Washington University
Journal of Law & Policy

For Love Or Money? Defining Relationships In Law And Life

Introduction

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Human life is structured by a variety of relationships, interactions, exchanges, and organizations—some are complicated, some are simple; some are longstanding, while others are brief; and some are memorialized through formal legal agreement or state-conferred status, while others remain the product of convenience, habit, or social convention. Yet one overriding characteristic by which the state, social communities, and individuals categorize human relationships and interactions is by distinguishing between those arising out of emotion—including love, passion, or altruism and those arising from economic expediency or profit-seeking. In other words, was the act, relationship, or exchange in question made for love (broadly construed) or for money?

Researchers know that this "love or money" dichotomy is in many ways artificial. In the real world, people interact for a variety of complex, intermingled, and often contradictory reasons. Many people are passionate about their work and love their jobs, yet nearly all

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enter the labor force and remain employed out of financial necessity. Conversely, while marriage is associated in American culture with love, many marry or remain married for reasons of social and economic advantage. Individuals blur the lines between love and money in a host of other ways: we purchase intimacy, companionship, and personal services associated with love, embark on business and commercial ventures with friends and family members, and engage in exchange relationships regarding the most intimate aspects of ourselves—our fertility, our children, our bodies, our blood—for motivations that appear a combination of altruism and profit-seeking.

Yet once the "love" or "money" labels have attached to a relationship or interaction, a variety of personal, social, and legal consequences flow from that label. Cognitive dissonance may result for an individual forced to consider in "money" terms a relationship once in the loving category. Social stigma may attach to those who transgress societal conventions regarding which interactions should be motivated by love and which by money. Legal disadvantage may result to those disempowered by the law's efforts to maintain the divide between love and money. In some circumstances the law encumbers or bans outright incursions by money into the realm of love.

Why has the "love or money" distinction been such an important and enduring one? To what extent does this distinction reflect reality? To the extent that it does not, why do we maintain the dichotomy? To further some state interest? The goals of some societal subgroup? Are these interests and goals valid ones? Or do they have negative consequences? These are the questions addressed by our symposium participants.

In *The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law*, Yuval Feldman examines the conventional distinction between intrinsic and extrinsic motivations for human behavior in social psychology and behavioral theory and outlines their complicated interaction. Focusing on law's role as an extrinsic motivator, Feldman explains that extrinsic motivation can reinforce intrinsic motivation by expressing social norms which in turn influence behavior, or undermine intrinsic motivation through a

"crowding out" effect. Reasoning from empirical data, Feldman argues that legal policy-making should take into account these behavioral realities by attending to how legal incentives are framed, how closely the legal instrument is tailored to individual intrinsic motivation, whether legal intervention functions similarly to monetary incentives and penalties in the particular context where it is applied, and the role that legal uncertainty plays. Feldman concludes that the intrinsic and extrinsic behavior categories echo the love or money divide, and that disentangling them is difficult but nonetheless important for effective legal interventions.

Rebecca Hollander-Blumoff responds with a focus on how corporate behavior is motivated. She suggests that Feldman's emphasis on the roles of intrinsic and extrinsic motivation complicates questions of motivation in the legal context. At least where deterrence is the goal and corporate actions are the target, she observes, concerns regarding crowding out are moot. She contends that the dichotomous categories of extrinsic and intrinsic behavior have little utility in the abstract, and argues for consideration of multiple motivations and their behavioral effects regardless of their origin. She proposes reframing the motivation analysis to consider not only which legal incentives are most likely to deter violators, but also which nonmonetary goals victims may have: a desire to receive an apology, for example, or an interest in fair process and public denunciation.

In *Does Profit-Seeking Rule Out Love? Evidence (or Not) From Economics and Law*, Julie A. Nelson argues that, though many believe that firms are driven by both economics and law to maximize profits, these views are mistaken on both fronts. Indeed, she contends, the profit-maximization assumption represents not merely a myth, but a self-fulfilling prophecy. To the extent we preach that firms must profit maximize because it is their purpose, "we undermine the very social values that we may believe we are defending." What should be feared, she concludes, is not the simple entry of "money"—prices, money, or market relations—into significant personal and social relationships, but the entry of narrow profit-maximization norms that reduce the value of everything to its contribution to the bottom line.

In *Capturing the "And:"*, William W. Bratton agrees with Nelson's conclusions: corporate law does not now nor has it ever required shareholder maximization. Indeed, Bratton argues that corporate law could not require maximization even if it tried. Instead, corporate law can only facilitate profit maximization, by freeing firms to attempt to maximize the value of what they produce. Bratton's primary focus is a related question raised by Nelson's project: why did profit-maximization come to dominate American thinking about firms in the first place? He contends that, though the writings of Adolf Berle continue to be invoked as support for modern-day shareholder primacy arguments, these invocations rest on a misunderstanding of Berle's theories. Bratton concludes that even the financial crisis was an insufficient shock to challenge the entrenched profit-maximization norms described by Nelson.

In *Working Relationships*, Laura Rosenbury considers the significance of social ties at work. Rosenbury points to the legal dichotomy between intimacy (experienced at home or within the family unit) and production (the purpose of paid employment), which closely tracks the love/money divide. The law's insistence on this dichotomy causes it to miss the noneconomic functions of relationships at work, and seems particularly perplexing in light of the common historical roots shared by family law and work law. Rosenbury argues that law's failure to attend to the workplace as a site for intimacy has important ramifications for antidiscrimination goals, in particular. At present, workplace intimacy is both potentially under-regulated (favoritism based on friendship networks is generally not actionable, for example) and over-regulated (through sexual harassment law, which sweeps broadly in the area of sexual interactions at work). Rosenbury sketches an agenda for legal reform that draws upon social science literature to ground a functional approach to relationships that is more attentive to the role of networks of care and intimacy at work, oriented toward advancing workplace equality, and less bounded by the preconceived nature or situs of the relationships.

Ethan Leib affirms the importance of employment as a site where intimacy forms, agreeing with Rosenbury that law's fixation on gender hierarchy and sexual harassment is an incomplete response to the dilemma presented by homophily (the tendency to prefer those

who are similar to ourselves along racial, gender, religious, national origin, or sexual orientation axes) in social networks at work. Leib discusses empirical research which suggests that individuals are more likely to perceive coworker interactions as transactional, perhaps because forces such as law or culture influence our understanding of intimacy as linked to context. Leib argues that a range of intimacies are likely operating at work, and that consideration of context is critical. Moreover, the shifting and permeable boundaries of the work*place* present challenges to any effort to erect a taxonomy of workplace intimacies, and may have important legal ramifications. For example, supportive work networks exist even when workers employed by other entities, such as competitors, suppliers or distributors. Leib embraces Rosenbury's agenda for reform and emphasizes the need for specificity and practical guidance, standards and rules.

In *Arm's-Length Intimacy: Employment as Relationship,* Marion Crain argues that work law's frame of employment as an arm's-length, impersonal, cash-for-labor transaction ignores the realities of dependence and investment that characterize employment for most workers. The consequences of this frame are experienced most keenly at termination: with no requirement of notice, no transitional period and limited income support through the unemployment insurance system, workers are cast adrift when they are terminated, even if the termination is through no fault of their own. Crain contends that work law's blindness to the intimacy inherent in many employment relationships is unsustainable. Crain looks to family law—particularly the law of marital termination—for an alternative model that challenges the love/money dichotomy, and proposes development of a status-based general law of relationship termination. The practical effects of this shift might include a requirement of notice and transitional assistance at discharge linked to longevity of employment and investment; recognition of and compensation for the emotional harm linked to termination; and even the recognition of property rights for workers in collectively created assets.

Scott Baker responds with a critique rooted in economic theory. Baker challenges Crain's assumption that employers possess the bulk of the bargaining power in the employment relation, suggesting that

her analysis overlooks the ways in which employees exploit the relationship-specific investments made by employers. Worrying that Crain's proposal would increase labor costs, prompting employers to substitute capital investment for labor and reducing overall employment, Baker argues for a more symmetric analysis that would create protections for employers where employees quit without notice or cause. Baker also questions the frequency of arbitrary discharge—is the problem of sufficient magnitude to justify the administrative costs of regulating it? Finally, Baker critiques Crain's suggestion of a general theory of recovery for relationship-specific investments, pointing to pragmatic difficulties in limiting its application and raising slippery-slope objections. Should every relationship be subject to notification-of-termination requirements, Baker asks? Baker concludes by defending the differential treatment of marriage and employment relationships at termination.

In *Enforcing Bargains In An Ongoing Marriage*, Mary Anne Case notes that courts are generally unwilling to enforce bargains within an ongoing marriage, in contrast to their increasingly receptive approach to the enforcement of contracts within other long-term sexual relationships. Case argues that the U.S. courts are an appropriate forum for the enforcement of bargains within an ongoing marriage because, if the courts are closed to such couples, they will look elsewhere for an authority to intermediate their disputes. Those authorities, such as religious bodies or individual clergy, may have views about appropriate gender roles within marriage that are limited within the U.S. courts by constitutional protections, such as the ban against slavery and the guarantees of equal protection and due process.

In response, Robert A. Pollak employs a critique of economic models of bargaining behavior to argue that, though enforceability of contracts within an ongoing marriage may improve upon the "love it or leave it" rule condemned by Case, the magnitude of the improvement would likely be small. Pollak argues that relevant economic models overstate the likelihood of inefficiency in the absence of contractual enforcement because they fail to account for three less costly and more effective mechanisms: internalized norms, self-help, and non-legal third-party help. Economic bargaining models also tend to ignore inefficiencies in the legal enforcement of

bargains in an ongoing marriage, including enforcement costs, the relational nature of such contracts, and the reluctance of family members to enter into contracts. As a result, he argues, Case's proposal is likely to involve only an incremental improvement over the status quo.

In *Incorporating The Hendricksons*, Larry E. Ribstein argues that recent proposals to apply the business associations model to domestic relationships risk undermining the integrity of both business association law and family law, because the two types of relationships differ in significant respects. These differences, Ribstein contends, relate to the separation between the individual and the organization, the trust and confidence among the members, and the broader social effects of governing the organizations. Ribstein concludes that there are some similarities between the business association and the family in basic function—each deal with long-term human relationships and the agency, opportunism, and other problems arising from such dealings. But the differences are many, suggesting that the law should provide for multiple forms in each category, while maintaining a separation between business and familial standard forms. Though the law should not seek to preclude any ultimate convergence of business and domestic standard forms as social conceptions of those entities change over time, "distinct standard forms should facilitate but not drive these social judgments."

Robert C. Ellickson agrees with Ribstein's conclusion that a direct transplant of forms between the business and domestic domains is unwise, but contests Ribstein's prediction that the two types of forms may ultimately converge, should conceptions of marriage change significantly over time. Relying on Thomas W. Merrill & Henry E. Smith, Ellickson argues that lawmakers should strive, not for more standard forms, but for an optimal number of standard forms. This optimal number would provide transactors a range of choices, without unduly increasing information costs. Ellickson concludes that marriage as an institution is currently desired by a wide range of adults seeking to enter unconditional trusting relationships that provide a robust form of social insurance and a mechanism for child rearing. He predicts that the demand for the marital standard form will endure, making convergence with business forms unlikely.

In *Testing as Commodification*, Katharine Silbaugh argues that debates within the standardized testing literature represent a split similar to the one witnessed in traditional debates on the commodifying effects of market exchange: those who extol the virtues of a common metric by which to make comparisons and evaluations, on the one hand, versus those who argue that test scores have swallowed other notions of the public good in education, on the other. Silbaugh concludes that "from the comparison we draw cautionary notes for the testing movement, areas for further research about motivation in behavioral science, and translation of a philosophical debate into practical policy."

Kieran Healy responds in *Counting and Commodifying*, posing three possible responses to the article: first, that testing is not really commodification; second, that perhaps testing is not as bad as Silbaugh suggests; and, finally, that it may be mistaken to envision certain subjects and practices as intrinsically unquantifiable. While the first two responses are critiques of the article's central claims, the third suggests that the problem identified is even more general than Silbaugh implies. Healy concludes that the problems Silbaugh identifies are not market-like flaws caused by the recent introduction of standardized testing, but rather are "well-known features of bureaucratic administration."

Kimberly Krawiec also responds to Silbaugh in *The Dark Side of Commodification Critiques: Politics & Elitism in Standardized Testing*, arguing that, though the testing-as-commodification analogy is imperfect, it shows more than Silbaugh acknowledges. Whereas Silbaugh concludes that her comparison demonstrates the failure of standardized testing, Krawiec contends that it primarily demonstrates the politically driven and elitist nature of much of the standardized testing debate. She concludes that commodification objections long have held an elitist flavor and—because they are more likely to resonate with audiences than narrower appeals to self-interest—have been invoked for political gains. If standardized testing debates bear similarities to market commodification debates, it is only natural, she argues, that the parallels extend to these traits as well.

In *"Money Can't Buy Me Love:" How Sex Therapy Became a Commodity in the Age of Viagra*, Susan Ekberg Stiritz and Susan Frelich Appleton explore the evolution of sex therapy, arguing that

the initial promise of transformative and liberatory practices that would shape egalitarian sexual expectations and practices ultimately morphed into the commodification of sexuality and the affirmation of male dominance. As modern medicine co-opted sexual dysfunction in order to market a variety of prescription drugs such as Viagra and Flibanserin (the pharmaceutical industry's attempt at female Viagra), "money"—in the form of a push toward corporate profits and global marketing—once again triumphed over "love" and relationships. Stiritz and Appleton conclude that Viagra has been embraced by our culture because it fits into the phallic fantasy model that dominates the culture, at the expense of a truly mutual sexuality grounded in relationships.

Adrienne Davis speculates on the intriguing questions raised by Stiritz and Appleton's essay, wondering about their implications for cultural understandings of sexual politics. For example, what does it mean to frame a sexual practice as erotic? Are some forms of eroticism more legitimate than others? Davis observes that Stiritz and Appleton's analysis implies that medically-enabled erections are illegitimate, at least as contrasted with erections that are "earned" through the currency of an interpersonal relationship. What, then, of singles or the disabled—do they have a right to the erotic? And what about inegalitarian erotic practices: how should we distinguish the erotic from the desired, the sexual, or even the pornographic? Finally, Davis asks, is there a right to an erotic life? If so, how should we understand it?

In short, whether turning their lens on corporate motivations, workplace practices and relationships, family law principles, educational testing, or sex therapy, our symposium authors encountered the ubiquitous love-or-money dichotomy. Some embraced the dichotomy as natural and logical, while others criticized it as a product of social construction that reinforces existing power differentials or fails to reflect behavioral realities. All of the essays emphasize the powerful role that law plays in reifying the love/money distinction, a story which is both familiar and simultaneously hopeful for legal policymakers interested in the possibilities for legal reform.