or projected 1981 figures). The applicants' formal education ranged from less than high school to a bachelor's degree: of the first 50 applicants, 9 (18%) had not completed high school, 27 (54%) had either graduated from high school or had received a General Equivalency Diploma, 13 (26%) had taken some college courses after high school or had attended business school or nursing school (2 were licensed practical nurses, and 1 was a registered nurse), and 1 had a bachelor's degree."), and Nancy E. Reame & Philip J. Parker, *Surrogate Pregnancy: Clinical Features of Forty-Four Cases*,

The legal prohibitions and restrictions on payment to surrogate mothers deny compensation to the person who is likely to be the poorest party to the surrogate motherhood arrangement, sometimes after the surrogate has already fulfilled her part of the agreement. The history of the legal regulation of surrogacy is much shorter than the history of the legal regulation of marriage. The law has had less time to develop background assumptions about how surrogate mothers and recipient parents — intimately connected by virtue of their status as present or future parents of the same children — are supposed to interact. Yet here again, the law refuses women compensation for activities that can be taxing and time-consuming. The payment for living and medical expenses that states permit surrogate mothers to accept from recipient parents is meant to respond to surrogate mothers' most basic needs, not to serve as a form of compensation. The law seems to presume in denying women compensation for their own efforts that the women will receive support from somewhere else, and in the process increases women's need for such support.

States also carefully restrict the payments that adoptive parents may make to birth mothers.<sup>67</sup> These restrictions, too, are meant to protect the specialness of the parent-child relation. This goal is undoubtedly important, yet it bears noting that the existing evidence suggests that women placing their children for adoption tend to be disadvantaged compared to the rest of the population.<sup>68</sup> In this context as

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162 AM. J. OBSTETRICS & GYNECOLOGY 1220, 1220-22 (1990) ("This report describes the obstetric characteristics of 44 pregnancies occurring in 41 women who participated in a private, attorney-affiliated surrogate parenting program and delivered of infants between November 1981 and June 1985. . . . The average level of education for this sample was 12.3 ± 2 years. Twelve of the 41 women (29%) were welfare recipients or reported no source of income at the time of insemination (two women were full-time students). For the remaining 29 subjects, the mean annual income was \$15,709 (range \$10,000 to \$35,000; median \$12,000). . . . Although the sample size is small by traditional standards, it represents approximately 10% of the estimated national population of surrogate mothers at the time of the study. . . . The most common annual income category reported by the subjects was ≤\$10,000 (46%), which is comparable to the national poverty level for a family of four in 1983.").

<sup>67</sup> See *supra* text accompanying note 51.

<sup>68</sup> For instance, one study of 146 adolescent women who surrendered their children for adoption after they "attended a pregnancy-counseling program affiliated with a large adoption agency that practices open adoption" found that these women were "disadvantaged when compared with the general population or with a population of never-pregnant teenagers." Steven D. McLaughlin et al., *Do Adolescents Who Relinquish Their Children Fare Better or Worse than Those Who Raise Them?*, 20 FAM. PLAN. PERSP. 25, 25 (1988). As the study concluded, "[a]dolescents who place their children for adoption continue to live with the disadvantages associated with the individual and socioeconomic factors that initially brought them to the adolescent mother status." *Id.* at 32. Another study analyzed "three hundred sample respondents . . . selected randomly from the records of the Department of Social Services in an eastern province of Canada." PAUL SACHDEV, UNLOCKING THE ADOPTION FILES 21 (1989). It found that the seventy-eight birth mothers in this sample "were not highly educated" and "by and large belonged to low- to middle-income status." *Id.* at 23, 50-51. "More than 90 percent had not gone beyond high school and a year in a



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well, more vulnerable people are shouldering the weight of the law's desire to recognize the worth of an intimate relation, and women are assumed and directed to get their support elsewhere.

*B. Differentiating Intimate Relationships  
Without Relying on Economic Restraints*

The law's urge to signify the dignity and distinctiveness of intimate relationships should be affirmed. But the apparent distributional consequences of the law's current efforts at differentiation suggest a need to reexamine how the legal system establishes the specialness of an intimate relationship, in ways that will assist the people who now seem to be further disadvantaged and deprived by legal acts of social sanctification. At the least, the law should be more conscious of and concerned about the cumulative distributive effects of its attempts to protect expressive values. It should search for alternative means of differentiating relationships that advance the same expressive ends with less distributional cost. When the law marks the specialness of intimate relations, it should try to avoid further entrenching inequalities of bargaining and resource power.

One possibility to explore is how the law might affirm the specialness of intimate relationships in ways that do not involve restrictions on economic exchange. After all, it is unlikely that the only way to promote the distinctiveness of intimate relationships is to insist upon the distance between intimacy and economics, especially because intimate relations are inevitably entangled in economic exchange.

In this regard, it might help to consider how the law marks the specialness of other relationships. There are relationships outside of marriage, nonmarital sexual relationships, and parenthood in which people are closely connected to one another, highly reliant on one another, sometimes in great need, bound to reveal private information, and often unevenly situated in their knowledge and bargaining power. Those characteristics describe, for instance, the relationship between a lawyer and client or a doctor and patient. These are relationships of enormous consequence. Yet the law places relatively few impediments on economic exchange within them. Instead, the legal system adopts a variety of other mechanisms to mark and uphold the importance and distinctiveness of the lawyer-client and doctor-patient relationships.

For instance, the law establishes that lawyers have a fiduciary duty to their clients, and doctors have a fiduciary duty to their patients. This duty legally obligates lawyers to act in their clients' interests and

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trade college. . . . Consistent with their low level of schooling, more than half of all birth mothers were currently or once employed as skilled or unskilled workers and one-third as sales or clerical workers." *Id.* at 50-51.

doctors to act in their patients' interests.<sup>69</sup> For example, except in compelling circumstances, lawyers must keep their clients' confidences,<sup>70</sup> and doctors must not disclose their patients' personal information.<sup>71</sup> Courts explain that the law requiring lawyers and doctors to

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<sup>69</sup> See, e.g., *Clancy v. State Bar*, 454 P.2d 329, 333 (Cal. 1969) (in bank) (per curiam) ("The relationship between an attorney and client is a fiduciary relationship of the very highest character. All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness."); *Petrillo v. Syntex Labs., Inc.*, 499 N.E.2d 952, 961 (Ill. App. Ct. 1986) ("The existence of this fiduciary relationship indicates that . . . [t]here is an implied promise, arising when the physician begins treating the patient, that the physician will refrain from engaging in conduct that is inconsistent with the 'good faith' required of a fiduciary. The patient should, we believe, be able to trust that the physician will act in the best interests of the patient thereby protecting the sanctity of the physician-patient relationship."); *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 322 N.W.2d 369, 372 (Neb. 1982) ("It is fundamental law that an attorney must not while representing a client do anything knowingly that is inconsistent with the terms of his employment or contrary to the best interests of his client."); *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) ("The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." (citations omitted)).

<sup>70</sup> See *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 171-72 (5th Cir. 1979) (enforcing "an attorney's duty to 'preserve the confidences and secrets of a client'" (quoting ABA CODE OF PROF'L RESPONSIBILITY Canon 4 (1970))); *People v. Lopez*, 845 P.2d 1153, 1155 (Colo. 1993) (en banc) (per curiam) ("[A] lawyer may reveal the confidences or secrets of the lawyer's client only after full disclosure to and with the consent of the client."); *In re Holley*, 729 N.Y.S.2d 128, 132-33 (App. Div. 2001) (per curiam) ("[R]espondent's failure to take adequate precautions to safeguard confidential materials of a client, even if considered unintentional, was careless conduct that reflects adversely on his fitness to practice law. . . . Under all the facts and circumstances, a sanction of public censure is fully warranted." (citation omitted)).

<sup>71</sup> See *Horne v. Patton*, 287 So. 2d 824, 829-30 (Ala. 1973) ("[A] medical doctor is under a general duty not to make extra-judicial disclosures of information acquired in the course of the doctor-patient relationship and . . . a breach of that duty will give rise to a cause of action. It is, of course, recognized that this duty is subject to exceptions prompted by the supervening interests of society, as well as the private interests of the patient himself."); *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 805 (App. Div. 1982) ("The relationship of the parties here was one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to plaintiff implicit in and essential to the doctor-patient relation. Such . . . breach is actionable . . . if it is wrongful, that is to say, without justification or excuse."); *McCormick v. England*, 494 S.E.2d 431, 435, 437 (S.C. Ct. App. 1997) ("A majority of the jurisdictions faced with the issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest. . . . We find the reasoning of the cases from other jurisdictions persuasive on this issue and today we join the majority and hold that an actionable tort lies for a physician's breach of the duty to maintain the confidences of his or her patient in the absence of a compelling public interest or other justification for the disclosure." (footnote omitted)); *Fairfax Hosp. v. Curtis*, 492 S.E.2d 642, 645 (Va. 1997) ("We hold that in the absence of a statutory command to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort. We observe that our holding today is consistent with decisions of most jurisdictions which have considered this issue.").

act as fiduciaries protects and upholds “the sanctity”<sup>72</sup> and “special”<sup>73</sup> nature of the lawyer-client and doctor-patient relationships by requiring lawyers and doctors to act with special regard for their clients and patients — regard that an ordinary service provider would not have to extend to an ordinary customer in a “commonplace commercial” transaction “in the commercial market place.”<sup>74</sup> As they note, the relation between lawyer and client or doctor and patient is distinctive, one of great “trust,”<sup>75</sup> “confidence,”<sup>76</sup> and “reliance.”<sup>77</sup>

The law similarly imposes stringent requirements on lawyers and doctors to secure the informed consent of their clients and patients. Lawyers and doctors are frequently obligated to convey to their clients and patients material information about risks, circumstances, and alternatives so that the clients and patients can make informed judgments about which courses of action to pursue.<sup>78</sup> Here, too, courts explain that the requirement to secure informed consent recognizes the

<sup>72</sup> *Petrillo*, 499 N.E.2d at 961.

<sup>73</sup> *Cooperman*, 633 N.E.2d at 1072.

<sup>74</sup> *Id.* at 1071–72; see also *Petrillo*, 499 N.E.2d at 961 (“The existence of this fiduciary relationship indicates that there is more between a patient and his physician than a mere contract under which the physician promises to heal and the patient promises to pay.”).

<sup>75</sup> *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994); *Brennan’s, Inc.*, 590 F.2d at 172; *Petrillo*, 499 N.E.2d at 961; *Cooperman*, 633 N.E.2d at 1071; *McCormick*, 494 S.E.2d at 435.

<sup>76</sup> *Milbank, Tweed, Hadley & McCloy*, 13 F.3d at 543; *Petrillo*, 499 N.E.2d at 961; *Cooperman*, 633 N.E.2d at 1071–72.

<sup>77</sup> *Brennan’s, Inc.*, 590 F.2d at 172.

<sup>78</sup> See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (in bank) (“First, ‘a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.’ Second, ‘the patient’s consent to treatment, to be effective, must be an informed consent.’ Third, in soliciting the patient’s consent, a physician has a fiduciary duty to disclose all information material to the patient’s decision.” (citations omitted) (quoting *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972) (in bank))); *Kinikin v. Heupel*, 305 N.W.2d 589, 595 (Minn. 1981) (“A physician must disclose risks of death or serious bodily harm which are of significant probability; to this there is no contention. Risks which a skilled practitioner of good standing in the community would reveal must also be disclosed. . . . Lastly, to the extent a doctor is or can be aware that his patient attaches particular significance to risks not generally considered by the medical profession serious enough to require discussion with the patient, these too must be brought out.”); *Greene v. Greene*, 436 N.E.2d 496, 499 (N.Y. 1982) (“The basic rule . . . is that ‘an attorney who seeks to avail himself of a contract made with his client, is bound to establish affirmatively that it was made by the client with full knowledge of all the material circumstances known to the attorney, and was in every respect free from fraud on his part, or misconception on the part of the client, and that a reasonable use was made by the attorney of the confidence reposed in him.’” (quoting *Whitehead v. Kennedy*, 69 N.Y. 462, 466 (1877))); *Johnson v. Kokemoor*, 545 N.W.2d 495, 501 (Wis. 1996) (“In order to insure that a patient can give an informed consent, a ‘physician or surgeon is under the duty to provide the patient with such information as may be necessary under the circumstances then existing’ to assess the significant potential risks which the patient confronts. The information that must be disclosed is that information which would be ‘material’ to a patient’s decision.” (citation omitted) (quoting *Scaria v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 647, 652 (Wis. 1975); *Martin v. Richards*, 531 N.W.2d 70, 78 (Wis. 1995))).

special nature of the relationship between lawyer and client or doctor and patient, in which the client or patient is likely to rely heavily on the professional's expertise and judgment, and to have less independent access to the information needed to make informed decisions.<sup>79</sup>

In contrast, the laws governing both the lawyer-client and the doctor-patient relationships place relatively few restraints on economic exchange. The restraints that do exist, moreover, tend to be forms of the standard legal protections for market transactions, such as restraints on theft,<sup>80</sup> fraud,<sup>81</sup> and unconscionability (strictly defined).<sup>82</sup> To an extent that is striking when compared to the law regulating familial intimates, the law governing professional relationships does not attempt to establish the specialness and importance of these relationships by declaring their separation from the market and loudly prohibiting certain forms of economic exchange within them. Instead, the legal sys-

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<sup>79</sup> See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) ("True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible." (footnotes omitted)); *id.* at 782 ("The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arms-length transactions. His dependence upon the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject." (footnote omitted)); *Cobbs*, 502 P.2d at 9 ("[P]atients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. . . . [T]he patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.").

<sup>80</sup> See *In re Cleland*, 2 P.3d 700, 703 (Colo. 2000) (en banc) (per curiam) ("As we have said numerous times before, disbarment is the presumed sanction when a lawyer knowingly misappropriates funds belonging to a client or a third person."); *In re Schoepfer*, 687 N.E.2d 391, 393 (Mass. 1997) ("[T]his court has generally stated that disbarment or indefinite suspension is the presumptive sanction if a lawyer has intentionally deprived a client of funds."); *In re Barlow*, 657 A.2d 1197, 1199 (N.J. 1995) (per curiam) ("We have consistently held that 'disbarment is the only appropriate discipline [for knowing misappropriation of client funds].'" (alteration in original) (quoting *In re Wilson*, 409 A.2d 1153, 1154 (N.J. 1979))); *In re Pierson*, 571 P.2d 907, 909 (Or. 1977) (in banc) (per curiam) ("We hold that a single conversion by a lawyer to his own use of his client's funds will result in permanent disbarment.").

<sup>81</sup> See *Jackson v. Julian*, 694 S.W.2d 434, 436 (Tex. App. 1985) ("To state a cause of action for actual fraud, the patient must allege that the doctor knowingly or recklessly made a false representation of a material fact with the intention that the patient would act thereon, and that she acted in reliance on the misrepresentation to her injury." (emphasis omitted)).

<sup>82</sup> See *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979) (per curiam) ("In these circumstances, the contract between [client] and [lawyer] was not so unconscionable that 'no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.'" (quoting *Swanson v. Hempstead*, 149 P.2d 404, 407 (Cal. Dist. Ct. App. 1944))).

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tem permits money to flow through these relationships and uses other means to mark their distinctiveness.

With this in mind, we can explore how the law might employ these alternate strategies to establish and protect the specialness of relationships between familial intimates. Consider how such alternate strategies might work in two specific contexts: surrogacy and adoption.

At the moment, the law governing surrogate motherhood attempts to recognize and protect the specialness of the parent-child relation by emphasizing restrictions and prohibitions on the payment that a surrogate mother may receive.<sup>83</sup> The law regulating professional relationships, however, suggests a number of other ways that the law might structure surrogacy arrangements to mark the distinctiveness and dignity of the parent-child relation. For instance, this body of law suggests the importance of securing the surrogate mother's informed consent. To some degree, the law already reflects this concern. As we have seen, a number of courts refuse to enforce surrogacy contracts unless the surrogate mother receives no more than medical and living expenses and has the right to change her mind about surrendering the child after the child's birth.<sup>84</sup> The latter requirement represents some effort toward establishing informed consent, on the theory that a surrogate mother will have more information about what surrender entails once the baby is born. But the law might go much further toward ensuring that a surrogate mother's consent is informed. For example, the law might hold that surrogacy contracts will be unenforceable unless the surrogate mother is informed about the potential dangers and risks associated with surrogacy. The law might also provide that surrogacy contracts will be unenforceable unless the surrogate mother is represented by her own legal counsel or otherwise informed of her legal rights. The law might require recipient parents to pay for the surrogate's legal counsel. In the process, the law could recognize and respect the specialness of the parent-child relation in ways that could also protect the surrogate mother rather than simply requiring her to forgo compensation.

Similarly, the law on professional relationships suggests that the law governing surrogacy could help safeguard the specialness of the parent-child relation by imposing a duty on both surrogate mothers and recipient parents to act as fiduciaries for each other and for the potential child. This duty could mean, for example, that both surrogate mothers and recipient parents would be legally obligated to convey all relevant information to each other. For instance, the law might require both surrogate mothers and recipient parents to reveal any

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<sup>83</sup> See *supra* text accompanying notes 52–57.

<sup>84</sup> See *supra* text accompanying note 55.

prior experience they have had with surrogacy, pregnancy, or child rearing. It might require both surrogate mothers and biological fathers to reveal whether they have any serious biological impairments that a child might inherit. It might require recipient parents to reveal any reason they might be unfit parents and to undergo an examination to ensure that they have the means and ability to care for a child. All of these potential legal requirements would recognize and protect the specialness of the parent-child relation, while distributing the burdens the requirements impose more evenly between surrogate mothers and recipient parents.

The law on adoption might be reformed along analogous lines. For example, this body of law might also place a renewed emphasis on securing the birth mother's informed consent. States frequently provide that an adoption cannot become legally binding until a certain amount of time has passed after the child's birth or after the birth mother has initially relinquished the child for adoption.<sup>85</sup> One purpose of these delays in making an adoption permanent is to increase the information that the birth mother has available in forming a final decision to place a child for adoption, on the premise that the birth mother will know more about the ramifications of an adoptive placement once the child has been born and the birth mother has initially surrendered custody. But the law might do more to ensure that a birth mother's consent to adoption is informed consent. For example, states might provide free legal counsel to birth mothers placing their children for adoption

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<sup>85</sup> See, e.g., ALA. CODE § 26-10A-13(a) (1992) ("A consent or relinquishment may be taken at any time, except that once signed or confirmed, may be withdrawn within five days after birth or within five days after signing of the consent or relinquishment, whichever comes last."); CAL. FAM. CODE § 8801.3(b)(2) (West Supp. 2004) ("The [adoption placement] agreement may not be signed by either the birth parents or the prospective adoptive parents until the time of discharge of the birth mother from the hospital."); *id.* § 8801.3(c)(2) ("[The adoption placement agreement form shall include a] statement that the birth parent understands that . . . if the birth parent takes no further action, on the 31st day after signing the adoption placement agreement, the agreement shall become a permanent and irrevocable consent to the adoption."); GA. CODE ANN. § 19-8-9(b) (2004) ("A person signing a surrender [of parental rights] . . . shall have the right to withdraw the surrender by written notice delivered in person or mailed by registered mail or statutory overnight delivery within ten days after signing . . ."); IOWA CODE ANN. § 600A.4(2)(g) (West Supp. 2005) ("[A release of custody s]hall be signed, not less than seventy-two hours after the birth of the child to be released, by all living parents. The seventy-two-hour minimum time period requirement shall not be waived."); R.I. GEN. LAWS § 15-7-6 (2003) ("Any duly licensed child placement agency in this state, or governmental child placement agency, at the request of the natural parent or parents of a child under eighteen (18) years of age, may, not sooner than fifteen (15) days after the birth of the child, petition the family court for the termination of the rights of the natural parents of the child to consent to its adoption."); VT. STAT. ANN. tit. 15A, § 2-404(a) (2002) ("A parent whose consent to the adoption of a minor is required by section 2-401 of this title may not execute a consent or a relinquishment sooner than 36 hours after the minor is born. A parent who executes a consent or relinquishment may revoke the consent or relinquishment within 21 days after the consent or relinquishment is executed by filing a written notice in the court in which the consent was executed.")

through public adoption agencies, require adoptive parents in private adoptions to pay for birth mothers' separate legal counsel, or otherwise take steps to make certain that birth mothers are aware of their rights within the adoption process and their rights if they decide not to place a child for adoption.<sup>86</sup> With such provisions, the law could recognize and protect the dignity and distinctiveness of the parent-child relation in ways that are also designed to protect birth mothers, rather than simply focused on limiting the compensation that birth mothers may receive.

*C. Reforming the Legal Restrictions  
on Economic Exchange Within Intimate Relationships*

In sum, the law might usefully seek to reduce the distributive costs of its efforts to mark the specialness of intimate relationships by pursuing means of differentiation that do not involve restrictions on economic exchange. Yet at the same time, it is highly doubtful that the law will abandon the notion that limiting economic exchange within intimate relationships is an important way to signify the specialness of those relationships. In some cases, there are practical and compelling reasons to want certain restrictions on economic exchange. For instance, allowing the sale of children would be likely to endanger children's welfare, to undermine the parent-child relationship, and to lessen the value placed on human life. A child is not a commodity and should not be subject to the same rules of economic exchange applied to commodities. Moreover, even in cases where the reasons for restricting economic exchange within intimate relationships may be less practically compelling, the legal tradition of limiting economic exchange between intimates is deeply entrenched and unlikely to be forsaken. Restraints on economic exchange have long wielded an enormous legal and social power to differentiate intimate relationships, even if intimate relations are not, and have never been, completely separate from the market.

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<sup>86</sup> California does require adoptive parents to pay for a birth mother's separate legal counsel if the birth mother so requests. See CAL. FAM. CODE § 8801.5(c) (West 2004) ("The department shall prescribe the format and process for advising birth parents of their rights, the content of which shall include, but not be limited to, the following: . . . (4) The right to separate legal counsel paid for by the prospective adoptive parents upon the request of the birth parent, as provided for by Section 8800."); *id.* § 8800(d) ("Notwithstanding any other law, it is unethical for an attorney to undertake the representation of both the prospective adoptive parents and the birth parents of a child in any negotiations or proceedings in connection with an adoption unless a written consent is obtained from both parties. The written consent shall include all of the following: (1) A notice to the birth parents . . . of their right to have an independent attorney advise and represent them in the adoption proceeding and that the prospective adoptive parents may be required to pay the reasonable attorney's fees up to a maximum of five hundred dollars (\$500) for that representation, unless a higher fee is agreed to by the parties.").

In this light, it is worth exploring how the law might adjust its restrictions on economic exchange within intimate relationships in an attempt to reduce the restrictions' undesirable distributive consequences. The law has good reasons for wanting to mark the specialness of intimate relationships. But the legal system can and should pursue its interest in differentiating intimacy with more concern that the process not leave some participants desperate and resourceless. Intimacy can be sacred and distinctive without being impoverishing.

One reason that the law's present efforts to differentiate intimacy may be impoverishing is that these efforts seem to systematically assume, and then help perpetuate, dependency. For instance, we have examined a number of contexts in which the law denies women rights to compensation for their activities on the apparent presumption that the women will receive support from someone else. In the process, these refusals to compensate make women more reliant on others for support. If one drops the assumption that women will always be supported by other people, the law's strategies for marking intimate relations might seem to impose extraordinarily high costs. In fact, many women have no one else to support them. Moreover, depending on another person may not be nearly as reliable or secure a source of income as self-support in any event. This suggests that one way to make intimacy less impoverishing may be to find means of reaffirming the distinctiveness of intimate relationships that also recognize the significance of self-support for both men and women.

Take the example of adoption again. As we have seen, birth mothers placing a child for adoption are currently permitted to receive living and medical expenses from the adoptive parents. A mass of statutes and court opinions strictly define what constitutes a living or medical expense.<sup>87</sup> States, though, might consider allowing more resources to flow to birth mothers in ways that would help birth mothers improve their life chances and their ability to support themselves. For instance, states might permit adoptive parents to pay for a birth mother's educational expenses or job training, something that some state adoption statutes now explicitly prohibit.<sup>88</sup>

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<sup>87</sup> See sources cited *supra* note 51.

<sup>88</sup> See 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West Supp. 2005) ("A person or persons who have filed or intend to file a petition to adopt a child under the Adoption Act shall be permitted to pay the reasonable living expenses of the biological parents of the child sought to be adopted . . . 'Reasonable living expenses' . . . does not include . . . educational expenses, or other similar expenses of the biological parents." (footnote omitted)); MINN. STAT. § 259.55(1) (2004) ("In any adoption under this chapter, a prospective adoptive parent or anyone acting in concert with, at the direction of, or on behalf of a prospective adoptive parent may pay only the following expenses of the birth parent . . . (4) reasonable living expenses of the birth mother . . . (iii) reasonable living expenses does not include . . . educational expenses, or other similar expenses of the birth mother."); MONT. CODE ANN. § 42-7-101(1) (2003) ("Reasonable adoption fees may be paid by



This legal reform could enhance a birth mother's opportunities in life and capacity for self-support, without sanctioning unlimited payments between adoptive parents and birth mothers. It would use structured and special forms of exchange to mark the specialness of the parent-child relation. It would acknowledge the power of legal restrictions on economic transfer to affirm the importance and distinctiveness of parenthood and to express society's abhorrence of the practice of selling children. At the same time, the proposed reform would permit more resources to go to birth mothers in ways that advance constructive aims and self-support. The reform would make it less likely that the law's efforts to differentiate and sanctify intimate relationships will leave those intimates with the fewest assets and the least bargaining power desperate and impoverished. It would recognize that the law need not be and should not be so focused on affirming the specialness of intimate relationships that it abandons some participants without resources.

#### CONCLUSION

There is no guarantee that the legal system will be willing to adjust the ways it demarcates intimacy. Yet legal reform that pursues new or simply modified means of denoting the specialness of intimate relationships might help change intuitions, both within the legal system and outside of it, about the best and most reasonable ways for the law to differentiate intimate relations. There is good cause, moreover, to invite flexibility in the legal system. As we have seen, the law's present efforts to establish an intimate relationship's special dignity and worth by declaring its separation from the market appear to systematically burden people who are already disproportionately burdened. This gives us good reason to reexamine the legal system's current attempts to mark the distinctiveness of intimate relationships and to explore alternative ways of differentiating intimate relations that might aid those people who are now most likely to be injured by the law's efforts at social sanctification.

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the adoptive parent for the actual cost of services. The cost of services must relate to . . . (k) other reasonable costs related to adoption that do not include education . . . for the birth parent."); N.H. REV. STAT. ANN. § 170-B:13(I) (Supp. 2004) ("In any adoption of an unrelated minor child under this chapter, an intended adoptive parent or anyone acting in concert with, at the direction of, or on behalf of an intended adoptive parent shall pay only the following expenses of the birth parent . . . (d) Reasonable living expenses of the birth mother . . . . Reasonable living expenses shall not include . . . educational expenses . . ."); N.D. CENT. CODE § 14-15-09(1) (2004) ("A petition for adoption must . . . state . . . j. That the petitioner's expenses were reasonable as verified by the court. . . . Reasonable fees may include . . . (5) Living expenses of the birth mother . . . . (b) Living expenses do not include . . . educational expenses . . . or other similar expenses of a birth mother.").