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# WHY TORTS DIE

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## I. INTRODUCTION

Tort law occupies far more factual and conceptual territory today than it did a century ago.[1] To cite just a few examples of this growth, a hundred years ago the concept of strict products liability had yet to appear on the jurisprudential horizon.[2] William Prosser had not extracted the tort of intentional infliction of emotional distress from the case reports.[3] And compensation for negligently inflicted prenatal injuries[4] and the imposition of liability for defective products based on

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1. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 360 (2002).

2. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., dissenting) (arguing for strict liability for defective products).

3. *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939) (proposing a "new tort" of intentional infliction of emotional distress); *cf.* FRANCIS M. BURDICK, THE LAW OF TORTS ¶ 109 (3d ed. 1913) (reiterating the longstanding rule that mental pain or anxiety alone will not support a cause of action).

4. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55 (5th ed. 1984). *Compare* RESTATEMENT (SECOND) OF TORTS § 869 (1979) (recognizing liabil-

market share[5] were not even gleams in the eyes of the most forward-thinking jurists.

But amid this general expansion of tort law, certain theories of liability have faded or disappeared. A century ago, a husband could recover substantial damages from someone who had sex with his wife,[6] even if the interloper had no idea that his lover was married.[7] In the Deep South, a Caucasian rail passenger could bring a claim against a railroad company if a conductor directed him or her to a compartment used by African-American customers.[8] And in several states, a wife could proceed against a tavern for the wages that its patron—her alcoholic husband—had failed to earn due to his chronic inebriation.[9] Should a contemporary plaintiff have the temerity to press any one of these claims, most courts would reject his or her lawsuit out of hand.

Scholars have paid more attention to how new torts are born than to how—and why—torts die.[10] But torts do die. Formerly prominent causes of action—of which the aforementioned criminal conversation, insult, and spousal alcoholism torts are but three of many—have become rare or have vanished altogether. Some of these torts have been abolished by courts or legislatures, others have been abandoned by plaintiffs, and still others have been abrogated in some jurisdictions and deserted elsewhere. In a few instances, a particular impetus (for example, the end of Prohibition) clearly bears responsibility for the demise of a related cause of action (claims against public officers for failing to enforce dry laws).[11] Other torts have disappeared under more mysterious circumstances, with the precise cause of death re-

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ity for prenatal injuries), *with* RESTATEMENT OF TORTS § 869 (1939) (rejecting liability for such injuries).

5. *See* Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980).

6. *E.g.*, Stark v. Johnson, 95 P. 930 (Colo. 1908); Smith v. Hockenberry, 109 N.W. 23 (Mich. 1906).

7. RESTATEMENT OF TORTS § 685 cmt. d (1938); 7 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 22.7 (1990).

8. *E.g.*, Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899 (Ga. Ct. App. 1907); RESTATEMENT OF TORTS § 48 cmt. e (1934).

9. *E.g.*, Earp v. Lilly, 75 N.E. 552 (Ill. 1905).

10. *See*, *e.g.*, Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997); Robert F. Blomquist, *"New Torts": A Critical History, Taxonomy, and Appraisal*, 95 DICK. L. REV. 23 (1990). To the extent that academics have turned their attention toward why torts die, they have typically focused on the passage of particular torts. *See*, *e.g.*, M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. 33, 98-102 (1987) (attributing the decline of the tort of seduction to changes in the status and perception of women in the United States during the twentieth century); Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455 (1999) (discussing the abrogation of torts recognized by the California Supreme Court under Chief Justice Rose Bird and attributing this development to changes in the political and philosophical leanings of the court).

11. *See* Act of Apr. 21, 1917, ch. 187, § 53, 1917 Neb. Laws 425, 448-49 (repealed 1935) (conferring a cause of action against government authorities who failed to enforce Prohibition).

maining unknown. Adding to the mystery, these claims have withered and died even as other torts have thrived in seemingly inhospitable environments.

A few authors have performed autopsies on specific torts and identified the suspected reasons behind their deaths.[12] These analyses, though interesting, are by their own admission of limited scope and do not provide especially useful analytic or predictive tools. This Article has a broader goal. Just as pathologists and epidemiologists study how fatal illnesses spread,[13] conservation biologists examine why animal species go extinct,[14] and geographers and anthropologists try to understand why societies succeed or fail,[15] this Article surveys the roster of dead and dying torts and then asks (and tries to answer) a novel question: Why do torts die? This question quickly breaks down into several other queries, of which the following are just a few: Do defunct tort theories share a common fatal flaw? Do torts die for reasons of substance, procedure, or some combination of both? What roles do courts, legislatures, and plaintiffs each play in the deaths of torts? And what, if anything, can the disappearance of some tort theories tell us about what makes other claims survive and prosper?

This Article proposes some answers to these questions. The discussion below offers and develops a framework for analyzing why torts die that focuses upon the contributions made by the following six factors: (1) the changes in the cultural atmosphere surrounding a tort; (2) the quality of the arguments directed against the tort; (3) the interests, abilities, and limitations of the audiences that entertain and act upon these arguments; (4) the influence exerted by the agents who advocate or oppose the elimination of the tort; (5) the attractiveness of alternatives, if any, that may exist to tort liability; and (6) the attributes of the tort itself that make it more or less susceptible to abolition or abandonment. When tested through case studies, this model suggests that torts die when atmosphere, arguments, audiences, agents, alternatives, and attributes combine to direct a tort toward abolition, abandonment, or both. Put another way, most bygone torts have not died simply because times changed. Changing times, or other ambient conditions of the environment in which a tort operates, *may* prove lethal to a tort if and when they produce arguments against the cause of action that are properly at-

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12. *E.g.*, Sinclair, *supra* note 10, at 98-102 (attributing the disappearance of the tort of seduction in the United States to shifts in "the myth of the ideal woman"); Sugarman, *supra* note 10.

13. CHARLES E. ROSENBERG, EXPLAINING EPIDEMICS AND OTHER STUDIES IN THE HISTORY OF MEDICINE 293-304 (1992).

14. *E.g.*, RICHARD ELLIS, NO TURNING BACK: THE LIFE AND DEATH OF ANIMAL SPECIES (2004); DAVID M. RAUP, EXTINCTION: BAD GENES OR BAD LUCK? (1991).

15. *E.g.*, JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (2005).

tuned to the interests, concerns, and capabilities of the agents and audiences who endorse or reject theories of liability, and the attributes of the tort and any available alternatives accelerate, rather than defuse, the drive toward abolition or abandonment. Where these factors are not properly aligned, a tort may prove capable of tacking into the prevailing cultural winds.

This Article proceeds as follows. The first step in developing the argument summarized above requires that I establish that some torts actually have died or are dying. Toward this purpose, Part II of this Article maps the graveyard of extinct or moribund torts, in which are buried the "amatory" or "heartbalm"[16] torts (alienation of affections, breach of promise to marry, criminal conversation, and seduction); bad faith denial of contract claims; corpse mishandling claims; claims for insult; the torts of maintenance and champerty; claims seeking consequential damages for injuries negligently inflicted on servants; certain nuisance suits; support actions by the wives of alcoholics; suits involving unsent, misdirected, or garbled telegrams; tort claims attacking a range of unfair trade or labor practices; and personal injury actions against employers, to the extent these suits sound in negligence. In this Part, I briefly describe the gist of each departed cause of action and review the evidence of its decrease or demise.

Next, Part III discusses how atmosphere, arguments, audiences, agents, alternatives, and the attributes of a given tort theory affect its ability to survive. To better ascertain how these factors operate and interact, Parts IV, V, and VI relate how claims for insult, "obesity lawsuits," and the heartbalm torts have arrived at the brink of extinction. To summarize these studies, the insult tort has vanished due to an atmospheric change—a marked decrease in passenger rail travel (which formerly produced the lion's share of insult claims)—combined with the cannibalizing effect of an alternative form of relief, the "new tort" of intentional infliction of emotional distress. The "obesity lawsuit" has come under attack because it threatens the interests of a cohesive group of potential defendants and has no comparably motivated base of supporters; additionally, holding the food industry accountable for the health effects of its products has been portrayed, effectively, as inconsistent with prevailing values. Finally, the amatory torts have fallen victim to the legal equivalent of a "perfect storm," in which fierce opponents, persuasive arguments, flaws within the torts themselves, and unfriendly cultural trends produced

16. The "heartbalm" label was affixed to these torts by their critics. *See* Frederick L. Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63, 65 (1936). The derogatory nickname stuck. This Article uses "heartbalm torts" as a shorthand reference to these claims, but in so doing, I do not mean to suggest a dismissive attitude toward the torts.

two perversely complementary rounds of abolitionist fervor—the first of which followed from a perceived excess of heartbalm suits in the 1920s and early 1930s, and the second, decades later, from a sense that so few of these claims were being filed by then that the torts no longer served a useful purpose. In each instance, the studied tort or torts succumbed to a confluence of compromising circumstances, implicating multiple components of the framework proposed in this Article.

Finally, Part VII of this Article reviews a few lessons that the three case studies provide. These studies establish the need to account for the impacts of atmosphere, arguments, audiences, agents, alternatives, and attributes when studying the death of a tort. Not all of these factors may be involved in the death of a cause of action, but as the case studies suggest, they often interact in interesting and unanticipated ways. The case studies also indicate that an unused tort is an endangered one, and thus portend that even modest "tort reform" measures cast as mending, not ending, the tort system may lead to the demise of tort theories by setting in motion a series of events in which the causes of action are first forsaken by plaintiffs and then eventually abolished by courts or legislatures.

## II. DEAD OR DYING TORTS

Tort plaintiffs today can recover for far more affronts than their ancestors ever dreamed possible. Across our nation, courts and legislatures seem to place an ever-broadening array of causes of action in the hands of plaintiffs and their attorneys.[17] But it would be a mistake to conclude from this overall expansion of tort liability that, once born, torts never die. On the contrary, just as animal species go extinct, buildings collapse, and stars implode into black holes, certain torts have already vanished, and others will disappear in the future.

To give an idea of the menagerie of defunct causes of action, the following is a partial[18] roster of extinct or endangered torts.[19]

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17. KEETON ET AL., *supra* note 4, § 1, at 3 (observing that "[n]ew and nameless torts are being recognized constantly . . . where none had been recognized before").

18. For a discussion of a few other now-defunct causes of action, see 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 (identifying the marriage of a son without parental consent as giving rise to an actionable injury), 218 (addressing nuisances involving disturbances with markets), and 237-39 (discussing the surcharge or misuse of common areas).

19. The author recognizes that the lines separating one tort theory from another are sometimes hard to discern, making it difficult to tell when a distinct tort has been born or has died. *Cf.* ELLIS, *supra* note 14, at 3 (observing that there are more than twenty definitions of "species" in use). For lack of any better taxonomic tools, in identifying distinct "torts," I have relied upon criteria including whether or not the tort has been assigned its own name; whether treatises, courts, and practitioners have regarded the tort as somehow distinct from other causes of action; and the differences, if any, between the legal rules

### *A. The "Heartbalm" Torts*

The heartbalm or amatory torts all involve derailed intimate relationships. An alienation of affections claim arises when a defendant[20] intentionally interferes with a marriage, straining relations between husband and wife.[21] Criminal conversation occurs when the defendant engages in sexual intercourse with a married person.[22] The plaintiff in a breach of promise to marry suit attacks a failure to follow through with an accepted promise of marriage.[23] Seduction, the fourth and final heartbalm tort, involves at least one act of intercourse between the defendant and an unmarried woman, accomplished by way of artifices and persuasions.[24]

A century ago, leading treatises devoted extensive discussion to the amatory torts.[25] Today, these claims barely survive. As of this writing, all but a handful of states have abolished or substantially limited claims for alienation of affections[26] and criminal conversation,[27] and about half of the states have abrogated or pared back claims for breach of promise to marry[28] and seduction.[29] Even where these claims persist, few plaintiffs show much interest in them. With

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formulated for the tort and those applicable to other types of claims. *Cf.* Bernstein, *supra* note 10, at 1541 (defining "new torts" as "roughly what torts people say they are").

20. Alienation of affections claims typically fell into one of two classes: (1) suits against a man or woman with romantic designs on a spouse and (2) claims brought against meddling in-laws. A higher burden of proof applied to alienation of affections suits against the latter class of defendants; a presumption existed that relatives acted with proper motives. *See* McCollister v. McCollister, 138 A. 472, 473 (Me. 1927); RESTATEMENT OF TORTS § 686(a) (1938).

21. KEETON ET AL., *supra* note 4, § 124, at 917. Some authorities have recognized a related heartbalm tort, "enticement," in situations where a person influences, assists, or forces one spouse to separate or remain apart from the other. *Id.*; *see also* RESTATEMENT OF TORTS § 684 (1938).

22. KEETON ET AL., *supra* note 4, § 124, at 917. A plaintiff alleging criminal conversation did not have to prove alienation of affections or loss of companionship and service in order to recover damages, though such evidence could aggravate the damages associated with a criminal conversation claim. The gist of the action lay in the defilement of the marriage bed and the violation of the husband's exclusive right to intercourse with his wife. *See* H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS § 95, at 460 (1917); 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 167 (4th ed. 1932).

23. Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 729 (2004).

24. Carter v. Murphy, 75 P.2d 1072, 1079-80 (Cal. 1938) (describing tort); RESTATEMENT OF TORTS § 701 (1938); CHAPIN, *supra* note 22, § 66. For recent takes on the seduction tort, see Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit' ": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996).

25. *E.g.*, 2 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 585-95 (1859).

26. *See infra* notes 370-77, 382, 390, 408-34, 454-60 and accompanying text.

27. *See infra* notes 370-77, 382, 390, 408-34, 443-53 and accompanying text.

28. *See infra* notes 370-77, 382, 390, 408-34, 461-62 and accompanying text.

29. *See infra* notes 370-77, 382, 390, 408-34, 464-65 and accompanying text.

the notable exceptions of Mississippi[30] and North Carolina[31] (both of which have recently entertained a spate of alienation of affections suits), over the past several years very few states have witnessed even a handful of cases implicating any of the heartbalm torts.[32]

### *B. Support Actions by Wives of Alcoholics*

An ancient common law rule provided that the mere provision of alcohol to someone who subsequently committed a liquor-fueled wrong did not provide a basis for imposing liability on the seller.[33] This rule changed starting in 1849,[34] when the temperance movement brought about the enactment of the first of the more than thirty civil liability laws—also known as "dramshop acts"—passed by various states.[35]

Consistent with one of the principal evils associated with alcohol back in the 1800s—the abandonment or neglect of families by chronically inebriated husbands and fathers[36]—several of these statutes were construed as allowing the wives of alcoholics to recover damages against saloonkeepers who sold drinks to their drunkard, unemployed—but otherwise healthy—husbands. The theory underlying these suits was that these sales worsened the husbands' alcoholism and thus prevented them from supporting their families through gainful employment.[37] Spousal alcoholism claims of this type were

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30. *E.g.*, Fitch v. Valentine, 959 So. 2d 1012 (Miss. 2007); Children's Med. Group, P.A. v. Phillips, 940 So. 2d 931 (Miss. 2006); Bland v. Hill, 735 So. 2d 414 (Miss. 1999); Hancock v. Watson, No. 2005-IA-00413-COA, 2007 Miss. App. LEXIS 7 (Ct. App. Jan. 9, 2007).

31. *E.g.*, Misenheimer v. Burris, 637 S.E.2d 173 (N.C. 2006); Stann v. Levine, 636 S.E.2d 214 (N.C. Ct. App. 2006); Nunn v. Allen, 574 S.E.2d 35 (N.C. Ct. App. 2002); Julie Scelfo, *Heartbreak's Revenge*, NEWSWEEK, Dec. 4, 2006, at 57 (estimating that approximately two hundred alienation of affections suits are being filed annually in North Carolina).

32. Marianne Funk, *Taking Heartbreak to Court Becomes Less Promising*, DESERET MORNING NEWS (Salt Lake City, Utah), Oct. 18, 1995, at B4 (observing that prior to a recently decided breach of promise suit, only three published cases existed in Utah concerning the tort, the last of which had been decided fifty years before); William Rabb, *'Other Woman' Safe in State*, MOBILE REGISTER, Aug. 13, 1997, at B1 (noting that suits by parents for their daughter's seduction are "extremely rare" in Alabama); Doug Smeath, *Alienated Spouses Can Sue*, DESERET MORNING NEWS (Salt Lake City, Utah), Sept. 26, 2004, at B1 (observing that "by all accounts, alienation-of-affections cases are very rare in Utah's courts"); s*ee infra* text accompanying notes 403-04.

33. Largo Corp. v. Crespin, 727 P.2d 1098, 1101 (Colo. 1986) (discussing the common law rule and the development of exceptions thereto).

34. This was the year that Wisconsin adopted the first dramshop act. Julius F. Lang, Jr. & John J. McGrath, Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1124 n.21 (1984).

35. *See* Richard Smith, Note, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 555 (2000).

36. *See* LaGuire v. Kain, 487 N.W.2d 389, 394 (Mich. 1992); Smith, *supra* note 35, at 565.

37. For example, a Nebraska dramshop law enacted in 1881 set up a licensing and bonding scheme for the sale of liquor in the state. Act of Feb. 28, 1881, ch. 61, 1881 Neb.

quite common in the early 1900s, particularly in the Midwestern states.[38] There, church groups went so far as to give seminars that taught women how to bring these suits.[39]

Spousal alcoholism actions dwindled during Prohibition, as the taps ran dry at the saloons whose owners once had been named as defendants. These claims disappeared altogether once temperance fervor abated,[40] leading to the repeal of both Prohibition[41] and many of the dramshop acts from which the spousal alcoholism tort sprouted.[42] Notwithstanding the recent reemergence of statutes and

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Laws 270 (repealed 1917). This statute provided that a saloonkeeper "shall pay all damages that the community or individuals may sustain in consequence of such traffic, he shall support all paupers, widows and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, his traffic in intoxicating drinks," *id.* § 15, at 275, and permitted married women to bring actions in their own names "for all damages sustained by herself and children on account of such traffic." *Id.* § 16, at 275. This law was repealed in 1917 and replaced with another statute that provided, in pertinent part, as follows:

> Any wife, child, parent, guardian, employee, or other person who shall be injured in person or property or means of support, by intoxication of any person, shall have a right of action against any person, association, or corporation, who by himself, his agent, or servant illegally furnished the intoxicating liquor that caused or contributed to the intoxication of such person, for all damages sustained.

Act of Apr. 21, 1917, ch. 187, § 52, 1917 Neb. Laws 425, 448 (repealed 1935).

38. *E.g.*, Earp v. Lilly, 75 N.E. 552 (Ill. 1905); Siegle v. Rush, 50 N.E. 1008 (Ill. 1898); Wolfe v. Johnson, 38 N.E. 886 (Ill. 1894); Leverenz v. Stevens, 124 Ill. App. 401 (App. Ct. 1906); League v. Ehmke, 94 N.W. 938 (Iowa 1903); Ennis v. Shiley, 47 Iowa 552 (1877); Gilmore v. Mathews, 67 Me. 517 (1877); Baker v. Mohl, 158 N.W. 187 (Mich. 1916); Kehrig v. Peters, 2 N.W. 801 (Mich. 1879); Colman v. Loeper, 143 N.W. 295 (Neb. 1913); Selders v. Brothers, 129 N.W. 170 (Neb. 1910); Acken v. Tinglehoff, 119 N.W. 456 (Neb. 1909); Jessen v. Wilhite, 104 N.W. 1064 (Neb. 1905); Mulford v. Clewell, 21 Ohio St. 191 (1871); Schneider v. Hosier, 21 Ohio St. 98 (1871); Garrigan v. Thompson, 95 N.W. 294 (S.D. 1903); Sandidge v. Widmann, 80 N.W. 164 (S.D. 1899); *see also* John A. Appleman, *Civil Liability Under the Illinois Dramshop Act*, 34 ILL. L. REV. 30, 35 (1939) (describing the cause of action as a common one).

39. *"Try" Saloon Men in Court; Give Drunkard's Wife $10,000*, CHI. TRIB., Jan. 26, 1912, at 1.

40. This void has not been filled by claims brought under common law negligence principles. Drafted around the time Prohibition collapsed, the *Restatement of Torts* expressly excepted sales of liquor from the general rule that one who knowingly sells a habit-forming drug to a husband or wife is liable to the spouse for any resulting harm to protected marital interests. RESTATEMENT OF TORTS § 696 cmt. c (1938). *But see* Pratt v. Daly, 104 P.2d 147, 151 (Ariz. 1940) (concluding that the sale of liquor to an alcoholic spouse by one with knowledge of his or her alcoholic condition gave rise to a common law negligence claim).

41. U.S. CONST. amend. XXI, § 1.

42. By 1978, more than half of the states that once had dramshop laws on the books had repealed them, Lang & McGrath, *supra* note 34, at 1124-25, and many of the remaining statutes limited liability to situations in which the alcohol had been sold to a minor or to a visibly intoxicated person. Vincent L. Ricci, Note, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 996 n.6 (1969); Smith, *supra* note 35, at 559-60. Nebraska and Illinois, the two states with the largest number of published opinions addressing the spousal alcoholism tort, were among the states taking action against these suits. Nebraska's dramshop act, with its civil-liability provisions, was repealed in 1935. Act of May 24, 1935, ch. 116, § 107, 1935 Neb. Laws 373, 430-31; *see also* Holmes v. Circo, 244 N.W.2d

case law that permit suits against bars and restaurants for the consequences of questionable or unlawful alcohol sales,[43] claims seeking recovery for lost wages due to spousal alcoholism alone are almost certainly a thing of the past.

### *C. Maintenance and Champerty*

Maintenance occurs when a third party provides a plaintiff with money for the purpose of bringing or sustaining a lawsuit.[44] A maintenance claim holds the sponsor liable for any injurious consequences of these payments.[45] Champerty, a particular type of maintenance, develops when a person or entity otherwise without a stake in a lawsuit agrees to fund the suit in exchange for a share of the profits, if any, reaped by the action.[46]

Tort claims for maintenance or champerty have never been common in the United States.[47] Beginning in the mid-1800s, American courts and legislatures determined that contingency-fee contracts between attorneys and their clients were not champertous, withdrawing the most common form of "officious intermeddling"[48] from the maintenance theory.[49] Maintenance and champerty have been invoked in modern cases typically only as defenses to allegedly unlawful contracts, not as affirmative causes of action in tort.[50] In the rare situations in which plaintiffs have alleged these theories as torts, a majority of courts have determined that maintenance and

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65, 67 (Neb. 1976) (discussing the effect of repeal). In Illinois, while a few dramshop cases continued to be brought into at least the 1960s, *see, e.g.*, *E. Alton Family Sues 3 Taverns Serving Husband*, EDWARDSVILLE INTELLIGENCER (Edwardsville, Ill.), July 7, 1962, at 7; *Ex-Wife Sues 40 Taverns for $490,000*, CHI. TRIB., Sept. 15, 1955, at 1, a measure enacted in 1986 drove a stake into the heart of this tort by amending the civil liability provisions of the state dramshop act to provide, in relevant part, that

> [n]othing in this Act shall be construed to confer a cause of action for injuries to the person or property of the intoxicated person himself, nor shall anything in this Act be construed to confer a cause of action for loss of means of support or society on the intoxicated person himself or on any person claiming to be supported by such intoxicated person . . . .

1986 ILL. LAWS 84-634.

43. Smith, *supra* note 35, at 556.

44. Schnabel v. Taft Broad. Co., 525 S.W.2d 819, 823 (Mo. Ct. App. 1975).

45. *Id.*; CHAPIN, *supra* note 22, § 103, at 497.

46. *Id.*; *see also* Merchants' Protective Ass'n v. Jacobsen, 127 P. 315, 317 (Idaho 1912) (discussing the origins of the champerty tort).

47. *See* CHAPIN, *supra* note 22, § 103, at 497 (commenting on the rareness of the torts); *see also* Golden Commissary Corp. v. Shipley, 157 A.2d 810, 814 n.2 (D.C. 1960) (citing sources stating or suggesting the same).

48. CHAPIN, *supra* note 22, § 103, at 497.

49. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 239-42 (1998).

50. Sec. Underground Storage, Inc. v. Anderson, 347 F.2d 964, 969 (10th Cir. 1965); Hardick v. Homol, 795 So. 2d 1107, 1110 (Fla. 5th DCA 2001); Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220 (Ohio 2003) (recognizing champerty and maintenance as contract defenses).

champerty claims are no longer viable, if they were ever recognized at all.[51]

### *D. Bad Faith Denial of Contract*

A tort does not have to be old to die. A tort claim for bad faith denial of the existence of a contract was first recognized in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*,[52] a 1984 decision by the California Supreme Court that espied a tort when a defendant, in addition to breaching a contract, "seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists."[53] That same court repudiated the bad faith denial of contract tort just eleven years later.[54]

Other claims embraced by the California Supreme Court in the 1980s under Chief Justice Rose Bird ultimately shared the fate of the bad faith denial of contract tort after Bird and two other progressive justices were replaced by more conservative jurists in 1986.[55] Under Chief Justice Malcolm Lucas, who took over for Bird after the 1986 election, the court revisited language in *Tameny v. Atlantic Richfield Co.*[56] that suggested that an employee could sue his or her employer in tort for a breach of the covenant of good faith and fair dealing that was implicit in an employment contract.[57] In *Foley v. Interactive Data Corp.*,[58] the Lucas court concluded that no such cause of action existed.[59] The court also backed off its earlier position[60] that a landlord was strictly liable for injuries caused by defects associated with rented premises,[61] a retreat construed by some as abandoning what had been a new cause of action against landlords.[62] Also, in *Moradi-*

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51. *E.g.*, Alexander v. Unification Church of Am., 634 F.2d 673, 677 n.6 (2d Cir. 1980); *Sec. Underground Storage, Inc.*, 347 F.2d at 969; *Hardick*, 795 So. 2d at 1111; McCullar v. Credit Bureau Sys., Inc., 832 S.W.2d 886, 887 (Ky. 1992); Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997); Tosi v. Jones, 685 N.E.2d 580, 583 (Ohio Ct. App. 1996). *But see* Weigel Broad. Co. v. Topel, No. 83 C 7921, 1985 U.S. Dist. LEXIS 23862, at *16 (N.D. Ill. Aug. 19, 1985) (recognizing maintenance as a cause of action); Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 906 (R.I. 2002) (recognizing maintenance as a valid tort).

52. 686 P.2d 1158 (Cal. 1984).

53. *Id.* at 1167.

54. Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 670 (Cal. 1995).

55. *See* Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at 1.

56. 610 P.2d 1330 (Cal. 1980).

57. *Id.* at 1337 n.12. In the interim, several California courts of appeal had construed *Tameny* as endorsing these claims. *See*, *e.g.*, Khanna v. Microdata Corp., 215 Cal. Rtpr. 860 (Ct. App. 1985); Crosier v. United Parcel Serv., Inc., 198 Cal. Rptr. 361 (Ct. App. 1983); Cleary v. Am. Airlines, Inc., 168 Cal. Rptr. 722 (Ct. App. 1980).

58. 765 P.2d 373 (Cal. 1988).

59. *Id.* at 401.

60. Becker v. IRM Corp., 698 P.2d 116, 122 (Cal. 1985).

61. Peterson v. Superior Court, 899 P.2d 905, 920 (Cal. 1995).

62. Sugarman, *supra* note 10, at 468.

*Shalal v. Fireman's Fund Insurance Cos.*,[63] the court overruled an earlier decision, *Royal Globe Insurance Co. v. Superior Court*,[64] to the extent that *Royal Globe* had read into state insurance law a statutory cause of action against insurers for an unreasonable failure to settle a claim.[65]

### *E. Mishandling of Dead Bodies*

Sometimes a tort remains viable in theory, but ignored in practice, as when it is displaced by an alternative cause of action without ever being formally abolished. One such forsaken tort concerns the abuse or mishandling of dead bodies. Courts and commentators once treated claims involving such facts as giving rise to a distinct and unique "corpse mishandling" tort.[66] It was said that the deceased's next of kin had a property right in,[67] or "a right of custody, control and disposition" of,[68] the corpse for purposes of burial or cremation and that infringements of this right would support a tort claim for injured feelings.[69] Thus, an action lay when a passenger on a steamship died during a voyage and his body could have been returned to the decedent's relatives, but was buried at sea instead.[70] Unauthorized dissections or autopsies also provided fertile grounds for litigation under this theory of recovery.[71]

The occasional decision recognizing a distinct wrongful autopsy or mishandled cremation tort still appears from time to time.[72] In practice, however, this cause of action is slowly being swallowed by the "new torts" of negligent and intentional infliction of emotional distress. This is a case of a child overtaking its parent; as originally devised, the emotional distress torts knit together under a single theory several formerly distinct torts, of which corpse mishandling was one, which shared little except that they all permitted plaintiffs

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63. 758 P.2d 58 (Cal. 1988).

64. 592 P.2d 329 (Cal. 1979).

65. *Moradi-Shalal*, 758 P.2d at 68.

66. RESTATEMENT OF TORTS § 868 (1939); BURDICK, *supra* note 3, ¶ 115; THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 280-81 (2d ed. 1888); PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 136 (2d prtg. 1937).

67. *E.g.*, Larson v. Chase, 50 N.W. 238, 238-39 (Minn. 1891); England v. Cent. Pocohontas Coal Co., 104 S.E. 46, 47 (W. Va. 1920); JACKSON, *supra* note 66, at 124; William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 51-52 (1956).

68. BURDICK, *supra* note 3, ¶ 115.

69. *Id.*; JACKSON, *supra* note 66, at 137-46, 158-75 (listing decisions).

70. Finlay v. Atl. Transp. Co., 115 N.E. 715, 717-18 (N.Y. 1917).

71. *See*, *e.g.*, Burney v. Children's Hosp., 47 N.E. 401, 402 (Mass. 1897); Hill v. Travelers' Ins. Co., 294 S.W. 1097, 1099 (Tenn. 1927).

72. *E.g.*, Brown v. Matthews Mortuary, Inc., 801 P.2d 37, 44 (Idaho 1990) (treating corpse mishandling cases as a special species of negligence claims); Kelly v. Brigham & Women's Hosp., 745 N.E.2d 969, 971 (Mass. App. Ct. 2001); Kellogg v. Office of the Chief Med. Exam'r of New York, 791 N.Y.S.2d 278, 279 (Sup. Ct. 2004).

to recover emotional distress damages even if they had not suffered any physical harm.[73] The widespread acceptance of the emotional distress torts over the past half-century has meant that plaintiffs suing upon facts that once would have supported a claim labeled "corpse mistreatment" are instead choosing to plead and prove their lawsuits under a negligent or intentional infliction of emotional distress framework.[74] Courts, meanwhile, have taken to treating the formerly distinct cause of action for corpse mishandling as a mere subspecies of the emotional distress torts,[75] in some cases requiring plaintiffs to apply an emotional distress label to their corpse mishandling claims.[76]

The net result has been a leaching away of corpse mistreatment's identity as a distinct tort—death by absorption, one might say. The *Restatement (Second) of Torts* continues to devote a separate section to corpse mishandling claims.[77] The treatise acknowledges, however, that "in reality the cause of action has been exclusively one for the mental distress,"[78] and its drafters expressed some doubt as to whether this type of claim still merited independent treatment in light of recent recognition of the emotional distress torts. Ultimately, the drafters concluded that it was "probably" desirable to retain the original *Restatement's* discussion of corpse mishandling claims, "at least for this Restatement."[79]

### *F. Loss of Services Actions*

As masters and servants have evolved into employers and employees, the law governing their respective rights has likewise undergone a transformation. In the past, a master could recover for consequential damages attributable to an injury negligently inflicted upon his servant.[80] This cause of action vindicated and protected the

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73. *See* Prosser, *supra* note 3.

74. *E.g.*, Perry v. St. Francis Hosp. & Med. Center, Inc., 886 F. Supp. 1551, 1560-61 (D. Kan. 1995); Janicki v. Hosp. of St. Raphael, 744 A.2d 963, 967 (Conn. Super. Ct. 1999); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 440 (W. Va. 1985).

75. *E.g.*, *Janicki*, 744 A.2d at 967-70; Guth v. Freeland, 28 P.3d 982, 989 (Haw. 2001); *Whitehair*, 327 S.E.2d at 440. A tentative draft of the *Restatement (Second) of Torts*, circulated in 1970, acknowledged the trend toward treating corpse mistreatment as a type of intentional or reckless infliction of emotional distress. RESTATEMENT (SECOND) OF TORTS § 868 (Tentative Draft No. 16, 1970).

76. *E.g.*, Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 882 (Colo. 1994).

77. RESTATEMENT (SECOND) OF TORTS § 868 (1979).

78. *Id.* § 868 cmt. a.

79. RESTATEMENT (SECOND) OF TORTS § 868 (Tentative Draft No. 16, 1970).

80. 2 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 479-80 (3d ed. 1866); KEETON ET AL., *supra* note 4, § 129, at 980.

master's property interest in the servant,[81] whom the master was required to support.[82]

Attempts have been made to transfer this rule to the modern context of business employers and employees,[83] but the doctrine has not thrived in this new setting. Scholarly criticism of this cause of action as archaic and ill-suited to modern employment relations has not helped matters.[84] As it stands, opinions in which an employer has been allowed to seek or recover consequential damages assignable to an injury negligently wrought upon an employee represent a decided, and possibly extinct, minority of modern decisions addressing this subject.[85]

### *G. Insult*

The insult tort departs from the general rule that denigrating (but nonslanderous) words normally provide no basis for a tort claim.[86] A century ago, if an employee of a railroad or another common carrier directed harsh words toward a customer or (in some jurisdictions) failed to protect a passenger from verbal abuse by third parties, this action or inaction conferred a cognizable tort claim upon the victim.[87]

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81. *See* Warren A. Seavey, *Liability to Master for Negligent Harm to Servant*, 1956 WASH. U. L.Q. 309, 310-11.

82. KEETON ET AL., *supra* note 4, § 129, at 998.

83. *See* Jones v. Waterman S.S. Corp., 155 F.2d 992, 997-98 (3d Cir. 1946); Darmour Prods. Corp. v. Herbert M. Baruch Corp., 27 P.2d 664, 665 (Cal. Dist. Ct. App. 1933); Mineral Indus., Inc. v. George, 255 N.Y.S.2d 114, 115-16 (Sup. Ct. 1965); Woodward v. Washburn, 3 Denio 369, 374 (N.Y. Sup. Ct. 1846).

84. KEETON ET AL., *supra* note 4, § 129, at 979 (discussing criticism of tort); Seavey, *supra* note 81, at 313 ("It would appear . . . that this action is obsolescent; and that there is no valid reason for reviving it.").

85. Cont'l Cas. Co. v. P.D.C., Inc., 931 F.2d 1429, 1431 (10th Cir. 1991) (listing cases concluding that an employer has no cause of action against one who negligently injures an employee); Zawadzki v. Checker Taxi Co., 539 F. Supp. 207, 208 (N.D. Ill. 1982) (same); I.J. Weinrot & Son, Inc. v. Jackson, 708 P.2d 682, 691 (Cal. 1985) (refusing to recognize cause of action); Klosterman v. Rogers, 973 P.2d 161, 163 (Idaho Ct. App. 1999) (same); Anderson Plasterers v. Meinecke, 543 N.W.2d 612, 614 (Iowa 1996) (same); Domingue v. Reliance Ins. Co., 619 So. 2d 1220, 1224 (La. Ct. App. 1993) (same); Ferguson v. Green Island Contracting Corp., 355 N.Y.S.2d 196, 198 (App. Div. 1974); Hartridge v. State Farm Mut. Auto. Ins. Co., 271 N.W.2d 598, 599-600 (Wis. 1978); Champion Well Serv., Inc. v. NL Indus., 769 P.2d 382, 383 (Wyo. 1989) (refusing to recognize cause of action); *see also* RESTATEMENT (SECOND) OF AGENCY § 316 cmt. b (1958) (noting that "[f]or several hundred years . . . there have been few cases in which a master has brought an action for negligent harm to a servant not a member of his family"); Joel E. Smith, Annotation, *Employer's Right of Action for Loss of Services or the Like Against Third Person Tortiously Killing or Injuring Employee*, 4 A.L.R. 4th 504, 511-17 (1981 & Supp. 2007) (listing cases rejecting the rule).

86. *See* BURDICK, *supra* note 3, ¶ 109; John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 63 (1950).

87. Wade, *supra* note 86, at 66-67.

To recover under this theory, the plaintiff (often a woman)[88] merely had to be subjected to language that would offend "a normal person of ordinary sensibility"[89]—that is, "such language as is by common consent among civilized people regarded as vulgar, coarse, immodest, and offensive."[90] Actionable misconduct included

> [p]rofane and indecent language, abusive and insulting epithets, indecent proposals, accusations of dishonesty or immoral conduct, insinuations as to poverty or stinginess, threats of violence, the attempt to put a white man into a Jim Crow car, shaking a ticket punch under a passenger's nose, and other assorted varieties of unpleasantness.[91]

The *Restatement (Second) of Torts* continues to recognize the tort of insult[92] as an exception to the more general rule that only extreme and outrageous behavior by a defendant will lead to liability for "pure" emotional distress unaccompanied by an invasion of another personal or property right.[93] But if the tort of insult still exists in theory, today it is a mere shadow of its former self. One author has observed that the "cause of action has largely vanished from American tort practice."[94] The available evidence bears out this statement. While an American Law Reports annotation on liability for insulting or abusive language identifies several dozen decisions implicating the tort of insult,[95] the vast majority of these cases date from the late 1800s or the first few decades of the 1900s, and the author has located only a smattering of published decisions over the past half-century in which plaintiffs have recovered even a pittance under an insult theory.[96]

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88. *See*, *e.g.*, Austro-Am. S.S. Co. v. Thomas, 248 F. 231, 233 (2d Cir. 1917); Yazoo & M.V.R. Co. v. Fitzgerald, 50 So. 631, 632 (Miss. 1909); Gillespie v. Brooklyn Heights R. Co., 70 N.E. 857, 858 (N.Y. 1904). In fact, one Alabama court believed it necessary to remind the reader that the cause of action for insult was available to men, too. S. Ry. Co. v. Carroll, 70 So. 984, 985 (Ala. Ct. App. 1915).

89. Ga. Ry. & Elec. Co. v. Baker, 58 S.E. 88, 91 (Ga. Ct. App. 1907).

90. Birmingham Ry., Light & Power Co. v. Glenn, 60 So. 111, 112 (Ala. 1912).

91. Prosser, *supra* note 67, at 61-62 (footnotes omitted).

92. RESTATEMENT (SECOND) OF TORTS § 48 (1965).

93. *Id.* § 46.

94. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1377 (2000).

95. W.J. Dunn, Annotation, *Civil Liability for Insulting or Abusive Language not Amounting to Defamation*, 15 A.L.R.2d 108, 114-17 (1951 & Supp. 2000).

96. *See* Wiggs v. Courshon, 355 F. Supp. 206, 211 (S.D. Fla. 1973); Gebhardt v. Pub. Serv. Coordinated Transp., 137 A.2d 48, 53-54 (N.J. Sup. Ct. App. Div. 1957); Brown v. Fifth Ave. Coach Lines, Inc., 185 N.Y.S.2d 923, 928 (Mun. Ct. 1959); *cf.* Crites v. Delta Air Lines, Inc., 341 S.E.2d 264, 267 (Ga. Ct. App. 1986); Ricci v. Am. Airlines, 544 A.2d 428, 433 (N.J. Sup. Ct. App. Div. 1988) (remanding case to trial court for determination of whether a stewardess' conduct toward a passenger was insulting and abusive). By way of comparison, in the 1980s alone roughly six hundred opinions cited the *Restatement* section that relates to the elements of intentional infliction of emotional distress. Jean C. Love,

### *H. Nuisance*

Make no mistake: the law of nuisance is alive and well. But this "impenetrable jungle"[97] no longer covers certain factual acreage. For instance, courts in the United States have rejected the old English "ancient lights" doctrine.[98] Long ago, a landowner invoking this rule could acquire a prescriptive right to the free flow of sunlight and air across neighboring land owned by another,[99] a right enforceable through a nuisance action.[100] As Blackstone wrote, "to erect a house or other building so near to mine, that it obstructs my ancient lights and windows is a [nuisance]."[101] Although some jurisdictions in this country initially embraced this doctrine,[102] the switch was flipped more than a century ago. Over the past one hundred and fifty years, one decision after another has gainsaid a compensable right to the maintenance of ancient lights.[103] During this span, only a handful of states, desirous of encouraging solar power, have permitted tort claims for interrupted sunlight.[104]

### *I. Telegram Suits*

Telegraph companies used to find themselves on the wrong end of verdicts holding them liable in tort for the negligent transmission of messages. Even though the transmission of a telegram was governed by a contract, tort liability adhered to Western Union and other companies when they did not send a message or somehow garbled the transmission.[105] One common fact pattern involved a failure to transmit, or the delayed transmission of, a message conveying a lucrative job offer or another business opportunity.[106]

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*Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 127 (1990).

97. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71, at 549 (1941).

98. The ancient lights doctrine has been traced as far back as the sixteenth century. J. Michael Banas, Note, *Return to Ancient Lights?* Prah v. Maretti, 1984 DET. C.L. REV. 101, 104-05.

99. *Id.* at 105.

100. *See* 2 HILLIARD, *supra* note 80, at 2-3.

101. 3 BLACKSTONE, *supra* note 18, at 216-17.

102. H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS § 152 (1875); Sophia Douglass Pfeiffer, *Ancient Lights: Legal Protection of Access to Solar Energy*, 68 A.B.A. J. 288, 289 (1982).

103. *See* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 359 (Fla. 3d DCA 1959) (noting the widespread rejection of the doctrine); Prah v. Maretti, 321 N.W.2d 182, 188 n.8 (Wis. 1982) (same); 2 HILLIARD, *supra* note 80, at 5-7; WOOD, *supra* note 102, §§ 152-53, at 152.

104. *See* Tenn v. 889 Assocs., Ltd., 500 A.2d 366, 370 (N.H. 1985); *Prah*, 321 N.W.2d at 191.

105. BURDICK, *supra* note 3, ¶¶ 588-89.

106. W. Union Tel. Co. v. Bowman, 37 So. 493, 495 (Ala. 1904); McPherson v. W. Union Tel. Co., 155 N.W. 557, 558 (Mich. 1915); W. Union Tel. Co. v. Longwill, 21 P. 339, 340 (N.M. 1889); BURDICK, *supra* note 3, ¶ 600, at 559.

This sort of claim disappeared in the early 1900s, once the federal and state governments began to comprehensively regulate the telegraph industry.[107] These schemes typically required telegraph companies to file tariffs with the appropriate regulatory agencies.[108] The tariffs set the rates and terms of service; they also typically included terms limiting the liability of the regulated interest for lapses or mistakes in service.[109] In 1921, the United States Supreme Court upheld the validity of these liability limitations, holding that they went hand-in-hand with the strict government control and rate structures to which the companies had submitted.[110] This determination, and the gradual displacement of the telegraph by other methods of communication, triggered a decline in this type of litigation.[111]

### *J. Unfair Trade and Labor Practices*

The common law of the late 1800s treated certain labor and marketing practices as essentially tortious in nature. Grievances assessed under a tort rubric included labor strikes and boycotts, which were adjudicated under principles borrowed from the torts of interference with contract and interference with prospective economic advantage,[112] and claims alleging that the defendant passed off its products as those of the plaintiff, behavior that was regarded as a type of deceit.[113]

Plaintiffs still sue for similar wrongs today. However, lawyers no longer dress these claims in tort clothing, and courts do not look to tort law to supply the pertinent rules of decision. Instead, we regard

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107. *See* Rendi L. Mann-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?*, 1993 U. ILL. L. REV. 629, 631-32.

108. *Id.* at 635-36; Christy Cornell Kunin, Comment, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907, 909 (1992).

109. Mann-Stadt, *supra* note 107, at 636.

110. W. Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571-72 (1921); *see also* W. Union Tel. Co. v. Priester, 276 U.S. 252, 259-60 (1928); Waters v. Pac. Tel. Co., 523 P.2d 1161, 1163-66 (Cal. 1974); S. Bell Tel. & Tel. Co v. Ivenchek, Inc., 204 S.E.2d 457, 459-60 (Ga. Ct. App. 1974); Mann-Stadt, *supra* note 107, at 641-43; Kunin, *supra* note 108, at 910-12.

111. That said, over the past three decades several courts have determined that exculpatory clauses in filed tariffs do not preclude certain tort claims brought against telephone companies. Kunin, *supra* note 108, at 915 n.45 (listing decisions).

112. *See, e.g.*, Old Dominion Steam-Ship Co. v. McKenna, 30 F. 48, 50 (C.C.S.D.N.Y. 1887); Carew v. Rutherford, 106 Mass. 1, 13-15 (1870); Barr v. Essex Trades Council, 30 A. 881, 890 (N.J. Chan. 1894); Moores & Co. v. Bricklayers' Union, 1889 Ohio Misc. LEXIS 119, at *26-30 (Ohio Super. Ct. 1889); COOLEY, *supra* note 66, at 329-33; WILLIAM B. HALE, HANDBOOK ON THE LAW OF TORTS § 189 (1896); Jeremiah Smith, *Crucial Issues in Labor Litigation*, 20 HARV. L. REV. 253 (1907).

113. RESTATEMENT OF TORTS introductory note to Interference with Business by Trade Practices chapter (Preliminary Draft No. 5, 1938); BURDICK, *supra* note 3, ¶¶ 467-79; COOLEY, *supra* note 66, at 413-20, 423-30; J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:2 (4th ed. 2007).

these claims as properly addressed by, and under, the distinct fields of labor and trademark law.[114] Statutes enacted to dispel the confusion (or repeal the rules) attendant to the adjudication of these disputes under common law principles[115] now provide the rules of decision for these actions. In labor law, the forum for resolution of these conflicts has changed as well, with administrative agencies assuming responsibility for entertaining most grievances between labor and management and between individual employees and unions.[116]

The disappearance of trademark and labor disputes from the *Restatement of Torts* reflects their reassignment from tort law to newly developed fields of study. The *First Restatement* devoted numerous sections to distinguishing fair from unfair trade practices[117] and legitimate from illegitimate labor activities.[118] These sections were deleted from the *Second Restatement*, which was published just a few decades later. An introductory note in the *Second Restatement* explained the drafters' decision to omit the discussion of unfair trade practices:

> The rules relating to liability for harm caused by unfair trade practices developed doctrinally from established principles in the law of Torts, and for this reason the decision was made that it was appropriate to include these legal areas in the Restatement of Torts, despite the fact that the fields of Unfair Competition and Trade Regulation were rapidly developing into independent bodies of law with diminishing reliance upon the traditional principles of Tort law. In the more than 40 years since that decision was initially made, the influence of Tort law has continued to decrease, so that it is now largely of historical interest and the law of Unfair Competition and Trade Regulation is no more dependent upon

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114. *See, e.g.*, R.K. Enter., LLC v. Pro-Comp Mgmt., Inc., 158 S.W.3d 685, 690 (Ark. 2004) (holding that state trade secrets act preempted a common law misappropriation claim); Jones v. Demoulas Super Markets, Inc., 308 N.E.2d 512, 518-19 (Mass. 1974) (discussing the application of federal and state statutes to secondary boycotts); MCCARTHY, *supra* note 113, § 1:15 (observing that "[w]hile the law of unfair competition was born an offspring of the law of torts, it has grown and matured into an independent field of law that can stand on its own feet"); 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS §§ 6.8, 6.13 (2d ed. 1986) (noting the displacement of tort law with developments in labor law).

115. For example, as enacted in 1932, the Norris-LaGuardia Act, 29 U.S.C § 101 et seq., barred courts from treating most types of labor picketing as an actionable form of intentional interference with contract or prospective economic advantage. *See* CHARLES O. GREGORY & HAROLD A. KATZ, LABOR AND THE LAW 184-99 (3d ed. 1979); Joseph Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. PITT. L. REV. 170 (1953) (discussing the use of labor injunctions against picketers, ending with the passage and enforcement of the Norris-LaGuardia Act).

116. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-46 (1959) (discussing the vesting of jurisdiction over certain labor disputes with the National Labor Relations Board).

117. RESTATEMENT OF TORTS §§ 757-761 (1939); RESTATEMENT OF TORTS §§ 711-756 (1938).

118. RESTATEMENT OF TORTS §§ 775-812 (1939).

> Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level. The Council formally reached the decision that these chapters no longer belong in the Restatement of Torts, and they are omitted from this Second Restatement.[119]

The Council directed a similar comment toward the *Restatement's* abandoned chapter thirty-eight, which concerned the interplay between tort law and labor disputes:

> Obviously, the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as a part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations, both state and federal. Chapter 38 has therefore also been omitted from the Second Restatement of Torts.[120]

### *K. Personal Injury Lawsuits by Employees*

Negligence suits against employers for personal injuries suffered at work represented the front line of American tort litigation in the late 1800s.[121] This changed in the early 1900s, when states replaced these suits with proceedings before administrative agencies that applied strict liability principles to compensate workers for their injuries.[122] Employers who participate in worker's compensation programs typically receive immunity from negligence suits brought by their employees,[123] meaning that personal injury claims against employers occupy a far less prominent position within the law of torts today than they did a century ago.[124]

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119. RESTATEMENT (SECOND) OF TORTS division 9, introductory note 1-2 (1979).

120. *Id.* at 2.

121. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 775 (1982).

122. *See generally* PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (Univ. Chicago Press 2000) (discussing the background and origin of workers' compensation); Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305 (1998) (same).

123. *E.g.*, ALA. CODE § 25-5-52 (1975); CAL. LAB. CODE § 3602(a) (West 2007).

124. That said, the preemptive effect of workers' compensation is limited, meaning some vestiges of the old regime still remain intact. Federal laws continue to allow employees in certain industries to sue their employers for on-the-job injuries, *see, e.g.*, Jones Act, 46 U.S.C. app. § 688(a) (2000) (merchant marine); Federal Employer's Liability Act, 45 U.S.C. § 51 (2000) (railroads); businesses that do not participate in workers' compensation programs may remain subject to suit, 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW §§ 102.01[1], 102.02[2] (2001) (discussing the few remaining states in which workers' compensation is elective and the retention of liability for employers in compulsory jurisdictions who do not participate in workers' compensation schemes); and workers' compensation statutes often contain exceptions for intentionally inflicted injuries, *id.* § 103.01.

This list of defunct torts could go on, but hopefully it has made its point: many tort theories have not withstood the tests of time. This survey also reveals that there is no single explanation for *how* torts die. Generally speaking, torts can be either abolished or abandoned, with these broad categories being susceptible to further parsing to produce more precise labels such as reassignment, absorption, etc. The similarly diverse set of explanations for *why* torts die will be addressed in the next part of this Article.

## III. FACTORS INFLUENCING THE RETENTION OR REJECTION OF TORT THEORIES

Lest one conclude from the preceding discussion that torts invariably succumb to even the most modest of cultural downdrafts, it bears mentioning that some claims seem impervious to even sustained and potent criticism. One tort, for example, still "suffers from considerable doctrinal confusion"[125] long after its inception.[126] A commentator has written that "courts [have] impose[d] liability under the rubric of [this tort] in a variety of contexts, but they have failed to develop common or consistent doctrines."[127] Liability under this theory hinges in large part on the tricky question of the defendant's motive, creating knotty problems of proof.[128] The tort has produced enormous (and heavily criticized) jury verdicts, with billions of dollars being awarded to individual plaintiffs.[129] Scholars have criticized the tort on the ground that it deters efficient conduct[130] while unduly chilling free speech.[131] Finally, some observers have been troubled by the tort's conceptual pedigree: the claim developed, in part, out of suits by the masters of servants against those who enticed their laborers to quit or escape.[132] From all these facts, one might conclude that this unnamed tort is in grave danger of extinction. This is far from the truth, however, for the tort is none other

125. Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1099 (1993).

126. Gary D. Wexler, Note, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 284-92 (1994) (reviewing the history of this tort and the contemporary confusion surrounding it).

127. Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 61 (1982).

128. *See* Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 347 (1980).

129. *See* Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. Ct. App. 1987). In this matter, a Texas jury awarded Pennzoil $10.53 billion. Thomas W. Lippman, *Jury Awards $10.53 Billion to Pennzoil in Texaco Case*, WASH. POST, Nov. 20, 1985, at A1. A *Washington Post* editorial described the jury verdict as "absurd," adding that it was "the kind of verdict that is bringing the whole American tort system and its wide-open verdicts into disrepute." Editorial, *Corporate Breach of Promise*, WASH. POST, Nov. 21, 1985, at A26.

130. *See* Perlman, *supra* note 127, at 79.

131. Wexler, *supra* note 126, at 323-25.

132. *Id.* at 326-27.

than intentional interference with contract, which today is "one of the most pervasive causes of action in American business litigation."[133]

So if a tort does not collapse due to just any criticism, can one at least identify the factors that influence whether a claim lives or dies? Quite possibly, yes. Studies into the spread of diseases tend to examine three intertwined factors: the makeup of the pathogen, the character and constitutions of those exposed to the threat, and the conditions that brought the victims into contact with the harmful agent.[134] Likewise, inquiries into the extinctions of animal populations or species commonly start with the conditions upon which the animal depended for survival, pertinent changes to this environment, and the characteristics of the population or species that made it vulnerable to these shifts.[135]

The framework proposed here for reviewing the deaths of torts borrows from the disease and extinction models,[136] but adjusts these methodologies to suit the legal landscape. In so doing, the torts model identifies not three, but six subjects for study.[137] These topics are the cultural environment in which a tort operates; the quality of the arguments directed against the tort; the interests, capabilities, and limitations of the audiences that decide whether to retain or reject the cause of action; the relative influence of the tort's opponents and supporters; the availability and desirability of alternatives to the tort; and the intrinsic qualities of the threatened claim itself. These factors can be described more alliteratively as atmosphere, arguments, audiences, agents, alternatives, and attributes. The text be-

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133. *Id*. at 280. In 1989, Louisiana joined the other forty-nine states in recognizing this tort (or at least some variations thereof). 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 232-34 (La. 1989). In doing so, however, the Louisiana Supreme Court observed that "[s]ome aspects of this tort have been subjected to serious criticisms, leaving open a good many questions about the basis of liability and defense, the types of contract or relationship to be protected, and the kinds of interference that will be actionable." *Id*. at 234.

134. For a discussion of one such investigation, see STEVEN JOHNSON, THE GHOST MAP (2006) (relating how nineteenth century Londoners discovered how cholera spread in that city).

135. *See generally* ELLIS, *supra* note 14 (discussing the extinction of animal species); Michael E. Soulé, *What Do We Really Know About Extinction?*, *in* GENETICS AND CONSERVATION: A REFERENCE FOR MANAGING WILD ANIMAL AND PLANT POPULATIONS 111 (Christine M. Shonewald-Cox et al. eds., 1983) (same).

136. This borrowing makes sense on a conceptual level; analogies long have existed between the spread of disease and the dissemination of ideas, *see* ANDRÉ SIEGFRIED, ROUTES OF CONTAGION 85-91 (Jean Henderson & Mercedes Clarasó trans., 1965); W. Goffman & V.A. Newill, *Communication and Epidemic Processes*, 298 PROCEEDINGS OF THE ROYAL SOC'Y OF LONDON, SERIES A, MATHEMATICAL AND PHYSICAL SCI. 316, 316-18 (1967), and the disappearance of a theory is, in a sense, not too different from the extinction of an organism.

137. The disease and extinction models also can be made more specific. For example, one scientist has identified eighteen different factors that may contribute to the extinction of animal populations. Soulé, *supra* note 135, at 116.

low summarizes how each of these factors may contribute to the deaths of torts, offering hypotheses that will undergo further testing in the case studies to follow.

### *A. Atmosphere*

The first factor that may influence why torts die is perhaps also the most obvious. If tort law reflects the society it serves,[138] changes in the surrounding culture may bring about the extinction of a tort that no longer comports with the realities of the world around it. Torts that succumbed to changes in the ambient cultural environment are easy to find. Claims brought against those who enticed slaves to escape[139] could not, and did not, survive our country's repudiation of the peculiar institution of slavery.[140] Likewise, suits charging local government officials with a failure to enforce Prohibition[141] became an anachronism as soon as the "Noble Experiment" drew to a close.[142] The elimination of these torts represented the inescapable results of the collapses of the regimes that they served.

These examples demonstrate how changes in the cultural atmosphere in which a tort operates can fatally compromise a cause of action. As used here, "atmosphere" refers to conditions, trends, and events in the surrounding environment that, although not aimed at or concerned with any one tort specifically or even tort law generally, nevertheless may have an indirect effect on the viability of a tort theory or theories. An inhospitable atmosphere can set the stage for the demise of tort theories by providing grounds upon which to challenge a cause of action or by creating or emboldening an audience for these attacks. The emancipation and Prohibition examples offered above illustrate the first sort of atmospheric shift; the expulsion of Rose Bird and two of her colleagues on the California Supreme Court in 1986 offers an example of the second. This campaign was fueled principally by discontent over the challenged jurists' voting records on issues of criminal law, especially the death penalty.[143] The replacement of these justices also happened to produce a court more receptive to limitations on tort liability, though it was not until compel-

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138. Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 725-26 (1937) (observing that "[i]t is, therefore, inevitable that changes in the relative importance attached by public opinion to the interests concerned [in litigation], should have a controlling effect upon the judicial decisions which create the law of Torts").

139. *E.g.*, Ohio Stats. ch. 76, § 6 (1841) (conferring upon the master of a slave or servant a cause of action against one who "counsel[s], advise[s], or entice[s]" the slave or servant to escape).

140. *See* U.S. CONST. amend. XIII.

141. Act of Apr. 21, 1917, ch. 187, § 53, 1917 Neb. Laws 425, 448-49 (repealed 1935).

142. *See* U.S. CONST. amend. XXI.

143. *See* Bob Egelko, *Deukmejian Wins the Court Majority He Long Sought*, RECORDER, Nov. 6, 1986, at 1 (discussing the campaign and its results).

ling arguments against specific torts were pressed through the proper channels that the Lucas court ultimately struck down several of the novel causes of action that had been embraced just a few years before.

Discussions of why a tort or torts have died tend to stress the impact of atmospheric changes. The transition of social relations from status to contract has doomed some torts,[144] while the transformation of gender expectations and sexual relations has hamstrung others[145]—or so the stories go. To the extent that these explanations tend to suggest that the death of a tort represents the inevitable outgrowth of sweeping social transitions, they give unduly short shrift to factors that may blunt or redirect the impact of all but the most inauspicious cultural movements. It is simply not true that a tort theory always will collapse upon the disappearance of the conditions that gave birth to the cause of action. For example, claims for intentional interference with contract originated long ago during a labor shortage occasioned by the Black Death. The dearth of laborers occasioned legislation that forbade the enticement of servants away from their masters—the precursor to modern intentional interference with contract law.[146] This labor crisis eventually eased, and master-servant ties have slowly disappeared.[147] Intentional interference with contract lives on, however, because over the centuries the gravamen of the tort was extended to numerous other contexts outside of the master-servant relationship.[148] The tort evolved while others stagnated, and as a result has survived social change that otherwise might have posed a grave threat to its existence. The curious persistence of intentional interference with contract (and other torts) suggests that while changes in the surrounding atmosphere may provide part of the explanation for why torts die, other factors also may enter into the equation.

### *B. Arguments*

If atmosphere is not necessarily decisive, what other influences might make a difference in whether a tort lives or dies? Being human constructs, torts exist for a reason, and when they die, presumably

144. *See e.g.*, Klosterman v. Rogers, 973 P.2d 161, 163 (Idaho Ct. App. 1999) (attributing the death of claims seeking damages for negligent injuries inflicted on servants to this development).

145. FRIEDMAN, *supra* note 1, at 433; Sinclair, *supra* note 10, at 98-102.

146. 2 HARPER ET AL., *supra* note 114, § 6.5, at 303.

147. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 41-46 (3d ed. 2005).

148. *See* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) (discussing the evolution and broadened application of this tort in the nineteenth century); Wexler, *supra* note 126, at 281 (observing that "[t]he scope of tortious interference with contract has expanded dramatically in the past 140 years").

they also die for a reason—or, in this context, perhaps the word "motive" is more apt. These motives can be framed as arguments, and some arguments may resonate better than others and thus prove more effective in undermining a tort.

The substance of a criticism matters for the simple reason that some complaints may be intrinsically more potent than others. One might attack a tort on the ground that it makes plaintiffs' lawyers unduly rich, but this line of reasoning does not present a compelling case for getting rid of the cause of action. This problem, even if real, is likely not isolated to any single tort and can be addressed through measures less drastic than outright abolition. More compelling arguments challenge a tort on grounds that are both more fundamental and more specific. Among them, a cause of action can be attacked as falling outside the recognized conceptual limits of tort liability; as not advancing the perceived aims of tort law generally; or as an unwieldy tool for achieving these goals. The first of these (frequently overlapping) critiques attacks a tort as being aberrant from a jurisprudential standpoint; the second charges that the tort is substantively lacking; the third implies that alternative mechanisms would deliver similar benefits, but with less cost and uncertainty.

The first powerful line of attack alleges that a claim somehow falls outside the proper conceptual boundaries of tort liability. This argument may portray a fact pattern as susceptible to challenge, just not by way of a tort, or it may regard these facts as insufficient to create liability under any theory. These critiques often characterize the assignment of tort liability as unduly extending the recognized limits of at least one of the essential elements of tort liability, such as duty, causation, or resulting injury. One may question whether the defendant's conduct truly "causes" the injury at issue, or assert that the defendant has no duty to avoid the actions integral to the tort, or charge that the plaintiff has suffered no injury (at least not one compensable in tort). Critics of contemporary lawsuits challenging the marketing and distribution of handguns commonly invoked these themes, arguing that

> [t]he sale of a firearm merely furnishes the condition for a crime and, as a matter of law, there can be no finding of proximate cause in an action brought on behalf of a victim against the seller of the firearm used in the crime. In addition, any criminal misuse of a firearm that is not reasonably foreseeable is an intervening, or an independent superseding cause, which the manufacturer of a non-defective weapon has no duty to anticipate or prevent.[149]

149. H.R. REP. NO. 109-124, at 7-8 (2005) (footnotes omitted).

These attacks ultimately proved persuasive; in 2005 a sympathetic Congress passed legislation limiting these suits.[150]

Another batch of weighty arguments attacks a cause of action as being out of step with the perceived goals of tort law, such as the allocation of measured compensation to injured parties;[151] the maximization of social wealth by deterring inefficient conduct;[152] or the issuance and affirmation of appropriate moral judgments.[153] The text below addresses each of these arguments in turn.

First, a tort might die if it develops a reputation for either systematically overcompensating plaintiffs or chronically undercompensating them. On a very basic level, a perception of overcompensation could arise if society concludes that a tort no longer implicates a cognizable right or interest. At that point, any payment to the plaintiff would be excessive. But matters do not have to deteriorate quite so badly to place a tort at risk. A backlash might result from a sense that injured parties proceeding under a particular theory are recovering more than they should or that the wrong plaintiffs are receiving awards due to a failure by (or inability of) courts and juries to reliably distinguish between bogus and meritorious claims.

Perceived undercompensation may also produce the death of a tort, though by slightly different means. Economic considerations affect decisions by plaintiffs and their attorneys about when to sue and which theories to pursue in court.[154] If a given tort promises insufficient returns—whether this state of affairs owes to unlikelihood of

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150. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005).

151. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 525 (2003); Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 139 (1999).

152. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1 (1987); Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1032-38 (2001); Goldberg, *supra* note 151, at 525.

153. *See* Bohlen, *supra* note 138, at 725 ("The primary purpose of the law of Torts is to reach a 'fair' adjustment between the conflicting interests of the litigating parties."); Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 956-95 (1994) (discussing various "moral theories" of tort law that have been proposed by scholars).

154. *See generally* Robert M. Rosen, *How to Screen for Success in Employment Cases*, 16 TOURO L. REV. 1319 (2000) (advising how to screen employment cases to maximize returns); Kenneth M. Suggs, *Case Selection in the Age of Tort "Reform," in* ASSOC. OF TRIAL LAWYERS OF AM. CONVENTION REFERENCE MATERIALS 735 (2005) (discussing the factors that lawyers should consider in deciding whether to take a case, including the value of a case and the costs associated with trying it); Mary Nell Trautner, *How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 N.Y.L. SCH. L. REV. 215 (2006) (reviewing the factors that affect which cases are accepted by trial lawyers, including case value); Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution* (Princeton Univ. Indus. Relations Section, Working Paper No. 364, 1996) (discussing how both pecuniary and nonpecuniary considerations factor into case selection).

success, modest recoveries through trial or settlement, expenses associated with prosecuting the case, or difficulties in collecting from the defendant—absent unusual circumstances, it presumably will be bypassed in favor of other theories of recovery or avenues of relief.[155] Alternatively, the prospective defendant's misconduct may not be challenged at all. Either way, the tort will wither and die from disuse.

Second, following from the premise that a primary goal of tort law is to deter inefficient conduct, a tort seen as either deterring too little or too much also may find itself in jeopardy. Tort liability, by its nature, places a price tag on behavior. Overdeterrence arguments may arise when the dunned activity comes across as being several orders of magnitude more beneficial than any invaded interest. For example, American courts have rejected the ancient lights doctrine on the asserted ground that the doctrine stands in the way of the robust development of private property.[156] One court described the doctrine as "hostile to the spirit of [American] institutions" and "not adapted to the existing state of things in this country," such that "it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences."[157] Similar overdeterrence arguments likely lay behind the more recent erasure of tort liability regarded as impeding beneficial—but not especially lucrative (from the defendant's point of view)—conduct such as increased food donations[158] and the provision of first aid by Good Samaritans,[159] with legislatures crafting immunities in these contexts.

Other torts might be challenged as serving no useful deterrent function. Underdeterrence could result if a defendant cannot accu-

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155. Eisenberg & Farber, *supra* note 154, at 3-4 ("First and other things equal, a potential claimant will be more likely to file a lawsuit if the costs of litigation are low. This follows directly from the presumption that only cases with positive expected value to the plaintiff are filed."). Nonpecuniary costs factor into this calculus as well. Modern plaintiffs may be embarrassed to press certain claims (such as spousal alcoholism suits) in court, whereas one's ancestors would not hesitate to advance this type of suit; the added embarrassment associated with these claims today is no less a "cost" of suit than are out-of-pocket expenses.

156. *See* Guest v. Reynolds, 68 Ill. 478, 487-88 (1873) (rejecting the ancient lights doctrine as inconsistent with local interest in property development); Pierre v. Fernald, 26 Me. 436, 441 (1847) (same); Parker & Edgarton v. Foote, 19 Wend. 309, 318 (N.Y. Sup. Ct. 1838) (same); *Notes of Cases*, 18 VA. L. REG. 788, 788 (1913) (describing the ancient lights doctrine as "a distinct clog to progress").

157. *Parker & Edgarton*, 19 Wend. at 318; *see also Guest*, 68 Ill. at 488 (finding the ancient lights doctrine "not applicable to our growing cities and villages").

158. MICH. COMP. LAWS § 691.1572 (2007) (providing limited immunity from civil damages to those who donate food to a nonprofit organization for distribution to the needy or poor).

159. *Id.* § 691.1522 (immunizing restaurants and their employees from damages attributable to use of the Heimlich maneuver unless the person providing aid was grossly negligent).

rately gauge the costs and benefits associated with its conduct, leading it to persist in inefficient behavior whether or not tort liability attaches. Alternatively or in addition, a tort may implicate substantive elements or procedural rules that make it extremely difficult to recover against even a culpable defendant or to receive enough damages to create an effective deterrent. Or the nature of a tort may be such that the defendant will refuse to obey the law even if he or she knows that severe consequences will follow. Whatever the reason, if deterrence is a salient function of tort law, reason would dictate that a tort shown to have no useful deterrent effect stands in danger of extinction.

Third, one may attack a cause of action as out of step with another goal commonly associated with tort law, namely, the delivery of corrective justice or, more broadly, the maintenance of preferred morals and values.[160] If the purpose of tort law is to prevent nonreciprocal risks, permit recovery for "wrongful losses," or rectify injustices as between particular parties,[161] critiques that call out a tort for failing to achieve these results (as by questioning the moral blameworthiness of the particular tortious conduct) may strike a chord. These sorts of arguments, of course, often overlap with contentions invoking compensation or deterrence themes, which themselves derive from moral judgments; to defend a defendant's conduct as unworthy of censure is not too different from saying that a plaintiff does not deserve compensation for what the defendant did. A somewhat different (but still potent) kind of "moral" argument arises when a tort takes on baggage not directly related to its delivery of corrective justice. For example, as times change, a tort may become perceived as demeaning to a particular group or institution. In this situation, the content and meaning of the tort may generate criticism even if few quibble with how the tort allocates justice between particular parties.

Finally, a tort may be challenged as overly taxing to litigants and courts, failing to generate predictable outcomes, producing divergent liability standards across jurisdictions, or as an ineffective vehicle for developing optimal public policy.[162] These contentions focus less on the fairness of the results generated by a tort and more on the supposedly excessive costs of predicting, getting to, or applying

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160. *See* Weston, *supra* note 153, at 956-95 (discussing various "moral theories" of tort law).

161. *See id*.

162. *See* 1 THE DEVELOPING LABOR LAW 4-8 (Patrick Hardin et al. eds, 4th ed. 2001) (discussing the shortcomings of judicial regulation of labor conflicts, leading to the enactment of federal regulatory legislation); JOSEPH F. ZIMMERMAN, FEDERAL PREEMPTION: THE SILENT REVOLUTION 9-11 (1991) (reviewing the criteria given by the federal government for the exercise of its preemption power).

these outcomes—matters of process, more than substance. These arguments may concede the need for a mechanism to resolve a particular class of disputes, but contend that these matters can be optimally resolved outside of the court system, under principles different from those supplied by tort law, or both. And so, a tort may provide appropriate compensation to injured parties, deter inefficient conduct, and deliver "justice" as between particular plaintiffs and defendants, but still come under fire because it has proven unwieldy or otherwise falls short in some respect relative to alternative approaches.

Depending on the surrounding circumstances, any or all of the aforementioned criticisms may gain traction—achieve "stickiness," in marketing parlance[163]—and result in a tort's demise. These circumstances include the audiences and agents who entertain and act upon these arguments, which represent the next subjects for discussion.

### *C. Audiences*

The audiences to which the aforementioned arguments (and others) are directed may affect whether these contentions will resonate or fall on deaf ears. Judges, legislators, plaintiffs, lawyers, defendants, the general public—all play significant roles in determining whether a tort lives or dies. Due to institutional and individual prerogatives and constraints, these audiences may respond differently to specific critiques of a cause of action. Plaintiffs and their attorneys, for instance, are the most directly affected by a tort that chronically undercompensates and thus are the proverbial canaries in the mine when a tort starts to produce inadequate paydays. At the same time, these same individuals are unlikely to bemoan a tort that is too lucrative. Courts, bound and disciplined by precedent and conditioned to dwell upon the essential elements of a cause of action, might respond to arguments that a cause of action strays outside the accepted conceptual boundaries of tort law. These jurists may ignore allegations that the damages available under a tort theory are too generous, even though these same arguments might prove persuasive among legislators if and when advanced through attention-getting language. One could go on; for example, courts are unlikely to respond to process-oriented concerns if the solution is to create a new forum for the dispute at issue—typically a legislative prerogative.

These audiences also differ in their respective capacities to kill off a tort. Plaintiffs typically act by inaction, refusing to invoke a tort and thereby causing it to slowly waste away. Courts and legislatures can and will expressly abolish torts, but may differ in their relative willingness and ability to do so. Courts, "the least dangerous branch"

163. MALCOLM GLADWELL, THE TIPPING POINT 92 (Bay Back Books 2002).

of government,[164] may prove more reluctant than legislatures to abolish common law and (especially) statutory rights. The institutional limitations of the judicial system also mean that a court will abrogate a tort only when presented with a case in which the plaintiff has alleged the theory and the defendant has responded that the tort should be abolished. With some rarely invoked torts, it may take years or even decades for a case having this posture to wind its way to a court of precedent. Legislatures, meanwhile, have their own idiosyncratic procedures and priorities that push some issues to the forefront of the agenda, while other bills die in committee or are never even placed in the hopper.

### *D. Agents*

The vulnerability of a tort theory also may depend on whether it threatens or offends a coherent class of would-be defendants capable of organization and counterattack and lacks a comparably influential base of supporters. If this type of imbalance exists, opponents of a tort may dominate the discourse over the cause of action and place its abolition at the top of the legislative or judicial agenda. Conversely, some torts may generate strong constituencies but only fragmented opposition, securing their survival. The successful campaign by the gun industry to limit lawsuits attacking the sale and distribution of handguns offers an example of a concerted, well-organized effort by influential agents that brought down a (nascent) cause of action.[165] The supporters and opponents of medical malpractice claims are more evenly matched, meaning, among other things, that discontent over the costs and perceived overabundance of these suits[166] has not come close to bringing about the abolition of this type of claim.[167]

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164. The quoted language is drawn from ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press 2d ed. 1986).

165. *See generally* Timothy D. Lytton, *The NRA, the Brady Campaign, & the Politics of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 152 (Timothy D. Lytton ed., 2005) (discussing the political wrangling over state and federal legislation that would limit gun litigation).

166. In a 2004 Kaiser Family Foundation poll of the general public, sixty-one percent of survey participants said that patients bring too many lawsuits against doctors; sixty percent said that "[t]oo many lawyers filing unwarranted lawsuits" was a "very important" factor in causing higher malpractice insurance costs; sixty percent said that the number of malpractice suits being filed was a "very important" factor in causing higher health care costs; and sixty-three percent said that "[l]owering the cost of health care and insurance" should be a top priority for Congress and the President. KAISER FAMILY FOUND. & HARVARD SCH. OF PUB. HEALTH, HEALTH CARE AGENDA FOR THE NEW CONGRESS charts 3, 6, 7 & 8 (2005).

167. The Kaiser study did not even bother to ask participants whether they would be in favor of an outright ban on malpractice suits. Sixty-three percent of those surveyed, however, expressed support for a law that would cap pain and suffering damages in mal-

The "agents" factor also incorporates a more idiosyncratic element. Sometimes an individual appears who possesses unique skills and interests that will enable him or her to marshal and amplify opposition to a tort or arouse support for an alternative approach.[168] In his book *The Tipping Point*, Malcolm Gladwell identifies the types of people who facilitate the spread and acceptance of ideas as "mavens," "connectors," and "salesmen"; sometimes a single individual fits all three of these descriptions.[169] Due to their abilities, these individuals may exert disproportionate influence on whether a tort lives or dies. Whether and when a maven, connector, or salesman will emerge in any given context is never certain, but when one does, it can spell trouble for a cause of action.

### *E. Alternatives*

The availability of alternatives to a tort may also play a part in ushering claims out the door. The desirability of a tort is always a relative proposition. Even if all can agree that a tort addresses a legitimate harm or problem, this consensus does not rule out the possibility that another approach, whether within or outside of the tort system, might respond to the same situation more effectively.[170] The advent of worker's compensation programs offers the paradigmatic case-in-point of an alternative remedy displacing a tort. Similarly, courts that recently have refused to recognize the maintenance and champerty torts have justified their decisions partially on their perception that malicious prosecution and abuse of process theories address similar ills, making the older torts unnecessary.[171]

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practice suits, *id*. chart 10, and seventy-two percent of survey participants favored a law prohibiting individuals from filing medical malpractice lawsuits unless and until an independent medical specialist reviewed their claims and found them "reasonable." *Id.* chart 9.

168. *Cf.* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 78-79 (1967) (critiquing the "great-man hypothesis" of social change, "which holds that particular persons play irreplaceably decisive roles in determining the path of social change" on the ground that "[i]n difficult times, great businessmen, political leaders, musicians, or physicists will emerge").

169. GLADWELL, *supra* note 163, at 30-88. "Mavens are really information brokers, sharing and trading what they know." *Id*. at 69. A connector is someone "with a special gift for bringing the world together." *Id*. at 38. A salesman has "the skills to persuade us when we are unconvinced of what we are hearing." *Id.* at 70.

170. Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 23 (1990) ("Proposals for tort reform often amount to choices about which societal institution—the torts system, the criminal-regulatory system, or the market—should be responsible for preventing particular types of injuries."). *See generally* Peter H. Schuck, *Why Regulating Guns Through Litigation Won't Work*, *in* SUING THE GUN INDUSTRY, *supra* note 165, at 225, 230 (listing the institutional capabilities needed to create effective policy).

171. *Hardick v. Homol*, 795 So. 2d 1107, 1111 (Fla. 5th DCA 2001); *Tosi v. Jones*, 685 N.E.2d 580, 583 (Ohio Ct. App. 1996).

### *F. Attributes*

The sixth and final factor worth mentioning is the character and composition of the afflicted tort itself. Some torts may be poorly designed, or more fragile and less capable of adaptation than other causes of action. For instance, whereas some torts (battery comes to mind) involve conduct that has been immediately recognizable as injurious since time immemorial, the gravamen of other claims may rest upon values or interests that are peculiar to a particular time or place. If a tort is overly dependent on a particular milieu, it may be especially vulnerable to changes in the surrounding culture that undercut the case for liability. A different problem may afflict tort theories that involve rarely arising fact patterns. These torts receive little exposure before attorneys, judges, and the general public, which may compromise the cause of action by rendering it both obscure and difficult to apply.

As constructed by courts and legislatures, torts may possess other innate flaws that leave them susceptible to attack. A certain conceptual awkwardness may adhere to torts founded upon interests classified as *quasi*-rights or which stand on the boundary line between tort and contract; any resulting judicial discomfort with these claims may make them more prone to elimination or replacement. Torts that incorporate few evidentiary or other procedural safeguards to protect against false claims may lend themselves to criticism that they are unreliable instruments for determining culpability. Similarly, torts with few or no standards or limits concerning the award of damages may come under fire when an occasional jury exercises its unfettered discretion and bestows a lucrative award upon a plaintiff. At the other end of the spectrum, a tort may incorporate procedural or substantive hurdles that make recovery almost impossible, deterring plaintiffs from ever invoking the theory. In all of these situations, a tort's composition may prove to be the claim's worst enemy.

Torts that are factually or conceptually removed from other causes of action may suffer from another handicap. As discussed earlier, plaintiffs and their attorneys presumably will turn their backs on claims that produce inadequate paydays. In practice, a claim "undercompensates" when the predicted payout to the plaintiff and attorney is less than the opportunity cost of the time and other resources invested in pursuing the claim. Some torts are both broadly applicable and opportunistic, in that they can easily be added to a suit pursued under other legal theories as well. The incremental expense of adding these claims to a case is normally quite low. Other torts, by contrast, are all-or-nothing propositions. Torts that implicate idiosyncratic facts or occupy conceptually remote territory often

cannot be combined with other theories of relief. A lawsuit premised on one of these torts hinges entirely on that theory, meaning that the tort "costs" more to allege and pursue. As a result, plaintiffs and their attorneys may pause before embracing this latter type of tort.

The six factors identified above—atmosphere, arguments, audiences, agents, alternatives, and attributes—all seem to play a part in why torts die. They also help explain why torts live. Returning to intentional interference with contract, the most likely explanation for why that tort has survived indifferent and even hostile environments begins with the fact that its attributes have ensured it a fairly broad base of support and no steadfast enemies (outside of academia, at least). The tort can be added to a variety of breach of contract suits inexpensively, with the principal cost being the naming of an additional defendant alleged to have induced the breach.[172] Its inexpensiveness and broad applicability guarantee that the tort will be frequently invoked by plaintiffs and their lawyers, usage that sends a message that the tort serves some real need in modern society. The tort singles out no one industry or cohesive group for liability, while all can envision how the theory could be useful to them in the proper situation. Though courts are sometimes frustrated by the tort, the arguments levied against it have not been of a type that judges typically respond to by eliminating a cause of action, at least not without a ready substitute at hand. In other words, intentional interference with contract has survived because the six factors relevant to why torts die simply have not aligned in a manner that would place the tort in jeopardy.

But how do these factors interact to produce the *death* of a tort? To probe this subject, this Article next will undertake detailed autopsies of the tort of insult, of claims seeking to hold the food industry responsible for obesity, and of the heartbalm torts.

## IV. CASE STUDY #1: THE TORT OF INSULT

Of the three case studies presented in this Article, the demise of the insult tort seems to be the easiest to explain: this tort lived and died on the rails. The disappearance of passenger rail traffic dealt a blow to the cause of action by eliminating the setting for the interactions that produced most insult claims. Yet the tort might have migrated to new factual settings, and thereby survived, but for an innovation that blocked off this path. The new tort of intentional infliction of emotional distress, which emerged just as passenger rail service was winding down in this country, occupied this territory to the

172. *See* Wexler, *supra* note 126, at 280-81 (observing that "[a]nytime there is a breach of contract . . . , a well-represented plaintiff looks for third parties to sue to maximize its total recovery").

exclusion of insult claims. In so doing, the new cause of action has accelerated the death spiral of the insult tort by depriving it of needed exposure before courts, plaintiffs, and attorneys.

The tort of insult originated in an 1823 opinion by Supreme Court Justice Joseph Story, then riding circuit. The case of *Chamberlain v. Chandler*[173] involved a dispute between passengers on a boat and the ship's crew, in which the guests were aggrieved by some misbehavior (possibly consisting of "habitual obscenity, harsh threats, and immodest conduct") by their hosts.[174] Justice Story wrote that in booking their voyage the passengers had contracted "not for toleration merely, but for respectful treatment."[175] A breach of this implied term of the transportation agreement, Story concluded, could support a claim against the ship's master.[176] Over time, claims for insult shed their contractual cocoon and became recognized as a cause of action sounding in tort.[177]

While the insult tort was born on the high seas, it was raised on the rails. Claims for insult remained few and far between until the advent of railroad passenger travel in the mid-to-late 1800s. Among its revolutionary impacts on American life, rail travel threw together individuals who otherwise would have had little contact with one another in polite society.[178] Especially once train travel became more affordable after the Civil War,[179] passenger cars mixed women with men, the wealthy with the less well-off, the Northerner with the Southerner, the rude with the civil, and even—until Jim Crow wandered up to the tracks—one race with another.[180] Some welcomed the diversity of backgrounds and temperaments found in rail cars.[181] Others saw only chaos and lamented the lack of civility exhibited by railroad staff and other passengers.[182] To Victorian-era critics, the fact that many rail passengers were women made any deviations

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173. 5 F. 413 (C.C.D. Mass. 1823).

174. *Id.* at 414.

175. *Id.*

176. *Id.* at 415.

177. Gillespie v. Brooklyn Heights R. Co., 70 N.E. 857, 859 (N.Y. 1904) (discussing the nature of the insult tort). *But see* Bleecker v. Colo. & S. Ry. Co., 114 P. 481, 482-83 (Colo. 1911) (regarding insult as a type of contractual breach).

178. SARAH H. GORDON, PASSAGE TO UNION: HOW THE RAILROADS TRANSFORMED AMERICAN LIFE, 1829–1929, at 93 (1996) (discussing the diversity of rail passenger traffic); AMY G. RICHTER, HOME ON THE RAILS 17, 20-21 (2005) (same).

179. JOHN F. STOVER, AMERICAN RAILROADS 108 (2d ed. 1997).

180. GORDON, *supra* note 178, at 84, 225-26; RICHTER, *supra* note 178, at 17, 20-21; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 37-40 (3d rev. ed. 1974).

181. RICHTER, *supra* note 178, at 15.

182. GORDON, *supra* note 178, at 97; RICHTER, *supra* note 178, at 21-22.

from proper behavior even more worrisome.[183] If good manners had no place aboard a rail car, what other misbehavior might follow?

It was at this point that the tort of insult stepped in to provide a surrogate code of conduct for rail travel. The threat of being held liable under an insult theory encouraged railroads to take steps to ensure civil behavior within their cars.[184] And so they did, issuing edicts to employees to engage passengers politely and to spot and remove troublemakers.[185] Combined with other developments in rail service (such as the reservation of certain rail cars for female customers in order "to group women of good character on the train together, sheltered as far as practicable from annoyance and insult"[186]), the insult tort deterred the improper conduct that polyglot railcar communities might otherwise have engendered. At the same time, the tort ensured that employees of the railroads—the leviathan industry of the nineteenth century—exhibited a modicum of politeness to their customers. The tort thus afforded the everyday citizen a symbolically important measure of control over, or at least respect from, an instrumentality that otherwise dictated many of the terms and conditions of everyday American life.[187]

The insult tort reached its zenith during the final two decades of the 1800s and the first two decades of the next century.[188] This boom in insult claims resulted in part from the introduction of electric railcar networks into numerous American towns and cities, drawing new classes of plaintiffs, defendants, and attorneys to the tort.[189] Furthermore, a substantial number of the cases brought during this era

183. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 145 (2001); RICHTER, *supra* note 178, at 93.

184. On this point, the *Second Restatement* still surmises that "[t]he chief value of the [insult] rule lies in the incentive which it provides for the selection of employees who will not be grossly discourteous to those who must come in contact with them, and for the making of proper rules and supervision to enforce them." RESTATEMENT (SECOND) OF TORTS § 48 cmt. a (1965).

185. RICHTER, *supra* note 178, at 24.

186. *Bass v. Chicago & Nw. Ry. Co.*, 36 Wis. 450, 460 (1874); *see also* ELY, *supra* note 183, at 145.

187. *See* Friedman & Ladinsky, *supra* note 168, at 63 (discussing popular perceptions of the railroad industry in the late 1800s).

188. More than three-quarters of the decisions listed in the American Law Reports annotation that discusses the liability of common carriers for insulting conduct hail from this era. Dunn, *supra* note 95, at 132-36.

189. "By 1902, there were 22,000 miles of track in the streets of the United States," and streetcars carried five billion passengers per year. ROGER YEPSEN, CITY TRAINS: MOVING THROUGH AMERICA'S CITIES BY RAIL 31 (1993); *see also* DAVID E. NYE, ELECTRIFYING AMERICA: SOCIAL MEANINGS OF A NEW TECHNOLOGY, 1880–1940, at 94 (1990) (describing the increase in streetcar track mileage and ridership between 1890 and 1902). These streetcars commingled classes, genders, and ethnicities in much the same manner as did railroad cars. SCOTT MOLLOY, TROLLEY WARS: STREETCAR WORKERS ON THE LINE 82-84 (1996).

originated in the American South.[190] It is quite possible that the attitudes of many Southerners on matters of class, gender, and race during this period may have made them acutely sensitive to perceived insults.[191] More easily demonstrable is the fact that rail transportation came to this part of the nation relatively late,[192] making the social mixing that occurred with this method of travel a novelty and a threat—one that tort law might tame—to many within this region as Reconstruction gave way to Redemption and beyond.[193]

And then the tort disappeared, with very few insult suits being filed in the last several decades.[194] Why? The likely culprits are developments in technology and the law that closed the factual and conceptual aperture for these claims, combined with the lessened attractiveness of the tort to plaintiffs and their attorneys as the amounts obtained in plaintiffs' judgments declined while litigation costs rose. These forces have converged to drive the number of insult suits down to a point at which the tort could not, and cannot, sustain itself.

A central purpose of the insult tort had been to create a code of conduct for rail travel, to be enforced by private entities acutely sensitive to the financial and reputational implications of adverse judgments. In the first half of the twentieth century the private automobile supplanted rail travel as the principal means of transportation over significant distances.[195] Fewer rail passengers meant fewer dis-

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190. Of the approximately fifty American cases cited in an American Law Reports annotation for the principle that a common carrier is liable for insults by employees, more than half emanated from states of the former Confederacy, and another eight from Kentucky. Dunn, *supra* note 95, at 132-36.

191. Notably, Virginia, Mississippi, and West Virginia—two Confederate states and one that split off from a Confederate state—were the three states that had "fighting words" civil liability statutes proscribing insulting language likely to lead to a breach of the peace. Wade, *supra* note 86, at 82-83.

192. STOVER, *supra* note 179, at 135.

193. "Redemption" refers to the return to power of the Democratic Party in the American South following post-bellum Reconstruction. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 421-25, 587-601 (1st ed. 1989) (discussing Redemption).

194. *See supra* text accompanying notes 94-96.

195. In 1900, Americans traveled 212.5 passenger miles per capita on the nation's railroads. Malcolm M. Willey & Stuart A. Rice, *The Agencies of Communication*, *in* RECENT SOCIAL TRENDS 167, 169 (1933). By 1920, this figure had swelled to 444.6 miles per capita. *Id.* Over the next decade, the total underwent a sudden reversal, declining to a mere 218.3 miles per capita by 1930. *Id.* The reason is easy to identify: In 1900 there were only about 8000 automobiles in this country. *Id.* at 172. By January 1, 1931, more than twenty-five million cars littered the nation's roads. *Id.* That the spread of the automobile spelled trouble for the railroad was no secret; as a 1933 study noted, "imperceptibly but surely the automobile, and especially the private vehicle, [has] encroached upon the short haul traffic of the railroads" and thus "there has been created a competition between two agencies of transportation which seriously affects the older of them." *Id.* at 171-72; *see also* NORMAN T. MOLINE, MOBILITY AND THE SMALL TOWN, 1900-1930: TRANSPORTATION CHANGE IN OREGON, ILLINOIS 66-67 (1971) (discussing the replacement of the railroad by automobile

putes over insulting conduct. Most privately operated light rail systems, meanwhile, disappeared altogether.[196] These developments wiped out many of the entities formerly subject to insult suits.[197] While local governments have assumed responsibility for mass transportation in many urban areas, it has never been a central function of the government to protect individuals from unwelcome speech from other citizens[198] or, for that matter, to guarantee punctilious civility by municipal employees. Applying the insult tort in its unadulterated form to government entities would require a substantial rethinking of their basic obligations to their constituents. That revolution simply has not occurred.

At the same time, the damages associated with insulting behavior have not kept pace with the rising costs of litigation. Insult suits were never especially lucrative. Plaintiffs typically received a few hundred dollars for their troubles, with the occasional verdict reaching four figures.[199] Though decent sums, these awards were never going to make plaintiffs—let alone their lawyers—especially rich. As the twentieth century progressed, insult awards did not increase much at all; in fact, they seemed to retreat. Perhaps this owed to a stiffening of the collective upper lip when it came to insulting conduct; perhaps it owed to changing expectations regarding the level of service one is owed while traveling;[200] or perhaps the leveling purpose

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traffic). A similar fate befell local light rail systems, which were driven out of most cities. *See*, *e.g.*, JAMES A. TOMAN & BLAINE S. HAYS, HORSE TRAILS TO REGIONAL RAILS: THE STORY OF PUBLIC TRANSIT IN GREATER CLEVELAND 136-37, 155-62, 177-78, 225-48 (1996) (discussing the gradual replacement of Cleveland's street rail system by the automobile).

196. NYE, *supra* note 189, at 133-35; YEPSEN, *supra* note 189, at 35, 37-38, 53-56; Willey & Rice, *supra* note 195, at 180.

197. Sporadic attempts to identify other types of businesses that may be liable for insulting conduct, meanwhile, have met with middling results. *See*, *e.g.*, Stavnezer v. Sage-Allen & Co., 152 A.2d 312 (Conn. 1959) (turning back an attempt to apply the insult doctrine outside of the common carrier/public utility setting); Slocum v. Food Fair Stores of Fla., Inc., 100 So. 2d 396 (Fla. 1958) (same). Back when insult claims were relatively frequent, innkeepers were the next most common type of defendant in this sort of suit. A substantial share of these claims involved overzealous hotel detectives and their recurring tendency to accuse guests of immoral practices. *See*, *e.g.*, Emmke v. De Silva, 293 F. 17 (8th Cir. 1923); Dixon v. Hotel Tutwiler Operating Co., 108 So. 26 (Ala. 1926); De Wolf v. Ford, 86 N.E. 527 (N.Y. 1908). These days, hotel detectives are even less common than railroads, meaning that this sort of dispute rarely arises.

198. *Cf. Cohen v. California*, 403 U.S. 15, 25-26 (1971) (holding that the state cannot punish vulgar speech in order to promote cleanliness in public discourse).

199. *See*, *e.g.*, *Ga. Ry. & Elec. Co. v. Baker*, 58 S.E. 88, 89 (Ga. Ct. App. 1907) (jury verdict of $775); *Mobile, J. & K.C.R. Co. v. Kranfield*, 46 So. 71, 72 (Miss. 1908) (finding jury verdict of $2500 excessive and ordering a new trial unless the plaintiff agreed to a $750 judgment); *Morris v. St. Louis & S.F.R. Co.*, 168 S.W. 325, 326 (Mo. Ct. App. 1914) (jury verdict of $500); *White v. Metro. St. Ry. Co.*, 112 S.W. 278, 279 (Mo. Ct. App. 1908) (jury verdict of $251).

200. The *Restatement (Second) of Torts* raised the bar for insult claims slightly above that of the *First Restatement*. The *First Restatement* provides that "[a] common carrier is subject to liability to members of the public who are entitled to and are utilizing its facilities as passengers for the offense reasonably suffered by them through the insulting con-

of the insult tort lost its importance once the railroad industry fell into disarray. Whatever the reason, the last few reported verdicts in insult cases have been very meager indeed. In *Brown v. Fifth Avenue Coach Lines, Inc.*,[201] the claimant received a mere $100 for her embarrassment and humiliation at the hands of a bus driver.[202] In *Wiggs v. Courshon*,[203] an insult case arising out of a dispute at a hotel, the trial judge cut the jury's $25,000 award by ninety percent and granted a defense motion for a new trial unless the plaintiffs stipulated to a reduction to $2500.[204] As the costs of litigation continue to rise, these inauspicious results have likely had a chilling effect on other potential insult suits.

Up to this point, the forces that have compromised the insult tort have consisted of changes in the surrounding cultural atmosphere. But another factor more intrinsic to the law itself has also contributed to the disappearance of insult claims. Specifically, since its inception more than a half-century ago the tort of intentional infliction of emotional distress has cannibalized the insult cause of action.

As recently as the 1930s, there was no distinct claim known as intentional infliction of emotional distress. Technically speaking, one could not recover for "pure" emotional distress unaccompanied by a violation of another legal right, such as the right to bodily integrity.[205] Yet, as previously touched upon, there existed a number of recurring fact patterns in which courts relied on quasi-interests or other legal fictions as grounds for otherwise forbidden awards of damages for mental suffering.[206] The recognition of a quasi-property interest in the dead body of a family member,[207] discussed earlier, offers an example of this functionally expedient, but analytically roundabout, reasoning.

Scholars eventually began to collect and review decisions in which courts had allowed recovery for mental suffering to see if any general principles permeated the case law. In a 1936 article[208] sur-

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duct of its servants while otherwise acting within the scope of their employment." RESTATEMENT OF TORTS § 48 (1934). The *Second Restatement* relates that "[a] common carrier or other public utility is subject to liability to patrons utilizing its facilities for *gross* insults which reasonably offend them." RESTATEMENT (SECOND) OF TORTS § 48 (1965) (emphasis added).

201. 185 N.Y.S.2d 923 (Mun. Ct. 1959).

202. *Id*. at 928.

203. 355 F. Supp. 206 (S.D. Fla. 1973).

204. *Id.* at 210.

205. *See* RESTATEMENT OF TORTS §§ 46-47 (1934) (stating the general rule disallowing recovery for "pure" emotional distress).

206. *See* Prosser, *supra* note 3, at 881-87.

207. *See supra* text accompanying note 66.

208. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

veying these decisions, Calvert Magruder of Harvard estimated that, as a "general proposition . . . independently of whether a cause of action has arisen for any other more familiar tort, the law will give damages for mental distress of an aggravated sort, resulting from an outrageous aggression by the defendant upon the plaintiff's peace of mind."[209] Three years later, William Prosser went further and gleaned from these same decisions a "new tort," which he labeled "intentional infliction of extreme mental suffering." In a seminal article, Prosser rounded up the menagerie of distinct torts implicating "pure" emotional distress and then advocated their summary execution. Prosser concluded that it would be preferable

> to jettison the entire cargo of technical torts with which the real cause of action has been burdened, and recognize it as standing on its own feet. There is every indication that this will henceforth be done, and that the intentional infliction of extreme mental suffering by outrageous conduct will be treated as a separate and independent tort.[210]

Prosser proved both persuasive and prophetic. The authors of the *Restatement of Torts*, who previously had adhered to the traditional view that no recovery could be had for emotional distress alone, reversed course and recognized intentional infliction of emotional distress as a distinct and valid tort in 1948.[211] Since then, this tort has gained favor among judges[212] because it offers a coherent (though vague) standard for imposing liability for emotional distress in a variety of contexts, and allows courts to abandon or ignore the awkward legal fictions that underlie the old array of torts that permitted similar recoveries.[213] The new claim attracts plaintiffs and their lawyers because the notions of extreme emotional distress, and the defendant's obligation to avoid its unnecessary infliction through intentional means, are readily communicated to jurors.[214] Furthermore, an intentional infliction of emotional distress claim is easily grafted onto a lawsuit already premised on other grounds, meaning that the cost of invoking this tort is normally quite low. These attributes have produced a steady supply of case law addressing and explicating the tort, making its elements, its relationship with various

209. *Id*. at 1064.

210. Prosser, *supra* note 3, at 892.

211. RESTATEMENT OF TORTS § 46 (Supp. 1948).

212. *But cf. Boyles v. Kerr*, 855 S.W.2d 593, 597-98 (Tex. 1993) (holding that, as a general matter, Texas law does not recognize a duty to avoid the negligent infliction of emotional distress and citing cases from other jurisdictions holding likewise).

213. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (1979) (observing that giving an individual a property right in another's corpse "does not . . . fit very well into the category of property").

214. *See* JON R. ABELE, EMOTIONAL DISTRESS: PROVING DAMAGES 3 (2003) (discussing the resonance of this tort).

procedural hurdles, and the prospect of recovery upon particular sets of facts ever easier to discern. The net result of this virtuous cycle is that today, intentional infliction of emotional distress is today one of the more commonly alleged torts in the nation's courts.[215]

But the success of this new cause of action has come at the expense of the older torts from which Prosser infused life into his creation. As to some of these claims, fact patterns once pled as distinct torts are now commonly alleged under an intentional (or negligent) infliction of emotional distress theory, but without much change as to what amounts to actionable misconduct or any marked decrease in claims alleged under the sum total of these theories. The ongoing substitution of negligent and intentional infliction of emotional distress for the corpse mishandling tort offers a case in point. In these situations, while the older tort may be dying, the facts that once gave rise to this claim remain actionable under another label. Claims premised merely on insulting conduct by common carriers, however, have virtually disappeared, regardless of how they are pled.

The insult tort has not vanished just because it is duplicative of, or subsumed entirely within, intentional infliction of emotional distress. Claims for insult and claims for intentional infliction of emotional distress are not the same; they merely overlap. As a general rule, intentional infliction of emotional distress is actionable only if the wrongdoer's conduct was "extreme and outrageous."[216] The common carrier insult cases, by comparison, allow recovery for emotional harm caused by language that is merely thoughtless, rude, or abusive. While insulting behavior by a common carrier or another passenger *can* be extreme and outrageous,[217] a plaintiff can recover under an insult theory even if it is not.[218] Still, the overlap between insult and infliction of emotional distress has compromised the former tort by giving plaintiffs with claims that fit under either theory a decision to make: to allege their claims under both of the theories or

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215. *See* MARSHALL S. SHAPO, TORT LAW AND CULTURE 271 (2003) (observing that "virtually all American jurisdictions hold that one may recover for severe emotional distress that is inflicted intentionally or recklessly"); Love, *supra* note 96, at 127.

216. In defining intentional infliction of emotional distress, the *Restatement (Second) of Torts* provides that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." RESTATEMENT (SECOND) OF TORTS § 46 (1965). The analogous description in the *First Restatement*, as revised in 1948, provided that "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." RESTATEMENT OF TORTS § 46 (Supp. 1948).

217. RESTATEMENT (SECOND) OF TORTS § 48 cmt. c (1965). The writer of the leading article on abusive and insulting language wrote in 1950 that "[t]he use of abusive and insulting language would clearly come within the scope of the 'new tort' which now seems to be developing." Wade, *supra* note 86, at 82.

218. *See* Prosser, *supra* note 67, at 59.

only one. More and more, plaintiffs with strong claims implicating egregious misconduct have opted to forego the insult tort and proceed exclusively under an intentional infliction of emotional distress rubric. These decisions have carved off the "best" claims from the insult theory, further weakening an already distressed tort.

In the recent case of *Williams v. Tri-County Metropolitan Transportation District*,[219] for example, a bus driver allegedly " 'berated, insulted, and belittled' " the plaintiff, a disabled passenger, as she attempted to board the bus with her assistance dog.[220] The plaintiff allegedly suffered severe " 'fear, anguish, depression, anxiety, and humiliation' " due to the verbal assault.[221] A hundred years ago, this would have presented a classic fact pattern implicating the insult tort. But the plaintiff in *Williams*, suing in the 1990s, alleged only intentional infliction of emotional distress, and the Oregon Court of Appeals weighed her allegations against the backdrop of rules developed for that tort.[222] Nowhere within its opinion did the *Williams* court mention the existence of a separate insult tort that might also have supported the plaintiff's lawsuit.

The plaintiff and her attorney in *Williams* may not have known that the tort of insult existed. But even if they had, it would have made sense to proceed exclusively under an intentional infliction of emotional distress theory. The absence of insult suits in recent years has meant that few modern decisions exist construing and applying the tort. This dearth of case law has increased the uncertainty of recovering upon even meritorious insult claims, as the substance of the insult tort and the procedure of trying an insult claim have become difficult to discern. Had the *Williams* plaintiff or her lawyer considered bringing an insult claim, they would have wondered what the essential elements of this tort were, whether it applied to government entities, whether any jury instructions existed for the tort, and whether the judge or jury would even have any idea what an insult claim entailed. All this uncertainty drives up the cost of pursuing an insult claim while casting doubt on the likely returns. And so the insult tort gets rejected, time and again, by plaintiffs with claims

219. 958 P.2d 202 (Or. Ct. App. 1998).

220. *Id.* at 203.

221. *Id.*

222. To be sure, these rules implicitly assimilated much of the reasoning behind the insult tort. With regard to intentional infliction of emotional distress claims, the *Williams* court noted that "a defendant's position or role *vis-à-vis* a plaintiff may be one that 'imposes on the defendant a greater obligation to refrain from subjecting the victim to abuse, fright, or shock than would be true in arm's length encounters among strangers.' " *Id.* at 204 (citation omitted). In finding that that a heightened standard of care applied to the facts before it, the court emphasized the "special" relationship between public transportation carriers and their passengers and "the public nature of the driver's conduct." *Id.* at 206.

strong enough to be pursued under an intentional infliction of emotional distress rubric that offers many advantages—and no apparent disadvantages—relative to the insult theory.

Decisions like those made by the *Williams* plaintiff have disassociated the insult tort from the most egregious instances of misconduct by common carriers and, in so doing, have imparted a weaker gravamen on the insult cause of action. The effective limitation of the insult tort to misconduct that does not qualify as the intentional infliction of emotional distress has also trapped the insult tort in a conceptual no man's land. It has long been established that no insult claim lies for "petty and trivial offensiveness."[223] The *Second Restatement* provides that a viable insult claim must involve "gross insults which reasonably offend" the plaintiff.[224] The treatise observes that "[e]ven profanity may not be grossly insulting, where it obviously amounts to nothing more than mere emphasis or a habit of speech, or where it is so customary in the particular community that it may be said to be generally tolerated."[225] Plaintiffs and their attorneys might be forgiven for failing to understand where "petty and trivial offensiveness" ends and actionable "gross insults" begin.

The abandonment of the insult tort has also meant that even those modern plaintiffs with claims that fall short of intentional infliction of emotional distress are failing to appreciate the opportunity provided by the increasingly obscure insult tort. In *Harris v. Jefferson Partners, L.P.*,[226] the plaintiff, a bus passenger, alleged that his driver was rude to him after the bus was involved in a traffic accident.[227] The plaintiff framed his resulting cause of action as intentional infliction of emotional distress.[228] The trial court granted the defendants' motion for summary judgment.[229] On appeal, the Supreme Court of South Dakota intimated that the plaintiff might have rescued his lawsuit had he alleged a claim for insult—or at least relied on this theory in his briefs.[230] But the plaintiff completely ignored this alternative avenue to recovery and, in relevant measure, proceeded exclusively under an intentional infliction of emotional distress theory.[231] Under the circumstances, the *Harris* court felt that it had no choice but to review the plaintiff's claim under intentional

223. Prosser, *supra* note 67, at 63.
224. RESTATEMENT (SECOND) OF TORTS § 48 (1965).
225. *Id.* cmt. c.
226. 653 N.W.2d 496 (S.D. 2002).
227. *Id.* at 497-98.
228. *Id.* at 498-99.
229. *Id.* at 499.
230. *Id.* at 500-01.
231. *Id.* at 501.

infliction of emotional distress standards and found his suit wanting under the principles applicable to that tort.[232]

And so, the insult tort has died because of troubles that would be familiar to any biologist tracking the extinction of an animal species: its factual habitat vanished, its source of energy (new suits) disappeared as the claim became less economically attractive, and new theories of relief encroached onto the tort's conceptual habitat, forcing the claim to more marginal pastures.[233] The net result of this confluence of an inhospitable atmosphere, an appealing alternative, and the peculiar interests of the audiences who either seize upon or ignore tort theories is a cause of action that has been banished to the hinterlands of modern tort law.

## V. CASE STUDY #2: THE "OBESITY LAWSUIT"

The insult tort has vanished only after an extended run as a viable cause of action. At the other end of the spectrum, the recent abolition of claims involving the negligent or reckless sale or distribution of handguns[234] and the ongoing campaign to limit lawsuits seeking recovery in tort for obesity allegedly caused by calorie-laden food products illustrates the vulnerability of fledgling tort claims to attacks by well-organized foes, particularly when these claims are portrayed as stretching the conceptual boundaries of tort law. In both instances, novel tort theories have come under trained fire for perceived overreaching. Since slightly more has been written about the campaign to limit handgun lawsuits[235] than the ongoing push to curb obesity lawsuits,[236] the discussion below will focus upon the backlash against this second type of claim. As will be shown, this tort has succumbed to potent arguments skillfully wielded by forceful agents.

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232. *Id.* at 502; *see also* Khan v. Am. Airlines, 639 N.E.2d 210, 215 (Ill. App. Ct. 1994) (rejecting the plaintiff's suit against an airline for infliction of emotional distress suit on the ground that the defendant's conduct was insufficiently extreme and outrageous; no mention was made by the plaintiff or the court of a separate tort of "insult" that might have sustained the plaintiff's suit).

233. Federal and state antidiscrimination laws enacted over the past fifty years also may have siphoned off claims that once conceivably could have been pursued under an insult theory. *See, e.g.*, Green v. Dillards, Inc., 483 F.3d 533, 540 (8th Cir. 2007) (holding that plaintiffs who allegedly were rudely treated at a department store because of their race stated a discrimination claim under 42 U.S.C. § 1981).

234. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005).

235. *See, e.g.*, SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS, *supra* note 165.

236. This is not to imply that no one has discussed the general subject of obesity litigation before—quite the opposite is true. *See, e.g.*, Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427 (2006); Alyse Meislik, Note, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781 (2004). The subject matter of this Part differs from previously prepared analyses, however, in that its focus lies on the campaign directed against these suits.

An extended survey of obesity litigation lies beyond the scope of this Article.[237] For present purposes, it suffices to say that the idea of holding food manufacturers and retailers liable under common law tort principles for obesity and other health consequences of fattening products percolated quickly and with little warning. In 2000, the idea of obesity litigation seemed fantastic enough that the comic newspaper *The Onion* ran a news story on a fictitious lawsuit brought against "Big Chocolate."[238] *The Onion* story was less parody than prescient. Less than three years later, prominent plaintiffs' attorneys gathered in Boston for a conference titled "Legal Approaches to the Obesity Epidemic,"[239] and a few "obesity lawsuits" had already been filed.[240]

These initial forays toward holding the food service industry liable for obesity were not well received, to say the least.[241] In February 2003, a *New York Times* columnist wrote that "[f]ast-food litigation has been greeted coolly so far because it appears to run up against a core American value: personal responsibility."[242] A Gallup poll conducted five months later revealed that eighty-nine percent of those surveyed opposed holding the fast-food industry legally responsible for the diet-related health problems of people who ate their food on a regular basis.[243] A contemporaneous *Los Angeles Times* editorial titled *Fast-Food Foolishness* cast the suits as driven by venal trial lawyers and concluded that "[p]eople shouldn't get stuffed, but this line of litigation should."[244] *The Washington Post* chimed in, "[t]he idea of suing over fat is admittedly ridiculous. Whatever the solution to the country's obesity problem may be, it isn't lawsuits."[245]

This inauspicious welcome notwithstanding, advocates of obesity lawsuits understood that public opinion might eventually shift in their favor.[246] In a frequently drawn analogy, litigation over the

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237. For a thorough review of the types of obesity litigation pursued to date, see Frank, *supra* note 236. The discussion in the text above primarily addresses what Frank describes as "claims of personal injury based on eating fattening food or claims of consumer fraud based on an alleged lack of sufficient disclosure of the nutritional impact of junk food." *Id.* at 433.

238. *Hershey's Ordered to Pay Obese Americans $135 Billion*, THE ONION, Aug. 2, 2000, http://theonion.com/content/node/28407.

239. Karen Robinson-Jacobs, *Lawyers Put Their Weight Behind Obesity Cases*, L.A. TIMES, July 2, 2003, at A1.

240. *See* Meislik, *supra* note 236, at 792-95 (discussing obesity lawsuits filed in 2002).

241. Michelle M. Mello et al., *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFFAIRS 207, 207 (2003).

242. Adam Cohen, Editorial, *The McNugget of Truth in the Lawsuits Against Fast-Food Restaurants*, N.Y. TIMES, Feb. 3, 2003, at A24.

243. H.R. REP. NO. 109-130, at 9 (2005) (discussing poll results).

244. *Fast-Food Foolishness*, L.A. TIMES, July 7, 2003, at B10.

245. *Missing a Fat Target*, WASH. POST, Mar. 22, 2004, at A20.

246. By 2004, one attorney was quoting a survey in which only fifty-six percent of Americans predicted that they would not side with a plaintiff in an obesity lawsuit. Kate

health effects of cigarettes also had a painfully slow and unpromising start but eventually gained momentum and became enough of a threat to force tobacco companies to the bargaining table.[247] A smoking gun document obtained through civil discovery here,[248] a favorable judge and jury panel there,[249] and suits once regarded as frivolous might eventually merge into the mainstream of tort law—or at least become sufficiently viable to drive potential defendants toward settlement talks that could produce changes in their marketing practices.[250]

That might well have happened by now, but for the mistakes made by the advocates of obesity lawsuits in nurturing this cause of action. It has been written that "new torts" are more likely to thrive when they are not considered new at all, but merely the logical (and preferably inevitable) outgrowths of well-established principles of law—an insight known as the "paradox of novelty."[251] As a corollary, close association with a particular advocate or group of advocates will compromise a new tort theory, an effect known as the "paradox of agency."[252] Proponents of obesity lawsuits violated both of these axioms by self-consciously (and rather notoriously) trying to create a new class of claims overnight[253] and by becoming too closely associated with this new cause of action, setting the tort up for arguments that it stood too far away from the conceptual center of tort law.

Of these self-inflicted wounds, the tort's close association with trial lawyers likely has been the more severe. Unflattering media attention has cast obesity lawsuits as the concoction of a predatory trial bar searching for a new kill. News articles written about these suits have focused on the supposed "masterminds" behind this new

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Zernike, *Lawyers Shift Focus from Big Tobacco to Big Food*, N.Y. TIMES, Apr. 9, 2004, at A15.

247. *See* H.R. REP. NO. 109-130, at 5-6 (2005); Mello et al., *supra* note 241, at 207. Professor John Banzhaf, often described as the "mastermind" behind obesity lawsuits, was quoted as saying, "[e]verything's always called frivolous, but we just keep winning the damn things." Lib Copeland, *Snack Attack: After Taking on Big Tobacco, Social Reformer Jabs at a New Target: Big Fat*, WASH. POST, Nov. 3, 2002, at F1.

248. Some observers regard the discovery of a "cache of incriminating tobacco industry documents" in 1994 as a pivotal moment in the prosecution of civil suits against cigarette companies. Mello et al., *supra* note 241, at 212.

249. *See* H.R. REP. NO. 109-130, at 7 (2005) (quoting Prof. Banzhaf as saying, " 'you may not like it . . . but we'll find a judge. And then we'll find a jury' that will find restaurants liable for their customers' overeating").

250. Nathan K. Bierma, *Food Industry Cooks up Ways to Stymie Suits*, CHI. TRIB., Aug. 15, 2003, Tempo, at 1.

251. Bernstein, *supra* note 10, at 1544-47.

252. *Id.* at 1552-59.

253. Professor Banzhaf was quoted as saying that these suits manifested his lifelong interest in "pushing the boundaries." Copeland, *supra* note 247.

theory of liability.[254] One 2004 *New York Times* article observed that "a well-honed army of familiar lawyers who waged war against the tobacco companies for decades and won megamillion-dollar settlements is preparing a new wave of food fights."[255] The policies embraced by the attorneys who developed obesity lawsuits did little to combat their wolf-pack reputation. Attendees at the obesity conference in Boston were forbidden to discuss the proceedings with outsiders and even signed affidavits guaranteeing their silence.[256] The perception was one of a cluster of attorneys plotting the next advances in tort law in the proverbial smoke-filled room, quite the opposite of the more organic and gradual growth patterns that have marked the most successful modern torts.[257]

In casting obesity litigation as a way to tackle the nation's obesity problem, these attorneys also overlooked the significance that the delivery of individualized corrective justice retains as a framing purpose of tort law. Proponents of obesity lawsuits were quite open about the broad goals attendant to these cases; they wanted nothing less than changes in how food products are marketed and sold in the United States.[258] In an interview broadcast on the television program *60 Minutes*, Professor John Banzhaf described the strategy and purpose of obesity lawsuits as follows:

> If we can win one out of 10 cases, if we can persuade one out of ten juries to hit these people with big verdicts, the way we have with tobacco, we can force them to make important changes and finally somebody will be doing something about the problem of obesity, because, at this point nobody else, not the health educators, not the bureaucrats, *not our legislators*, are doing a damn thing about it.[259]

Attorneys advocating this line of litigation spoke specifically of changing food labeling practices[260] and of other policy aims that, on the surface, had little to do with making any particular plaintiff whole.[261] These ambitious goals teed up arguments that obesity lawsuits were end-runs around the democratic process[262] and that the re-

254. *Id.* (profiling Banzhaf); Ameet Sachdev, *Obesity Case Ruling Whets Appetite of Food Activist*, CHI. TRIB., Feb. 2, 2003, Business, at 1 (same); *see also* H.R. REP. NO. 109-130, at 4 (2005).

255. Zernike, *supra* note 246, at A15.

256. H.R. REP. NO. 109-130, at 5; Kathleen Burge, *Lawyers Plan New Strategies to Fight Obesity*, BOSTON GLOBE, July 6, 2003, at B1.

257. Bernstein, *supra* note 10, at 1545.

258. *See* Copeland, *supra* note 247; Christopher Lee, *Fast-Food Chains Get a Break Today*, WASH. POST, Mar. 11, 2004, at A2; Robinson-Jacobs, *supra* note 239.

259. H.R. REP. NO. 109-130, at 14 (quoting *60 Minutes: Food Fight* (CBS television broadcast Sept. 15, 2002)).

260. Copeland, *supra* note 247.

261. *Id.*

262. *See* H.R. REP. NO. 109-130, at 14-15.

lief sought in these cases had nothing to do with justice for specific plaintiffs and everything to do with the preferred policy outcomes of the attorneys.[263] These criticisms also have invoked themes of overcompensation (since obesity plaintiffs were perceived as suffering no injury not of their own making), overdeterrence (of both individual responsibility to lead a healthy lifestyle and the availability of fast food), and a perceived overextension of basic tort principles. Typifying these attacks, the report prepared by the House of Representatives Judiciary Committee on H.R. 554, The Personal Responsibility in Food Consumption Act of 2005, announced that this proposal to limit obesity lawsuits (which passed the House of Representatives, while companion legislation died in the Senate) "would preserve the separation of powers, support the principle of personal responsibility, and protect the largest employers in the United States from financial ruin in the face of frivolous obesity-related liability claims."[264]

These arguments have gained credence because of the influence and fervor of the opponents of these suits, as compared to the relatively flaccid and disorganized base of support for the claims. "Big Food" has proven to be a formidable foe, capable of driving public opinion even further into its corner.[265] A week after the secrecy-shrouded conference in Boston, the United States Chamber of Commerce released a study purporting to show an absence of evidence that fast food is a primary cause of obesity.[266] That same month, the National Restaurant Association held its own conference to discuss obesity lawsuits,[267] and the Association and its state affiliates have implemented a grassroots campaign designed to mobilize opposition to obesity lawsuits across the fifty states.[268] A sophisticated ad campaign appeared that attacked obesity lawsuits as overreaching by the trial bar. Representative television advertisements involved a lawyer mercilessly interrogating a Girl Scout about the fat content of her cookies[269] and the *Seinfeld* "Soup Nazi" character shouting at a customer, "Nothing for you! Come back when you're thinner."[270]

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263. *Id.*

264. *Id.* at 3-4.

265. *See* Bierma, *supra* note 250; Zernike, *supra* note 246 (discussing the industry response to the threat of obesity lawsuits). Warnings by financial analysts that obesity litigation posted "a clear long-term risk" to purveyors of fast food and snack foods no doubt provided additional motivation to the food industry to respond aggressively to these lawsuits. Mello et al., *supra* note 241, at 208.

266. Robinson-Jacobs, *supra* note 239.

267. Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. TIMES, July 7, 2005, at C1.

268. *Id.*

269. Burge, *supra* note 256.

270. Caroline E. Mayer & Amy Joyce, *The Escalating Obesity Wars*, WASH. POST, Apr. 27, 2005, at E1.

Even this well-organized, well-funded campaign might have been stymied, had advocates of obesity lawsuits been better organized and more highly motivated. But the plaintiffs' bar remains split over whether obesity lawsuits are worthwhile or even defensible.[271] No plaintiff has ever prevailed at trial on an obesity claim alleging common law fraud or negligence,[272] and it is uncertain whether anyone ever will in light of the problems of pleading and proof attendant to a suit pursued under those theories.[273] Several attorneys regard common law tort claims involving obesity as a distraction from more promising suits that would challenge allegedly deceptive food-marketing practices under state consumer protection laws.[274] In all, the questionable viability and profitability of obesity claims has meant that few attorneys have strenuously opposed legislation banning this type of lawsuit.

The net result is that as of February 2008, twenty-three states have enacted laws curtailing these sorts of claims.[275] Yet it may be too early to pronounce obesity lawsuits doomed or dead. The feared onslaught of obesity lawsuits having failed to materialize, legislative interest in measures barring these claims has flagged. The last law foreclosing these suits was enacted in 2006.[276] Furthermore, even those laws that abolish most obesity lawsuits typically preserve claims in which the plaintiff alleges an injury attributable to identified violations of state or federal law.[277] At the federal level, legisla-

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271. *Legal Kibitzers See Little Merit in Lawsuit over Fatty Food at McDonald's*, WASH. POST, Jan. 27, 2003, at E10.

272. That said, Professor Banzhaf's Web site lists several actual or threatened lawsuits over food marketing or labeling that produced settlements or other assertedly positive outcomes. Prof. John Banzhaf III: Using Legal Action to Help Fight Obesity, http://banzhaf.net/obesitylinks (last visited Feb. 15, 2008); *see also* Laura Parker, *Legal Experts Predict New Rounds in Food Fight*, USA TODAY, May 6, 2004, at 3A (observing that of eight known "fat" lawsuits, five "were at least partially successful").

273. For a discussion of the hurdles facing plaintiffs in obesity lawsuits, see Donald R. Richardson, "*Want Fries With That?": A Critical Analysis of Fast Food Litigation*, 107 W. VA. L. REV. 575 (2002).

274. *See* Parker, *supra* note 272.

275. Alphabetically, these states are Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. National Restaurant Association, State Frivolous-Lawsuit Legislation, http://www.restaurant.org/government/state/nutrition/bills_lawsuits.cfm (last visited Feb. 15, 2008).

276. Wisconsin enacted legislation in April 2006. National Restaurant Association, State Bill Tracking: Nutrition & Healthy Lifestyles, http://www.restaurant.org/government/state/nutrition/bills_key.cfm#lawsuits (last visited Feb. 15, 2008).

277. Even model legislation disseminated by the National Restaurant Association exempts civil actions in which the claimed injury was caused by a material violation of a state or federal adulteration or branding requirement or in which the defendant is alleged to have knowingly and willfully violated a state or federal law applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food. NAT'L REST. ASS'N, MODEL COMMONSENSE CONSUMPTION ACT, *available at* http://www.restaurant.org/

tion that would have limited obesity lawsuits stalled in Congress even when both chambers were controlled by Republicans,[278] and revived proposals have made little headway during the current legislative session.[279]

While it may be premature to draw lessons from a story with a final chapter that is as yet unwritten, the history to date of the obesity lawsuit offers some additional insights into why torts die. The effects of the "novelty paradox" and the "agency paradox" on these claims suggest how a fledgling tort can be especially vulnerable to attack, particularly if the tort is tethered to a controversial creator and not perceived as the organic product of well-established tort principles. The battle over obesity lawsuits also highlights the risks run by a cause of action that targets an influential, well-organized interest group—a cohesive band of agents—especially when the tort lacks a strong constituency of supporters. As *The New York Times* has noted, "[a]doption of commonsense consumption laws by almost half the states reveals how an organized and impassioned lobbying effort, combined with a receptive legislative climate, can quickly alter the legal framework on a major public health issue like obesity."[280] Finally, the recent stagnation of legislation aimed at snuffing out obesity lawsuits suggests that even skillfully orchestrated, widely endorsed campaigns against a tort may not have the power or urgency that is needed to influence the relevant audience or audiences. Institutional prerogatives and idiosyncrasies can make a difference in the lives and deaths of torts, as will be further established in the third and final case study.

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government/state/nutrition/resources/nra_200602_modelbilltext.doc.

278. The Commonsense Consumption Act of 2003, S. 1428, 108th Cong. (2003) would, with limited exceptions, have prevented any "qualified civil liability action," which was defined as

> a civil action brought by any person [including any governmental entity] against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief based on a claim of injury resulting from a person's weight gain, obesity, or any health condition that is related to weight gain or obesity.

S. 1428 § 3(5). The House of Representatives passed The Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003) by a 276-139 vote in March 2004, 150 CONG. REC. H981 (daily ed. Mar. 10, 2004), but companion legislation died in the Senate. Reintroduced in 2005, The Personal Responsibility in Food Consumption Act, H.R. 554, 109th Cong. (2005) passed the House again in October 2005, this time by a 306-120 margin, 151 CONG. REC. H8940 (daily ed. Oct. 19, 2005), but, once more, the measure did not come to a vote in the Senate.

279. Commonsense Consumption Act of 2007, H.R. 2183, 110th Cong. (2007); Commonsense Consumption Act of 2007, S. 1323, 110th Cong. (2007). As of December 2007, both bills lie dormant in committee.

280. Warner, *supra* note 267.

## VI. CASE STUDY #3: THE HEARTBALM TORTS

The last, and most complicated, of the case studies concerns the heartbalm torts.[281] Both Lawrence Friedman's recent evaluation of these torts[282] and M.B.W. Sinclair's discussion of seduction[283] touch upon the contributions that arguments, agents, audiences, and attributes made to the demise of these claims, though each author ultimately credits the downfall of the torts principally to changing attitudes regarding matters of sex and gender.[284] The text below expands on their work, explaining that while evolving views concerning gender, sex, and marriage certainly contributed to the immolation of the heartbalm torts, other factors provided fuel for these flames and ultimately determined how far they would spread.

The story begins a century ago, a time when the heartbalm torts seemed to occupy as secure a place within the tort compendium as they ever had before. The recent enactment of Married Women's Acts had increased the number of plaintiffs who could bring alienation of affections and criminal conversation claims.[285] A growing number of jurisdictions were allowing women to sue for their own seduction.[286]

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281. These torts have received a considerable amount of scholarly attention, even as they disappear. *E.g.*, William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985 (2001); Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); Sinclair, *supra* note 10; Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COLUM. L. REV. 242 (1952); Michele Crissman, Note, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518 (2003); Jill Jones, Comment, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61 (1998); Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulm*ent, 23 ARIZ. L. REV. 323 (1981); William M. Kelly, Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAW. 426 (1972); Nehal A. Patel, Note, *The State's Perpetual Protection of Adultery: Examining* Koestler v. Pollard *and Wisconsin's Faded Adultery Torts*, 2003 WIS. L. REV. 1013; R.M.J., Legislation Notes, *Abolition of Actions for Breach of Promise, Enticement, Criminal Conversation, and Seduction*, 22 VA. L. REV. 205 (1935); Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583 (1998).

282. LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS 206-12 (2007).

283. Sinclair, *supra* note 10.

284. *See* FRIEDMAN, *supra* note 282, at 209, 212 (explaining why the heartbalm torts have been abolished); Sinclair, *supra* note 10, at 98-102 (attributing the disappearance of the seduction tort to changes in what amounts to the "ideal woman").

285. CHAPIN, *supra* note 22, § 96, at 464-65. A few states refused to allow women to bring actions for criminal conversation, but the majority rule held to the contrary. *See* Karchner v. Mumie, 156 A.2d 537, 538-39 (Pa. 1959) (discussing the majority and minority rules on this topic).

286. Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, *supra* note 281, at 252. In ancient times, only the father of a seduced woman could bring a seduction claim, with the gravamen of the suit involving a real or presumed loss of services. Where suits by the seduced woman were permitted, the woman generally had to show that the seducer had used undue influence, fraud, force, duress, or other means of control or domination to accomplish the seduction. Otherwise, the victim was deemed *in pari delicto* with her paramour. *Breece v. Jett*, 556 S.W.2d 696, 705 (Mo. Ct. App. 1977).

And claims for breach of promise to marry, though controversial, were growing ever more enmeshed within the fabric of the law.

But these seemingly beneficial trends ultimately contributed to the disappearance of these causes of action. Allowing women to sue for alienation of affections, criminal conversation, or their own seduction undermined the traditional justifications for these torts. An accepted ground for allowing a husband to recover for criminal conversation was to compensate him for any genealogical uncertainty that might surround the offspring of his adulterous wife.[287] This explanation obviously did not apply to criminal conversation suits brought by a wife, who could be pretty well assured that her children were her own.[288] With both women and men as plaintiffs, this tort—and claims for alienation of affections—had to find support in a more nebulous right to spousal consortium.[289] Allowing women to sue for their own seduction, meanwhile, pushed that tort even further from its original justification (which by the early 1900s was already understood to be a legal fiction[290])—allowing parents to recover for a loss of services occasioned by their daughter's debasement and any resulting pregnancy.[291] Finally, the burgeoning number of breach of promise to marry suits drew renewed, unflattering attention to the anomalous nature of that claim, which permitted tort damages for what by all appearances seemed to be a breach of contract.[292] Critics also worried that assigning tort liability to a broken marriage promise might make society worse off. If only the threat of suit would drive a wavering groom down the aisle, what hope could the couple have for a healthy marriage? Better, many thought, to allow the unhappy couple to disengage in peace than to encourage a marriage with little hope of success.[293]

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287. *Doe v. Roe*, 20 A. 83, 84 (Me. 1890); *Kroessin v. Keller*, 62 N.W. 438, 438 (Minn. 1895).

288. The Author hopes that most readers will concede this point even without a citation to authority, but here is one just in case: BURDICK, *supra* note 3, ¶ 330, at 315.

289. *See* Feinsinger, *supra* note 281, at 991 (observing that "the historical basis for the action of criminal conversation has been replaced by a mass of incoherent theories"); *id.* at 993 (noting that "[o]nce the wife's action was established, courts proceeded to develop rules which operate to remove the action from the realm of social reality").

290. *See, e.g.*, *Snider v. Newell*, 44 S.E. 354, 355-56 (N.C. 1903).

291. FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS § 264, at 572 (1933); 2 HILLIARD, *supra* note 25, at 599.

292. *See* ALBERT C. JACOBS & JULIUS GOEBEL, JR., CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 22 (3d ed. 1952); R.M.J., *supra* note 281, at 209; *see also* Tushnet, *supra* note 281, at 2586 (suggesting that the shift in justifications given for breach of promise claims, from allowing a bride to recover financial losses to compensating her for emotional harms, eventually doomed the tort).

293. R.M.J., *supra* note 281, at 210-11 (observing that the threat of breach of promise actions "results in blighted marriages, which consequently result in desertion, separation, and divorce").

The heartbalm torts also suffered from several other flaws in their makeup and application. First, the subject matter of these torts had long lent them a somewhat unsavory air.[294] Some observers felt that disputes over sex and infidelity should be resolved outside of the courts, both to preserve the reputation of the legal system and for the good of the parties involved.[295] Furthermore, it was no secret that the amatory torts were capable of abuse, frequently being used for reasons of spite[296] or—worse yet—blackmail.[297] Just the threat of such a suit, with its attendant publicity,[298] led to many a discreet payoff.[299] If matters proceeded to court, the he-said, she-said nature of many heartbalm claims—especially breach of promise to marry—meant that it could be difficult to distinguish the heartbroken lover from the clever fraudsmith.[300]

Second, these problems of proof extended to the question of damages; as to all of the heartbalm torts, there were few meaningful

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294. *See McCollister v. McCollister*, 138 A. 472, 473 (Me. 1927) (noting, as to an alienation of affections suit, "the nature of the claims so asserted is such that such suits furnish a most convenient weapon for extortion and the right to bring them is a constant temptation to the unscrupulous"); William J. Burns, *Blackmailing Now the Big American Crime*, N.Y. TIMES, July 23, 1916, at SM9 (describing how blackmailers used threat of alienation of affections and breach of promise suits to extort their marks).

295. *See*, *e.g.*, *Doe v. Roe*, 20 A. 83, 84 (Me. 1890) (observing that claims for alienation of affections seem "better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the person injured").

296. Then there is the breach of promise case. Ninety percent of such cases are prompted by spite, revenge or greed, as is proved by the fair one's usual willingness to paint her record black as the original sin for a chance to "show him up," with some likelihood of a cash return. *Cash for Love*, DES MOINES NEWS, July 13, 1918, at 4.

297. FRIEDMAN, *supra* note 282, at 116 (discussing the sordid reputation of breach of promise suits); Note, *Breach of Promise*, 7 HARV. L. REV. 372, 372 (1894) (observing that breach of promise to marry claims were being "used sometimes as a method of blackmail").

298. Peggy Cameron, *Court Doors Slam Shut on Many Broken Hearts Asking for Golden Balm*, WASH. POST, Apr. 7, 1935, at FS3 (observing that "[i]n the past few years breach of promise suits have served as an open sesame to newspaper publicity").

299. Joseph U. Dugan, *States Act to Curb Evils of 'Heart Balm' Lawsuits*, CHI. TRIB., Mar. 31, 1935, at E9 ("Wide publicity always has attended sensational charges of breach of promise, alienation of affections, and similar actions. The threat of such publicity often has been used by unscrupulous individuals and attorneys as a club to force settlement."). One scheme that is often linked to the heartbalm torts is known as the "badger game." *See* COMM. ON LAW REFORM OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT OF THE COMMITTEE ON LAW REFORM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON ACTIONS TO RECOVER DAMAGES FOR ALIENATION OF AFFECTIONS, FOR BREACH OF PROMISE OF MARRIAGE AND FOR CRIMINAL CONVERSATION 4 (1935) (discussing the connection between alienation of affections suits and the "badger game"). This con involves placing a married man in a compromising position with a woman, then blackmailing him to avoid disclosure of the "affair." For a modern take on the "badger game," see DERAILED (The Weinstein Co. & Miramax Films 2005).

300. J.M.G., Legislation, *Abolition of Actions for Breach of Promise, Alienation of Affections, Criminal Conversation and Seduction*, 5 BROOK. L. REV. 196, 198 (1936) (observing that "[d]ifficulties inherent in adducing evidence [in breach of promise cases], besides the failure to require any written contract, subject the action to grave abuse").

standards for affixing a price tag to the injuries suffered.[301] Particularly as the gravamen of heartbalm claims drifted more and more toward emotional and psychological injuries instead of out-of-pocket losses,[302] jury verdicts became notoriously unpredictable[303] and occasionally immense.[304] The publicity attendant to enormous awards worsened an already bad situation by encouraging plaintiffs with questionable claims to try their luck in court.[305]

Third, even though heartbalm lawsuits always attracted substantial attention,[306] this publicity disguised the fact that relatively few amatory actions were being filed with the courts by the early 1900s. A study of one rural Wisconsin court district over the 100-year period between 1855 and 1954 identified 497 suits alleging negligent bodily injury over that span, 150 cases implicating negligent injury to personal property, 112 cases involving intentional damage to realty, and thirty-four defamation cases, but only fifteen lawsuits alleging intentional damage to relational interests.[307] While a few more heartbalm suits may have been filed in urban areas,[308] as the twentieth century progressed their numbers were dwarfed by the soaring count of lawsuits involving automobile accidents.[309] Out of 22,297

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301. Feinsinger, *supra* note 281, at 984, 994-95 (listing the types of damages recoverable in heartbalm actions); N.P. Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417, 417 (1935). *cf.* Note, *Breach of Promise*, *supra* note 297, at 372 (asserting that a breach of promise claim "forces the courts into a commercial view of what cannot properly be regarded as a matter of trade or dicker").

302. Feinsinger, *supra* note 281, at 984, 994-95.

303. *See What is Woman's Love Worth*, WASH. POST, Sept. 12, 1915, at MS2 (observing, as to breach of promise suits, that "[n]o medium can be struck between the decisions of juries on this absorbing question, their findings are too variable").

304. *See* Mohn v. Tingley, 217 P. 733, 734 (Cal. 1923) (reporting a $100,000 verdict in alienation of affections suit); THEODORE E. APSTEIN, THE PARTING OF THE WAYS 20, 23 (1935) (discussing large verdicts awarded in breach of promise suits in the late 1800s and early 1900s, including seventeen awards of $60,000 or more between 1920 and 1925); FRIEDMAN, *supra* note 282, at 115, 118, 206-07 (discussing large damage verdicts in breach of promise and alienation of affections suits prosecuted between the late 1800s and the early 1900s); Feinsinger, *supra* note 301, at 417 (observing that the subject matter of heartbalm suits "aggravates the usual tendency of juries to overcompensate for injured feelings and leads them to express their emotional sympathy and moral indignation in the guise of exemplary damages"); *Girl Gets $75,000 Verdict Against Abeel*, N.Y. TIMES, Mar. 29, 1904, at 9 (reporting on a $75,000 jury verdict in a breach of promise to marry case); *Woman Wins Big Verdict*, N.Y. TIMES, Apr. 6, 1924, at 24 (reporting on a $50,000 verdict in an alienation of affections case).

305. *See* APSTEIN, *supra* note 304, at 21-22.

306. *See* Sinclair, *supra* note 10, at 85.

307. FRANCIS W. LAURENT, THE BUSINESS OF A TRIAL COURT 163 tbl.86 (1959).

308. ROBERT A. SILVERMAN, LAW AND URBAN GROWTH 127-28 (1981).

309. A review of the New Haven courts over a fourteen-year span (1919 to 1932) reported only 113 alienation of affections suits (a total that may include some suits not properly classified as "heartbalm" actions) but approximately 4000 lawsuits involving automobile accidents. CHARLES E. CLARK & HARRY SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT 8 tbl.1 (1937). Of course, more heartbalm suits were threatened than ac-

civil lawsuits filed in the Los Angeles Superior Court during its 1923-1924 fiscal year, only forty-five were for alienation of affections and just fifteen were for breach of promise to marry.[310] Suits alleging criminal conversation were especially uncommon. In 1935, the Association of the Bar for the City of New York reported that only four criminal conversation claims had been filed in the entire state of New York over the preceding thirteen years.[311]

To step back and summarize what has been said about the heartbalm torts up to this point, due to their attributes and long-circulating arguments, these claims were in a precarious position even before the Roaring Twenties ushered in new attitudes regarding women and sex. The torts had been knocked off-balance by reforms that expanded the types of plaintiffs capable of bringing these suits; their character and composition left them vulnerable to charges that they showered riches upon undeserving plaintiffs; and, notwithstanding the significant amount of negative publicity they generated, they were not being invoked especially often, meaning that few attorneys depended on these torts to put food on the table and thus would presumably fight for their survival.[312] The events of the 1920s and 1930s removed some objections to eliminating these torts and contributed to a crisis atmosphere that prompted a handful of legislatures to abolish the claims.[313] These developments, however, merely capitalized upon the preexisting ailments that afflicted the heartbalm torts, woes that had already proven potent enough to cause England to abolish civil suits for adultery back in 1857.[314]

The atmospheric shift of the 1920s that has been credited with inducing the death of the heartbalm torts involved changes in what young women were doing and, probably more important, in what

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tually brought, and one does see the occasional reference to heartbalm suits "crowd[ing] the dockets of the [c]ourts." *What Is Woman's Love Worth*, *supra* note 303.

310. *Year Shows Increase in Court Suits*, L.A. TIMES, Sept. 26, 1924, at A1; *see also* Gilbert v. Great Atl. & Pac. Tea Co., 269 N.Y.S. 640, 642 (City Ct. 1934) (noting that breach of promise actions were not as prevalent as personal injury cases).

311. *Bar Urges Curbs on Alienation Suits*, N.Y. TIMES, Feb. 14, 1935, at 44; *see also* Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, *supra* note 281, at 253 (observing that criminal conversation was "[a]pparently in almost complete disuse even before 1935").

312. Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, *supra* note 281, at 242 (noting that by 1935, "[f]or over a decade law reviews and tabloids publicized the possibilities of blackmail and extortion inherent in civil actions for breach of promise to marry, alienation of affections, seduction, and criminal conversation").

313. *See* G.M.W., *Twelve Years with the "Heart Balm Acts,"* 33 VA. L. REV. 314, 314 (describing the first round of anti-heartbalm laws as "[c]onceived in a rash of newspaper publicity and ballyhoo").

314. Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 59 (Eng.); Bernard Rudden, *Torticles*, 6/7 TUL. CIV. L. F. 105, 112 (1991-1992). Although this statute abolished the common law action for adultery, a husband still could recover damages from an interloper by petitioning the court for redress. JACOBS & GOEBEL, *supra* note 292, at 562.

they were *believed* to be doing. The "new woman" of the 1920s engaged in liberties that would have been unthinkable just a few decades before. This woman smoked, drank, swore, and—most pertinently—participated in, and even enjoyed, premarital sex.[315] Some have questioned whether the flappers of the 1920s typified the attitudes and behavior of the average young woman of that period.[316] But these bohemians did define the era within the public imagination and in so doing displaced earlier, more chaste models of young femininity.[317] The "gold digger," in short, replaced the Gibson Girl. This transition bode particularly ill for claims for seduction (as brought by the seduced woman) and breach of promise to marry, which rested on the premises that women sought marriage and were ruined (or at least embarrassed) by premarital sex.[318]

Yet even these changes in the status and perception of modern women need not have proven fatal to any or all of the heartbalm torts. For all their flaws, these torts still seemed to have some use. Many observers continued to believe that claims for alienation of affections and criminal conversation protected and vindicated the valid consortium interests of married men and women. Writing in 1934, one author determined that "[i]n spite of all [the objections to the alienation of affections tort], it is submitted that the action is still justifiable and performs a useful social function. That function is the preservation of the home."[319] Meanwhile, few parents of that (or any) time welcomed the seduction of their daughters. And even the breach of promise to marry tort was not beyond saving. Chivalry was not dead yet, and some thought that the problems afflicting breach of promise claims could be cured simply by raising the evidentiary threshold for these suits through measures such as requiring written evidence of the marriage promise at issue.[320]

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315. FREDERICK LEWIS ALLEN, ONLY YESTERDAY 67-92 (John Wiley & Sons, Inc. 1997).

316. J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 25 (1997).

317. *Id.*; Sinclair, *supra* note 10, at 86-90. Another, related development ascribed newfound economic autonomy to women. "That women had magically achieved economic freedom was the gospel of the 1920s." DIFONZO, *supra* note 316, at 20. Some critics also justified snuffing out the heartbalm torts on the ground that women had gained new legal rights in recent years. *No Balm for Blackmail*, CHRISTIAN SCI. MONITOR, Apr. 2, 1935, at 16 (describing the heartbalm torts as being "no longer consistent with the changed legal status of the sex").

318. Sinclair, *supra* note 10, at 86-90; Doris Blake, *Legislation Is Doom of Racket in Balm Suits*, CHI. TRIB., Dec. 22, 1935, at D3 (quoting an anti-heartbalm opponent as describing the premise behind breach of promise suits as "[w]oman is weak and defenseless, without means to support herself or protect herself from the machinations of men").

319. Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 505-06 (1934).

320. *See* COMM. ON LAW REFORM OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 299, at 3 (discussing earlier, failed attempts to revise the law to require written proof of the marriage promise in breach of promise actions).

Unfortunately for the heartbalm torts, moderate reform proposals were drowned out in the public discourse by a parade of sensational cases and astronomical verdicts in the decade leading up to 1935 that lent credence to cries of a heartbalm "crisis." Seemingly since time immemorial, there had always been the occasional sensational heartbalm suit[321]—but nothing to compare with the volume of scandalous cases brought in the early- to mid-1930s. During this span, actor Douglas Fairbanks, Jr., became embroiled in an alienation of affections case.[322] So too did the spiritualist/cult leader Father Divine[323] and actresses Helen Hayes[324] and Katherine Holmes.[325] Breach of promise suits were, if anything, even more notorious. These suits ensnared doctors,[326] executives,[327] financiers,[328] celebrities,[329] athletes,[330] and other prominent and respected men.[331] The fact that the plaintiffs in some of these cases were actresses[332] and show girls[333] did nothing to dampen interest in these matters.[334] Me-

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321. Sinclair, *supra* note 10, at 85.

322. *Fairbanks Charges Plot*, L.A. TIMES, Mar. 29, 1933, at A3; *Fairbanks, Jr., Sued for Balm*, L.A. TIMES, Mar. 17, 1933, at A1.

323. *Father Divine Is Sued*, N.Y. TIMES, Mar. 20, 1935, at 9.

324. *Helen Hayes Fights Suit*, L.A. TIMES, July 2, 1936, at 3.

325. *Holmes Balm Suit Dismissed*, L.A. TIMES, June 19, 1937, at 2.

326. *Dr. E. H. Lehman Is Sued*, N.Y. TIMES, Dec. 14, 1934, at 19 (reporting on a $100,000 breach of promise suit against a doctor).

327. *Singer Asks $1,000,000*, N.Y. TIMES, Nov. 28, 1934, at 7 (reporting on a breach of promise suit against a vice president and director of the Great Atlantic and Pacific Tea Company).

328. *Girl Sues George S. Groves*, N.Y. TIMES, Nov. 28, 1934, at 6 (reporting on a breach of promise suit against a local financier and yachtsman).

329. *Vallee Scores in Court*, N.Y. TIMES, Sept. 7, 1934, at 24 (reporting on a breach of promise suit brought against singer Rudy Vallee).

330. *Accuses Cyril Walker: Woman Sues Ex-Golf Champion for Breach of Promise*, N.Y. TIMES, Sept. 7, 1934, at 24 (reporting on a breach of promise and seduction suit against a renowned golfer); *Circus Girl Sues Baer*, N.Y. TIMES, Dec. 30, 1933, at 9 (reporting on a breach of promise suit against heavyweight boxer Max Baer).

331. *E.g.*, *M'Cormick Settles with Mrs. Doubleday*, N.Y. TIMES, May 19, 1934, at 14 (reporting on a breach of promise suit in which the parties reached an out-of-court settlement rumored to total $100,000). In all, it has been estimated that between 1925 and 1935, damages of approximately $15,000,000 were awarded to plaintiffs in breach of promise cases. JACOBS & GOEBEL, *supra* note 292, at 39.

332. *Two Actresses Indicted*, N.Y. TIMES, Dec. 4, 1934, at 23 (reporting the indictment of Vilma Aknay and Sari Fedak, the first of whom had brought, then dropped, a breach of promise lawsuit against playwright Ernst Vajda).

333. *Girl Sues Orchestra Leader*, N.Y. TIMES, May 13, 1934, at N7 (reporting on a New York breach of promise suit for $100,000 brought by a show girl).

334. The parsimony of juries in other cases received much less notice. *See, e.g.*, *'$10,000 Heart' Put Down to $1*, N.Y. TIMES, Feb. 12, 1935, at 42 (reporting a jury award of $1 in breach or promise to marry suit); *Asked $100,000, Gets 6 Cents*, N.Y. TIMES, May 29, 1934, at 9; *Ex-Senator France's Kin Assessed Cent in $50,000 Suit*, N.Y. TIMES, Oct. 22, 1932, at 8 (reporting on an award of one cent in a Maryland breach of promise suit); *Gets $1 in $200,000 Suit*, N.Y. TIMES, May 12, 1934, at 11. Though no official statistics exist, contemporaneous reports suggest that alienation of affections suits were especially difficult to prove. *See* Cameron, *supra* note 298 ("Judging from the ultimate outcomes of most of the

dia coverage of heartbalm cases boomed: Between 1934 and 1935, *The New York Times* ran more than eighty stories on breach of promise and alienation of affections suits.[335] The *Chicago Daily Tribune*, meanwhile, had run only 39 stories referencing "alienation of affections" between the years 1916 and 1920. That number grew to 56 between 1921 and 1925, to 102 between 1926 and 1930, and to 230 between 1931 and 1935—nearly a six-fold increase in coverage in less than two decades.[336]

These news reports revealed that heartbalm plaintiffs were demanding enormous sums—sometimes $100,000 or more[337]—and that

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suits now outlawed, wives have had a bad time collecting green-backed medicine for injured feelings.").

335. THE NEW YORK TIMES INDEX: ANNUAL CUMULATIVE VOLUME YEAR 1935, at 714-15 (1936); THE NEW YORK TIMES INDEX: ANNUAL CUMULATIVE VOLUME YEAR 1934, at 667-68 (1935). Of course, the number of stories in 1935 was enhanced by articles discussing the then-ongoing campaign to abolish heartbalm suits.

336. The author's unscientific survey of newspaper articles in the *Chicago Daily Tribune* and *The Washington Post* incorporating the phrase "alienation of affections" yielded the following results:

| NEWS ARTICLES REFERENCING "ALIENATION OF AFFECTIONS" | | |
|---|---|---|
| Years | *Chicago (Daily) Tribune* | *The Washington Post* |
| 1901-1905 | 8 | 7 |
| 1906-1910 | 32 | 31 |
| 1911-1915 | 38 | 41 |
| 1916-1920 | 39 | 23 |
| 1921-1925 | 56 | 27 |
| 1926-1930 | 102 | 95 |
| 1931-1935 | 230 | 105 |
| 1936-1940 | 113 | 56 |
| 1941-1945 | 15 | 19 |
| 1946-1950 | 109 | 45 |
| 1951-1955 | 50 | 22 |
| 1956-1960 | 49 | 25 |
| 1961-1965 | 39 | 6 |
| 1966-1970 | 9 | 9 |
| 1971-1975 | 3 | 12 |
| 1976-1980 | 16 | 7 |

The figures in this chart were drawn from searches of the archived compendia of *Chicago Tribune* and *Washington Post* articles available online at http://pqasb.pqarchiver.com/chicagotribune and http://pqasb.pqarchiver.com/washingtonpost. These totals capture numerous articles having nothing to do with the heartbalm tort of alienation of affections, but a sampling of the articles indicates that a large percentage of the pieces returned through this search do involve this subject.

337. *E.g.*, *$4,000,000 Stern Balm Suit Is Settled*, WASH. POST, Oct. 11, 1933, at 3; *Balm Suit Asks Riches*, L.A. TIMES, May 30, 1933, at A7; Cameron, *supra* note 298 (reporting on a breach of promise suit in which the plaintiff demanded $1,500,000); *Oil Man Faces Seduction Suit Filed by Girl*, L.A. TIMES, Dec. 9, 1926, at A2 (reporting on a $100,000 suit); *Wealthy Long Beach Widow Named in $600,000 Alienation Suit Filed by Surgeon's Wife*, L.A. TIMES, May 3, 1930, at A2. The demands made in the seven heartbalm filings lodged with the Los Angeles Superior Court on the last day that California permitted such suits after enacting anti-heartbalm legislation are perhaps more representative of typical demands. One plaintiff, suing her mother-in-law for alienation of affections, asked for $600,000; another plaintiff demanded $75,000; two others, $50,000 each; another, $25,867;

some juries were seizing the bait. One Michigan panel awarded $450,000 to a breach of promise plaintiff.[338] An alienation of affections case tried in Vermont produced a $465,000 plaintiff's verdict.[339] Awards of $50,000 or more to sympathetic plaintiffs were not especially rare.[340] Courts sometimes reduced particularly generous jury verdicts,[341] but since there were no real limits on the jury's discretion,[342] verdicts awarding plaintiffs tens of thousands of dollars often held up on appeal.[343] These riches were showered on a fortunate few plaintiffs in an era when per capita annual income was well less than $1000.[344] These verdicts also towered above the awards given to plaintiffs in other types of personal injury lawsuits, as illustrated by two decisions rendered by the Missouri Supreme Court on a single day: June 12, 1934. The first of these opinions rejected as excessive an award of $15,000 to a young man left crippled and unable to work due to the defendant's negligence.[345] The second case was an alienation of affections suit in which the trial court had cut a $120,000 verdict to a mere $50,000; the state supreme court ultimately reversed the judgment on grounds unrelated to the amount of damages.[346]

This seeming onslaught of high-profile cases and staggering awards gave the misleading perception that the nation was suffering from a heartbalm "crisis" (while in fact, as previously discussed, these suits were not especially common) and added fuel to simmering resentment against these claims—especially the claim for breach of

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another, $25,000; and the last, a mere $10,000. *Rush to File Balm Suits Made*, L.A. TIMES, Sept. 19, 1939, at 6.

338. The trial court reduced this verdict, but only to $150,000. Cleavenger v. Castle, 237 N.W. 542, 545 (Mich. 1931).

339. This verdict was knocked down to $125,000 by the trial court; the state supreme court affirmed the judgment as modified. Woodhouse v. Woodhouse, 130 A. 758, 787-88 (Vt. 1925).

340. *See*, *e.g.*, Overton v. Overton, 246 P. 1095, 1098 (Okla. 1926) (reducing to $60,000 a $150,000 verdict in an alienation of affections case but otherwise ratifying the judgment); *Wins $100,000 from Bedford-Jones's Wife*, N.Y. TIMES, Apr. 5, 1935, at 19 (reporting on the verdict in alienation of affections lawsuit).

341. *E.g.*, Doroszka v. Lavine, 150 A. 692, 693 (Conn. 1930) (ordering a remittitur of the verdict in a criminal conversation case).

342. Indeed, one contemporary observer suspected that courts sometimes goaded juries toward *higher* awards. Feinsinger, *supra* note 301, at 417.

343. Brown, *supra* note 319, at 499 (stating that damages awards in alienation of affections suits are "left pretty much to the jury"); W.E. Shipley, Annotation, *Excessiveness or Inadequacy of Damages for Alienation of Affections, Criminal Conversation, or Seduction*, 36 A.L.R.2d 548 (1954) (listing jury verdicts).

344. U.S. CENSUS BUREAU, SELECTED PER CAPITA INCOME AND PRODUCT ITEMS IN CURRENT AND REAL (2000) DOLLARS: 1929 TO 2005, *available at* http://usinfo.state.gov/infousa/economy/industry/docs/07s0655.xls.

345. Harlan v. Wabash Ry. Co., 73 S.W.2d 749 (Mo. 1934).

346. Howard v. Boyle, 73 S.W.2d 228 (Mo. 1934).

promise to marry, with its gold digger prosecutrix.[347] By the 1930s, people were talking about an upsurge of spurious heartbalm claims engendered by the apparent profitability of this type of action.[348] Other observers spoke of a "breach of promise business, by which millions have been collected."[349] A 1935 *Los Angeles Times* editorial remarked that "[b]reach of promise and 'lost-love' suits, frankly, are coming to be regarded in the light of shake-downs and blackmail—which they frequently are."[350] The sham character of alienation of affections suits became a national joke, even informing the plot of *Libeled Lady*, a 1936 comedy nominated for an Academy Award for Best Picture.[351]

These criticisms and snickers were certainly nothing new, but they gained just enough volume and attention in the mid-1930s to propel proposals to mend or end these heartbalm torts, which had stalled in years past,[352] toward the top of the legislative agenda. The

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347. *See* FRIEDMAN, *supra* note 282, at 207; Feinsinger, *supra* note 281, at 1008-09 ("[N]ewspaper emphasis has created an illusion of universality as to the evils of unfounded actions, coercive settlements or excessive verdicts which concededly exist in particular cases."); R.M.J., *supra* note 281, at 211 (noting that "the brunt of the attack" on the heartbalm torts in the mid-1930s centered on breach of promise claims).

348. Blake, *supra* note 318 (reflecting upon a balm suit in which damages of $150,000 were awarded to the plaintiff, which "started a rise in the 'wounded affections' market"); *Frown to Greet Damage Suits of the Lovelorn*, CHI. TRIB., Feb. 18, 1930, at 1 (quoting a Chicago judge as saying that "[a] large verdict in a breach of promise case brings a flood of persons complaining of bruised hearts"). Interestingly, there may have been a modest delay between the issuance of the most striking awards and the flashpoint of antiheartbalm furor. APSTEIN, *supra* note 304, at 25 (observing in 1935 that "the staggering settlements of pre-depression days are becoming fewer and fewer. Extortion is not so evident, and the legitimate claimant to a suit is given more careful consideration. Juries are less in sympathy with these actions"); *Fight Breach of Promise Laws in Four States*, JEFFERSON CITY POST-TRIB. (Jefferson City, Mo.), Feb. 12, 1935, at 2 (observing that "[e]ven before the feminine wave of feeling against [the torts], the depression had badly dented the heart balm business. Where women once asked for a million, they are now likely to rate their sufferings at $100,000 or less and thank fortune if they are awarded as much as $15,000").

349. Cameron, *supra* note 298.

350. *Discarding Heart Balm*, L.A. TIMES, Apr. 2, 1935, at A4. Another contemporary critic had this to say about certain heartbalm torts:

> Throughout the history of domestic relations in this country, the three most unpleasant phases for men have been breach of promise, alienation of affections and alimony. In point of age, breach of promise was really the first of these to be adopted as a racket by which a small percentage of American women could abuse their double-edged weapon, the law.

APSTEIN, *supra* note 304, at 17.

351. In *Libeled Lady*, newspaper editor Warren Haggerty (Spencer Tracy) enlists a former reporter, Bill Chandler (William Powell), to pose as a married man and then romance Connie Allenbury (Myrna Loy), hoping that he can use the "affair" to blackmail Allenbury into dropping her pending libel suit against his newspaper. Unfortunately for Haggerty, Allenbury and Chandler fall in love. LIBELED LADY (MGM 1936).

352. *See* COMM. ON STATE LEGISLATION OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON AN ACT TO AMEND THE PERSONAL PROPERTY LAW 1 (1932) (discussing then-ongoing attempts to limit breach of promise suits in New York); *Ending a Despicable Racket*, LOWELL SUN (Lowell, Mass.), Apr. 10, 1933, at 6 (praising a bill introduced in the New York legislature that would have abolished claims for breach of promise to marry in

Law Reform Committee of the Association of the Bar for the City of New York prepared a report in January 1935 that recommended the outright abolition of criminal conversation suits (which, according to the report's drafters, "put the marriage relation on a plane so sordid as to be comparable almost to the White Slave Traffic"),[353] limiting alienation of affections suits to claims against in-laws (since suits against paramours were "as a general proposition, resorted to by unscrupulous men and women to extort money from defendants unwilling to go through a trial of the issues for fear of publicity"),[354] and requiring written proof of the marriage promise in breach of promise cases, while limiting plaintiffs in these cases to actual expenses incurred in contemplation of marriage (as it was "generally believed that actions of this character verge on blackmail and that few self-respecting women will lend their names to proceedings of this nature").[355]

Other circulating proposals went even further, urging the abrogation of all four heartbalm torts. The most notable advocate of outright abolition was Roberta West Nicholson, an Indiana state legislator. Mrs. Nicholson was what *The Tipping Point* refers to as a "saleswoman."[356] Nicholson was blessed with a gift for publicity, and in 1935 she became the face of the antiheartbalm movement[357]—or, in her words, "the standard bearer of a crusade" against the torts.[358] In numerous speeches Nicholson advanced an array of arguments for getting rid of the amatory torts. According to Nicholson, heartbalm suits were "merely legal blackmail"[359] and had to be abolished "to [m]ake the [w]orld [s]afe for [m]en."[360] She argued that the torts rein-

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that state); *Frown to Greet Damage Suits of the Lovelorn*, *supra* note 348 (discussing the possible reform of pleading standards applicable to heartbalm suits in Illinois).

353. COMM. ON LAW REFORM OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 299, at 4.

354. *Id.* at 3.

355. *Id.* (quoting a 1932 report issued by the Committee on State Legislation of the Association).

356. GLADWELL, *supra* note 163, at 70.

357. *See*, *e.g.*, *Gold Digger War Brought Here by Indiana Woman*, CHI. TRIB., Mar. 28, 1935, at 16. Some of the articles and editorials discussing Nicholson and her campaign had a decidedly chauvinist air to them. In describing the anti-heartbalm deliberations in the Indiana House of Representatives, one article provided that Nicholson "expressed her feelings so effectively that 86 of her fellow lawmakers, all masculine, gallantly leaped to her side." *Editorial of the Day*, CHI. TRIB., Feb. 17, 1935, at 12. Another piece made sure to mention that Mrs. Nicholson was a "handsome" lady. Fred Myers, *Mrs. Nicholson's Move to Stamp out Heart Balm Suits Gains Support Other States*, THE VIDETTE-MESSENGER (Valparaiso, Ind.), Mar. 5, 1935, at 5.

358. *Only Woman in Texas Legislature Offers Bill to Bar Heart Balm Suits, Protect Corespondents*, SAN ANTONIO EXPRESS, Mar. 30, 1935, at 6.

359. *Woman Presses Bill to End Balm Suit*, WASH. POST, Feb. 2, 1935, at 2 (quoting Nicholson).

360. *End of the Golden Heart-Balm Era as Vivid Vera Cashes In*, FRESNO BEE, April 28, 1935, Magazine, at 3 (quoting Nicholson). Other women echoed Nicholson's arguments.

forced outdated views regarding the status of women, with antiheartbalm legislation being "symbolic of a change in attitude toward women. We don't want to see inferior women pull down our sex."[361] Nicholson also charged that the torts "induce[d] a sordid and vulgar conception of marital affairs in the minds of the immature" by appearing to place a dollar sign on love and affection and thereby reducing marriage to a commodity.[362]

Of all these arguments, casting the torts as tools in the hands of unscrupulous blackmailers and canny gold diggers best resonated among state legislators.[363] This was, in short, the "sticky" message of the day.[364] Legislators wanted to put an immediate halt to what one New York lawmaker described as "a tribute of $10,000,000 paid annually . . . to gold-diggers and blackmailers."[365] Ten million dollars was among the more conservative figures bandied about; one newspaper article spoke of a "*$2,000,000,000* 'aching-heart-itching-palm' industry."[366] Reflecting similar sentiments, New York's antiheartbalm law commenced with this revealing statement of policy:

> [R]emedies heretofore provided by law for the enforcement of actions based upon allege[d] alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the

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The president of the Los Angeles District of the California Federation of Women's Clubs denounced heartbalm suits as unholy rackets, Grace Y. Hudson, *Can Money Mend a Woman's Heart?*, L.A. TIMES, Apr. 21, 1935, at J3, and the president of the General Federation of Women's Clubs described these claims as "hold-ups." *Mrs. Grace Poole Thinks Most of Them Are Hold-Ups; 'Debasing,' Says Dr. Riley; 'Blackmail,' Declares Zioncheck*, WASH. POST, Mar. 21, 1935, at 15; *see also Foe of Heart Balm to Make U.S. Fight*, MANSFIELD NEWS-JOURNAL (Mansfield, Ohio), Mar. 22, 1935, at 4 (quoting a female Ohio legislator as saying that the purpose of her antiheartbalm "bill was to protect the men, 'particularly those grown a bit old but who still loved to play around' ").

361. *Gold Digger War Brought Here by Indiana Woman*, *supra* note 357.

362. *End of the Golden Heart-Balm Era as Vivid Vera Cashes In, supra* note 360.

363. FRIEDMAN, *supra* note 282, at 208; Jack Cejnar, *Victor Against Heart Balm to Make National Fight*, THE MORNING HERALD (Hagerstown, Md.), Mar. 22, 1935, at 3 (quoting an Indiana legislator as saying "that 999 out of 1,000 breach of promise and alienation of affections suits were nothing but 'shakedowns' "); John Dunlap, *Senate Move to End Overspending Threatens Pay of Thousand*, TIMES & DAILY NEWS LEADER (San Mateo, Cal.), Mar. 9, 1939, at 9 (quoting a California legislator as saying that breach of promise actions were a "major 'racket' in California"); *see also* Kane, *supra* note 16, at 65-66 (observing that "[i]t can safely be said" that the argument "that money [cannot] compensate for wounded feelings" in fact "had very little to do with the adoption of [antiheartbalm] legislation").

364. Mrs. Nicholson and her allies had a gift for sound bites that crisply communicated the blackmail message. Heartbalm suits were "merely legal blackmail," while "[t]he affliction" redressed by these actions, Nicholson said, "is not so much an aching heart as an itching palm." *"Heart Balm" Bill Passed by House*, INDIANAPOLIS STAR, Feb. 2, 1935, at 8.

365. *Move Planned in 8 Other States*, N.Y. TIMES, Mar. 30, 1935, at 3.

366. *The New Laws to Stop the "Heart Balm" Suits*, AM. WEEKLY, May 12, 1935, at 11 (emphasis added).

> victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies.[367]

Nicholson's other arguments were also well-chosen. By criticizing the torts as retarding the progress that women had achieved in the public sphere, she helped galvanize support for antiheartbalm bills among women legislators in several states.[368] Her assertion that the torts cheapened marriage provided a hook for abolishing claims for alienation of affections and criminal conversation, which, due to their invocation by both sexes (and the fact that one could sue one's in-laws for alienation of affections), did not mesh with the gold digger theme quite as neatly as breach of promise to marry and seduction suits did.

And so this first antiheartbalm campaign had spirited leadership, dovetailed with the cultural zeitgeist, attacked already compromised torts, and leveraged powerful arguments against these claims. Even so, the movement failed in more states than it succeeded. In 1935, only seven states passed bills abolishing one or more of the heartbalm torts, while similar legislation failed in more than a dozen other jurisdictions.[369] Indiana acted first among the states where antiheartbalm bills passed, enacting legislation in March 1935 that abolished all four torts (except for seduction claims brought by

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367. Act of Mar. 29, 1935, ch. 263, § 61-a, 1935 N.Y. Laws 732, 732-33.

368. *See* Sinclair, *supra* note 10, at 66 (discussing the support of antiheartbalm measures by women legislators); *Fight Breach of Promise Laws in Four States*, *supra* note 348 (discussing "the nation-wide feminine support" for antiheartbalm legislation); *Heart Balm Bill Introduced in Ohio*, INDIANAPOLIS STAR, Feb. 6, 1935, at 1 (reporting on the preparation of antiheartbalm measures by women legislators in Ohio); Everett Holles, *Move Against Gold Diggers Grows in U.S.*, OGDEN STANDARD-EXAMINER (Ogden, Utah), Mar. 22, 1935, at 3 (observing that "[t]he loudest champions of the [antiheartbalm] legislation are women"); Mary Margaret McBride, *Women Lawmakers of U.S. Would Force Heart Balm Off Gold Standard*, LOWELL SUN (Lowell, Mass.), Feb. 11, 1935, at 11; *Only Woman in Texas Legislature Offers Bill to Bar Heart Balm Suits, Protect Co-respondents*, *supra* note 358. Eleanor Roosevelt—probably the most prominent American female political figure of the era—also spoke out against heartbalm suits. The then-First Lady was quoted as saying "a woman's heart, if genuinely broken, cannot be mended with money." Frank A. Garbutt, *Gold Diggers Decline*, L.A. TIMES, July 5, 1935, at A4.

369. The authorities disagree on just how many states entertained antiheartbalm legislation in 1935. Professor Sinclair counts twenty-two, Sinclair, *supra* note 10, at 65 & n.240, while an April 1935 newspaper article states that antiheartbalm legislation had either passed or was under deliberation in twenty-seven states. Sigrid Arne, *Love's Old $weet $ong–Or, Is It Goodbye to Heart Balm?*, KINGSTON DAILY FREEMAN (Kingston, N.Y.), Apr. 26, 1935, at 21.

or on behalf of plaintiffs under the age of twenty-one).[370] In Illinois[371] and New York,[372] legislatures rejected moderate reform proposals[373] in favor of laws that struck heartbalm torts from the books. Alabama,[374] Michigan,[375] New Jersey,[376] and Pennsylvania[377] also banned or limited all or some of the amatory torts before the year ended. These measures typically passed by wide majorities. In Indiana, the state senate approved an antiheartbalm proposal by a 31-15 margin;[378] the vote in the state house was even more lopsided, with a margin of 87-7.[379] The Illinois House of Representatives voted 95-1 (the entire debate and vote taking only five minutes) in favor of an antiheartbalm law,[380] while the vote in the state senate was 37-0.[381]

Over the next decade, a trickle of states (most notably California) followed the lead of these trendsetting jurisdictions and abolished one or more of the heartbalm torts.[382] But by 1945 the burst of

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370. Act of Mar. 11, 1935, ch. 208, § 1, 1935 Ind. Acts 1009, 1009.

371. Act of May 4, 1935, § 1, 1935 Ill. Laws 716, 716 (abolishing claims for alienation of affections, criminal conversation, and breach of promise). In 1946, the Illinois Supreme Court found that this statute, to the extent it abolished claims for alienation of affections, violated a provision in the state constitution declaring an available remedy for all wrongs or injuries suffered. Heck v. Schupp, 68 N.E.2d 464, 466 (Ill. 1946). In response, the state legislature passed new laws that restored these torts but limited plaintiffs to actual economic damages suffered. *E.g.*, Act of July 18, 1947, § 4, 1947 Ill. Laws 796, 797 (reinstating claims for alienation of affections).

372. Act of Mar. 29, 1935, ch. 263, § 61-b, 1935 N.Y. Laws 732, 733 (abolishing all four torts).

373. Proposals also circulated in these states to heighten the standards of pleading of proof for heartbalm suits. None of these less extreme alternatives were enacted. *See* Wayne Thomis, *4 Bills to End Marriage Law Abuses Ready*, CHI. TRIB., Feb. 9, 1935, at 6; *Ban on Heart Balm Is Made State Law*, N.Y. TIMES, Mar. 30, 1935, at 3.

374. Act of Sept. 7, 1935, No. 356, § 1, 1935 Ala. Laws 780, 780 (abolishing all four torts, except claims for the seduction of a female under the age of twenty-one).

375. Act of June 3, 1935, No. 127, § 1, 1935 Mich. Pub. Acts 201, 201 (abolishing all four torts, except seduction claims involving minors).

376. Act of June 27, 1935, ch. 279, § 2, 1935 N.J. Laws 896, 897 (abolishing all four torts).

377. Act of June 22, 1935, No. 190, §§ 1-2, 1935 Pa. Laws 450, 450-51 (abolishing claims for breach of promise to marry and alienation of affections claims alleged against paramours).

378. *Anti-Heart Balm Bill Assured of Passage*, LOGANSPORT PHAROS-TRIB. (Logansport, Ind.), Mar. 8, 1935, at 10.

379. *Bill Provides Price Fixing by Governor*, KOKOMO TRIB. (Kokomo, Ind.), Feb. 2, 1935, at 9.

380. Percy Wood, *Illinois House Votes 95-1 to Bar Love Suits*, CHI. TRIB., Mar. 21, 1935, at 1.

381. *Love Suits Put Under Illinois Ban by Senate*, CHI. TRIB., Apr. 18, 1935, at 1. Similarly, the New York Senate passed antiheartbalm legislation by a vote of 36-9. *'Balm' Ban Is Voted by Albany Senate*, N.Y. TIMES, Mar. 20, 1935, at 1. The Assembly in that state passed the legislation by a 134-6 margin. *Assembly Without Debate Bans 'Balm' Suits and Speeds Measure to Governor Lehman*, N.Y. TIMES, Mar. 21, 1935, at 12.

382. Colorado abolished all four heartbalm torts in 1937. Act of Apr. 27, 1937, ch. 111, § 1, 1937 Colo. Sess. Laws 403, 403. California did the same in 1939 (though preserving actions for seduction of a minor). Act of May 10, 1939, ch. 128, § 2, 1939 Cal. Stat. 1245, 1245. Wyoming followed suit in 1941, Act of Feb. 10, 1941, ch. 36, § 2, 1941 Wyo. Sess.

antiheartbalm momentum seemed spent, with all four torts still alive in a large majority of the states. The perceived "heartbalm" crisis had passed, with Rosie the Riveter replacing the gold digger as the woman of the hour.[383]

The mixed results of the first antiheartbalm campaign demonstrates how difficult it can be to rid the books of a well-established tort. Legislators in states where antiheartbalm bills failed or were never even introduced may have decided that antiheartbalm legislation was unnecessary, might be unconstitutional,[384] or was too broad,[385] or they may have held some combination of these reservations. Many more lawmakers may have agreed with the New York state senator who thought that antiheartbalm legislation provided too much protection to the "coal-oil johnnies, the rich philanderers, the stuffed shirts"[386] while leaving innocent women defenseless[387]—in other words, that the heartbalm torts still served a useful purpose. These objections were not voiced solely by holdovers from Victorian times. In 1941, William Prosser wrote that the initial spate of antiheartbalm laws

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Laws 32, 32, and Florida joined the trend in 1945. Act of June 11, 1945, ch. 23138, § 1, 1945 Fla. Laws 1342, 1342. Other states acted more selectively during this period, banning one or two of the heartbalm torts. Massachusetts eliminated suits for breach of promise to marry in 1938. Act of May 24, 1938, ch. 350, § 1, 1938 Mass. Acts 326, 326. Maine and New Hampshire did the same in 1941. Act of Mar. 25, 1941, ch. 104, § 1, 1941 Me. Acts 140, 140; Act of June 5, 1941, ch. 150, § 1, 1941 N.H. Laws 223, 224. Nevada abolished claims for alienation of affections and breach of promise in 1943, Act of Mar. 5, 1943, ch. 53, § 2, 1943 Nev. Stat. 75, 75, and Maryland extinguished alienation of affections and breach of promise suits not involving pregnancies in 1945. Act of May 4, 1945, ch. 1010, § 2, 1945 Md. Laws 1759.

383. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 776 (2005).

384. *See* APSTEIN, *supra* note 304, at 28-29 (quoting an opponent of antiheartbalm legislation as expressing reservations about the constitutionality of eliminating a remedy for a wrong); *Anti-Heart Balm Bill Assured of Passage*, *supra* note 378 (quoting a foe of Indiana's antiheartbalm legislation as claiming that the bill would "remove the rights women have had for 150 years").

385. *Cf.* Feinsinger, *supra* note 281, at 1008 ("There will be little regret at the passing of the action for breach of promise to marry. But there is room for an honest difference of opinion as to the actions of alienation of affections and possibly of criminal conversation . . . ."). Alienation of affections had especial appeal because a large percentage of these actions were brought against one's in-laws. In 1978, the Iowa Supreme Court observed that a majority of alienation of affections cases that had reached that court (22 of 41) had been brought against family members instead of sexual paramours. Bearbower v. Merry, 266 N.W.2d 128, 132 (Iowa 1978).

386. *'Balm' Ban Is Voted by Albany Senate*, *supra* note 381.

387. *See House Defeats Balm Suit Bill*, SAN ANTONIO EXPRESS, Apr. 30, 1935, at 5 (quoting a Texas legislator as opposing antiheartbalm legislation on the ground that " 'men who come down here and entice our maidens away with golden promises should not be given an opportunity to escape' "); Holles, *supra* note 368 (quoting Roberta Nicholson as saying that some bachelors opposed antiheartbalm bills because they "retain what might be called Victorian ideals about protecting womanhood").

> reverse abruptly the entire tendency of the law to give increased protection to family interests and the sanctity of the home, and undoubtedly they deny relief in many cases of serious and genuine wrong. It may be that they do away with spurious suits at too great a price, and that other methods of limitation or control are to be preferred.[388]

Indeed, the very existence of the large awards to plaintiffs that prompted the crisis atmosphere revealed that when push came to verdict, a substantial share of the public still regarded the heartbalm torts as guarding valuable interests. The overwhelming votes for antiheartbalm laws established that, if put on the record, most legislators would support abolitionist measures. Institutional prerogatives and procedures, however, conferred upon legislators every opportunity to avoid shutting the door to these claims.[389] And so most states simply did nothing and waited until the antiheartbalm furor faded, as it soon did.

While there was little legislative action vis-à-vis the heartbalm torts during the two decades following the end of World War II,[390] during this period the already meager flow of heartbalm suits continued to dry up. The initial catalysts for this trend were atmospheric in nature. Though the divorce rate dropped between World War II and the early 1960s,[391] divorce was slowly but steadily becoming more available and accepted, lessening the stigma—and thus the damages—associated with a disrupted or failed marriage.[392] Adultery became perceived as a subject of private concern rather than a mat-

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388. PROSSER, *supra* note 97, § 101, at 938 (footnotes omitted).

389. *See* Arne, *supra* note 369 (noting how some antiheartbalm bills had died in committee).

390. In 1949, the Tennessee legislature raised the evidentiary threshold for breach of promise claims and limited plaintiffs in such suits to the recovery of their actual financial losses. Act of Apr. 8, 1949. ch. 161, §§ 1-4, 1949 Tenn. Pub. Acts 486, 486-87. Wisconsin abolished the breach of promise to marry tort in 1959. Act of Nov. 3, 1959, ch. 595, § 73, 1959 Wis. Sess. Laws 740, 765. Montana wiped out alienation of affections and breach of promise suits in 1963. Act of Mar. 7, 1963, ch. 200, §§ 1-2, 1963 Mont. Laws 598, 598-99.

391. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 360-61 (1996).

392. *See* FRIEDMAN, *supra* note 1, at 441 (discussing the spread of de facto no-fault divorce during this period); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1297 (1996); Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1526-27 (2000). The divorce rate would soar in later years, thanks in part to the advent of *actual* no-fault divorce in the 1970s. *See* DIFONZO, *supra* note 316, at 171-72 (discussing the spread of no-fault divorce in the 1970s); Sally C. Clarke, *Advance Report of Final Divorce Statistics*, 43 MONTHLY VITAL STAT. REP. 1, 9 tbl.1 (Supp. 1995) (showing the divorce rate as rising from 2.5 to 5.2 divorces per 1000 population between 1965 and 1980); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2050-57 (2000) (discussing the advent of no-fault divorce).

ter requiring state intervention.[393] Concurrently, breach of promise and seduction claims were being compromised by the acceptance of women into the workplace[394] (which meant that a broken marriage promise did not carry the same financial consequences as it once had) and an allowance, if not an endorsement, of the fact that premarital sex was not quite as socially ruinous as had once been supposed.[395]

By calling into question the existence and extent of the injuries suffered by heartbalm plaintiffs, these developments placed the number of immense plaintiffs' verdicts in these cases on a downward course.[396] As it became clear that heartbalm torts were no longer a ticket to riches (assuming that they ever had been in the first place), prospective complainants filed fewer and fewer of these suits.[397] The

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393. Gabrielle Vistor, Note, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837, 842 & n.42 (2006) (listing states repealing criminal adultery statutes between the 1960s and the present day).

394. PATTERSON, *supra* note 391, at 644.

395. *See id*. at 788.

396. *See*, *e.g.*, JACOBS & GOEBEL, *supra* note 292, at 40 (observing that "[s]ince the passage of heart balm statutes the awards (at least as they appear in the appeal cases of jurisdictions which had no such acts) seem to have been smaller"). My review of plaintiffs' verdicts rendered between 1960 and 1964, as described in published decisions in heartbalm cases, reveals one extremely large award of $179,000 (in a lawsuit involving, by all appearances, very wealthy defendants), Turner v. Turner, 369 S.W.2d 675, 676 (Tex. Civ. App. 1963), *aff'd in part and rev'd in part*, 385 S.W.2d 230 (Tex. 1964); a number of modestly lucrative suits, *e.g.*, McNelis v. Bruce, 367 P.2d 625, 626, 632 (Ariz. 1961) ($22,500, reduced to $15,000); Vogel v. Sylvester, 174 A.2d 122, 124 (Conn. 1961) ($47,500); Farrier v. Farrier, 197 N.E.2d 163, 164 (Ill. App. Ct. 1964) ($20,000); Castner v. Wright, 127 N.W.2d 583, 585 (Iowa 1964) ($45,000, reduced to $12,500 by court order); Poynter v. Albrecht, 123 N.W.2d 355, 355 (Minn. 1963) ($20,000); Edgren v. Reissner, 396 P.2d 564, 565 (Or. 1964) ($12,000); Miller v. Liles, 370 P.2d 217, 217 (Or. 1962) ($25,000); Fennell v. Littlejohn, 125 S.E.2d 408, 410-11 (S.C. 1962) ($16,000, reduced to $10,000); Miller v. Gruenwald, 396 P.2d 554, 554 (Wash. 1964) ($20,000); Bowles v. Mitchell, 120 S.E.2d 697, 698 (W. Va. 1961) ($15,000); and some rather modest returns, *e.g.*, Leardi v. Gonser, 176 A.2d 594, 595 (Conn. Super. Ct. 1961) ($1500); Kiger v. Meehan, 113 N.W.2d 743, 745 (Iowa 1962) ($5600); Wallen v. Gorman, 176 N.E.2d 262, 264 (Ohio Ct. App. 1960) ($4000); Ondick v. Ondick, 160 A.2d 708, 709 (Pa. 1960) ($7500). If one were to remove the *Tucker* verdict and account for remittiturs, the mean plaintiff's verdict in these reported decisions was approximately $15,000—not an insignificant sum, but one that pales in comparison to the amounts being awarded by juries in other types of tort suits around that time. *See* MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960–1979, at 26 (1982). In all, heartbalm awards appear about the same or modestly higher (without accounting for inflation) than they had been in the late 1920s and early 1930s, except at the attention-grabbing top end of the range, where enormous verdicts were much less common than they had been. This sample, of course, captures only cases in which heartbalm plaintiffs prevailed at trial and therefore gives a misleadingly sanguine picture of a prospective plaintiff's prospects.

397. *See* Felsenthal v. McMillan, 493 S.W.2d 729, 730 (Tex. 1973) (commenting upon the infrequency with which criminal conversation suits were being brought); *Alienation of Affections Trial Continues to Pack Court House; End Is Near*, BURLINGTON DAILY TIMES-NEWS (Burlington, N.C.), Feb. 3, 1950, at 9 (noting that a then ongoing alienation of affections lawsuit was the first of its kind to be tried in the county in more than twenty-five years); *Is Awarded $1,200 in Alienation of Affections Claim*, NEWARK ADVOCATE (Newark, Ohio), Oct. 21, 1955, at 1 (noting that the suit behind the headline was the first alienation of affections case tried in the county since the 1920s); *Lovelorn Laws Face Abolition*,

resulting drop in heartbalm suits, exacerbated by the prior abrogation of these claims by several states, itself contributed to a sense that the claims were archaic and ill-suited to modern times.[398] This view made plaintiff's verdicts even more rare and modest[399] and thereby cast an even darker pall upon the torts. The effects of this vicious cycle can be measured by viewing the declining number of published decisions concerning the heartbalm torts that have been issued by state courts over the past several decades. In 1930, state courts produced thirty-three published decisions involving one or more of the amatory torts.[400] By 1950, only eighteen reported deci-

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BENNINGTON BANNER (Bennington, Vt.), Mar. 29, 1973, at 1 (noting that very few heartbalm suits had been brought in the state in recent years); *What's Required in Alienation Suit?*, VAN WERT TIMES-BULLETIN (Van Wert, Ohio), Sept. 5, 1957, at 10 (observing the tort of alienation of affections "comes to public attention considerably less frequently than many others").

398. *See* Neal v. Neal, 873 P.2d 871, 874 (Idaho 1994) (noting that there had been no reported case concerning criminal conversation in the state since 1918 and surmising that the absence of claims owed to a change in societal views toward women that rendered the cause of action obsolete); Rich Tucker, *Old Tort Puts Price on Adultery*, FLA. TIMES-UNION, July 8, 2001, at B1 (quoting an Illinois lawyer as saying that courts are not receptive to alienation of affections cases and quoting a North Carolina attorney as saying that the burden of proving damages in alienation of affections suits is high).

399. *See* Florence Shinkle, *Heart's Balm*, ST. LOUIS POST-DISPATCH, June 23, 1996, at 1C (reporting that juries in recent alienation of affections cases had not gone "overboard in their awards and [had] not [given] damages at all in about three-fourths of the handful of cases filed in [recent] year[s]"). The dearth of heartbalm suits also made it increasingly difficult for plaintiff's lawyers to avoid missteps in these cases. At least judging from news reports, modern heartbalm suits seem to involve a disproportionate number of pretrial dismissals on procedural grounds, *e.g.*, *Beauty's Suit Is Tossed Out*, THE TIMES (San Mateo, Cal.), Feb. 27, 1967, at 1; numerous mistrials or reversals of judgments in favor of plaintiffs, *e.g.*, Larry Laughlin, *Judge Strikes Down $75,000 Awards to Cuckolded Husband*, CHILLICOTHE CONST.-TRIB. (Chillicothe, Mo.), Nov. 8, 1979, at 6; *Socialite Sued for Heart Balm*, LONG BEACH PRESS-TELEGRAM (Long Beach, Cal.), Jan. 15, 1950, at A2; and many new trials ordered on the ground that the damages awarded were excessive. *E.g.*, *Alienation Suit to Be Retried*, MORGANTOWN POST (Morgantown, W. Va.), June 15, 1960, at 10 (reporting the setting aside of a $200,000 jury verdict in an alienation of affections case). *cf. Law Nixes Breach of Promise Liability*, CHRON.-TELEGRAM (Elyria, Ohio), Mar. 28, 1978, at 5 (quoting an Ohio lawmaker describing the difficulty associated with proving damages in heartbalm suits).

400. Alexander v. Johnson, 31 S.W.2d 304 (Ark. 1930) (alienation of affections); Belm v. Patrick, 293 P. 847 (Cal. Ct. App. 1930) (breach of promise); Orndorff v. Scharlin, 289 P. 904 (Cal. Ct. App. 1930) (breach of promise); Rogers v. Haines, 285 P. 412 (Cal. Ct. App. 1930) (alienation of affections); Lessinger v. Miller, 152 A. 72 (Conn. 1930) (breach of promise); Glazer v. Rosoff, 151 A. 165 (Conn. 1930) (breach of promise); Doroszka v. Lavine, 150 A. 692 (Conn. 1930) (criminal conversation); Davis v. Cochran, 155 S.E. 379 (Ga. Ct. App. 1930) (criminal conversation); Johnson v. Richards, 294 P. 507 (Idaho 1930) (alienation of affections); Kralick v. Shuttleworth, 289 P. 74 (Idaho 1930) (seduction); Davidson v. Douglass, 284 P. 427 (Kan. 1930) (alienation of affections); Lovendale v. Brown, 150 A. 916 (Me. 1930) (criminal conversation); Scott v. Bontekoe, 233 N.W. 215 (Mich. 1930) (alienation of affections); Rockwell v. Rockwell, 231 N.W. 718 (Minn. 1930) (alienation of affections); Tucker v. Tucker, 31 S.W.2d 238 (Mo. Ct. App. 1930) (alienation of affections); Williamson v. Williamson, 231 N.W. 506 (Neb. 1930) (alienation of affections); Ebmeier v. Ebmeier, 231 N.W. 145 (Neb. 1930) (alienation of affections); Dunbeir v. Mengedoht, 230 N.W. 669 (Neb. 1930) (alienation of affections); Simone v. Frobisher, 152 A. 669 (N.J. 1930) (alienation of affections and criminal conversation); Buermann v. Morris, 152 A. 341 (N.J. 1930) (alien-

sions emerged from states in which these torts remained viable.[401] By 1970, only ten published decisions appeared concerning any of the heartbalm torts.[402] In 1990, only seven such opinions emerged in the dwindling set of states still permitting these claims.[403] By 2006, the number of published cases had dropped to four.[404] Though these decisions come from an ever-diminishing pool of jurisdictions recognizing these torts, even when this fact is accounted for and balanced against

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ation of affections); Freund v. Freund, 151 A. 375 (N.J. 1930) (alienation of affections); Scharwath v. Brooks, 150 A. 211 (N.J. 1930) (alienation of affections); Ciaglia v. Ciaglia, 148 A. 761 (N.J. 1930) (alienation of affections); Press v. Draper, 247 N.Y.S. 156 (Sup. Ct. 1930) (breach of promise); Lonnborg v. Lipset, 241 N.Y.S. 691 (Sup. Ct. 1930) (alienation of affections); McCoy v. Justice, 155 S.E. 452 (N.C. 1930) (alienation of affections and criminal conversation); Tunder v. Hollowach, 10 Ohio Law Abs. 197 (Ct. App. 1930) (criminal conversation); Nester v. Karavas, 8 Ohio Law Abs. 449 (Ohio Ct. App. 1930) (alienation of affections and seduction); Boyer v. Hopper, 148 A. 854 (Pa. 1930) (alienation of affections); Bowman v. Hart, 33 S.W.2d 58 (Tenn. 1930) (seduction); Bishop v. Webster, 153 S.E. 832 (Va. 1930) (seduction); Essig v. Keating, 291 P. 323 (Wash. 1930) (alienation of affections); Swiger v. Reinier, 290 P. 842 (Wash. 1930) (alienation of affections).

401. Potter v. Appleby, 73 A.2d 819 (Conn. 1950) (alienation of affections); Steigman v. Beller, 17 Conn. Supp. 62 (Super. Ct. 1950) (breach of promise to marry and seduction); Myers v. Myers, 94 N.E.2d 100 (Ill. Ct. App. 1950) (alienation of affections); Goin v. Goin, 230 S.W.2d 896 (Ky. Ct. App. 1950) (alienation of affections); Kugling v. Williamson, 42 N.W.2d 534 (Minn. 1950) (breach of promise to marry); Gikas v. Nicholis, 71 A.2d 785 (N.H. 1950) (breach of promise to marry); Stefancik v. Kuhns, 96 N.E.2d 318 (Ohio Ct. App. 1950) (alienation of affections); McDowell v. Hannefeld, 95 N.E.2d 394 (Ohio Ct. App. 1950) (alienation of affections); Cade v. Thompson, 225 P.2d 396 (Or. 1950) (breach of promise to marry); Holmes v. Herrick, 75 A.2d 296 (R.I. 1950) (alienations of affections); D'Ambra v. Ohanian, 74 A.2d 646 (R.I. 1950) (alienation of affections and criminal conversation); Breault v. Karasek, 74 A.2d 450 (R.I. 1950) (alienation of affections); McQuarters v. Ducote, 234 S.W.2d 433 (Tex. Civ. App. 1950) (alienation of affections); Oligny v. Underwood, 71 A.2d 250 (Vt. 1950) (alienation of affections); Bowen v. Pernell, 57 S.E.2d 36 (Va. 1950) (alienation of affections and criminal conversation); Bernier v. Kochopulos, 223 P.2d 205 (Wash. 1950) (alienation of affections and criminal conversation); Brown v. Brown, 214 P.2d 706 (Wash. 1950) (seduction); Lankford v. Tombari, 213 P.2d 627 (Wash. 1950) (alienation of affections and criminal conversation).

402. Roscoe v. Schoolitz, 464 P.2d 333 (Ariz. 1970) (alienation of affections); Tarquinio v. Pelletier, 266 A.2d 410 (Conn. Super. Ct. 1970) (criminal conversation); Kniznik v. Quick, 264 N.E.2d 707 (Ill. Ct. App. 1970) (alienation of affections); Lundberg v. Allen, 176 N.W.2d 775 (Iowa 1970) (alienation of affections); McGregor v. Turner, 469 P.2d 324 (Kan. 1970) (breach of promise to marry); Collett v. Bither, 262 A.2d 353 (Me. 1970) (alienation of affections); McDonald v. Vokaty, 180 N.W.2d 648 (Minn. 1970) (alienation of affections); Dube v. Rochette, 262 A.2d 288 (N.H. 1970) (alienation of affections); Leo v. Heller, 467 P.2d 439 (Or. 1970) (alienation of affections); Maclay v. Kelsey-Seybold Clinic, 456 S.W.2d 229 (Tex. Civ. App. 1970) (alienation of affections).

403. Treiber v. Hess, 782 S.W.2d 43 (Ark. 1990) (alienation of affections); Loomer v. Rittinger, 789 S.W.2d 16 (Ky. 1990) (alienation of affections); Overstreet v. Merlos, 570 So. 2d 1196 (Miss. 1990) (alienation of affections); Reiter v. Reiter, 804 S.W.2d 797 (Mo. Ct. App. 1990) (alienation of affections and criminal conversation); Crocker v. Larson, App. No. OA-A-01-9002-CV-00083, 1990 Tenn. App. LEXIS 632 (Ct. App. Sept. 11, 1990) (alienation of affections); Hanover v. Ruch, No. 58, 1990 Tenn. App. LEXIS 307 (Ct. App. May 1, 1990) (alienation of affections and criminal conversation).

404. Children's Med. Group, P.A. v. Phillips, 940 So. 2d 931 (Miss. 2006) (alienation of affections); McCutchen v. McCutchen, 624 S.E.2d 620 (N.C. 2006) (alienation of affections); Stann v. Levine, 636 S.E.2d 214 (N.C. Ct. App. 2006) (alienation of affections and criminal conversation); Fox v. Gibson, 626 S.E.2d 841 (N.C. Ct. App. 2006) (criminal conversation).

the nation's growing population, the results exhibit an unmistakable downward trend.

The slow diminution of the heartbalm torts prepared these claims for a round of legislative and judicial housekeeping that began in the late 1960s. Starting then, the women's rights movement[405] and the sexual revolution[406] drew renewed attention to the fact that these claims remained available to plaintiffs in most states.[407] In the second abolitionist movement that followed, legislators sought to clear the decks of torts that few modern plaintiffs were invoking, and which therefore came across as stale holdovers from an earlier day. Befitting the far from exigent circumstances, this second antiheartbalm campaign had a languid air to it. Whereas the first antiheartbalm push had exploded out of the gate in 1935 and then petered out, the second drive plodded along, one state legislature at a time, between the 1960s and the early 1990s. During this span, Connecticut,[408] Virginia,[409] West Virginia, [410] Wisconsin,[411] Delaware,[412] Vermont,[413] Maine,[414] Washington,[415] Alaska,[416] Texas,[417] Oregon,[418] Okla-

405. *See* Kay, *supra* note 392, at 2049-50.

406. *See id*. at 2048-50.

407. *Cf.* Patrick J. Powers, *Ruling Denies Money Suits for Breaking up Marriage*, BELLEVILLE NEWS-DEMOCRAT (Belleville, Ill.), June 20, 2003, at 3B (quoting an Illinois state legislator as saying that he had never received any requests to have the state's alienation of affections law removed from the books, and "[i]t's just something that's not on the radar screen").

408. Connecticut abolished suits for breach of promise and alienation of affections in 1967, An Act Abolishing Breach of Promise and Alienation of Affection Suits, No. 275, § 1, 1967 Conn. Pub. Acts 324, 324, and claims for criminal conversation in 1971. An Act Concerning Criminal Conversation, No. 177, 1971 Conn. Pub. Acts 269, 269.

409. Virginia abolished claims for alienation of affections, criminal conversation, and breach of promise to marry in 1968, Act of Apr. 5, 1968, ch. 716, § 1, 1968 Va. Acts 1259, 1259, and suits for seduction in 1974. Act of Apr. 8, 1974, ch. 606, § 1, 1974 Va. Acts 1163, 1163.

410. Act of Mar. 6, 1969, ch. 101, 1969 W. Va. Acts 1036, 1036 (abolishing claims for breach of promise to marry and for alienation of affections).

411. Act of Apr. 11, 1972, ch. 220, § 19, 1971 Wis. Sess. Laws 641, 646 (abolishing alienation of affections and criminal conversation).

412. Act of July 5, 1972, ch. 489, § 1, 58 Del. Laws 1601, 1601 (1972) (abolishing all four amatory torts).

413. Act of Apr. 2, 1974, No. 198, § 1, 1973 Vt. Acts & Resolves 208, 208 (abolishing all four amatory torts).

414. Act effective Oct. 3, 1973, ch. 298, 1973 Me. Acts 587, 587 (abolishing claims for alienation of affections).

415. Act of Apr. 10, 1973, ch. 154, § 121, 1973 Wash. Sess. Laws 1118, 1197 (abolishing claims brought by a woman for her own seduction).

416. Act of May 17, 1974, ch. 127, § 64, 1974 Alaska Sess. Laws 1, 12 (abolishing claims brought by a woman for her own seduction).

417. Act of June 19, 1975, ch. 637, § 1, 1975 Tex. Gen. Laws 1942, 1942 (abolishing claims for criminal conversation); Act of June 17, 1987, ch. 453, § 1, 1987 Tex. Gen. Laws 2030, 2030 (abolishing claims for alienation of affections).

418. Act of July 2, 1975, ch. 562, §§ 1-2, 1975 Or. Laws 1285, 1285 (abolishing claims for alienation of affections and criminal conversation).

homa,[419] the District of Columbia,[420] Arizona,[421] Minnesota,[422] Ohio,[423] Nevada,[424] Georgia,[425] New Hamsphire,[426] Kansas,[427] North Dakota,[428] Massachusetts,[429] Rhode Island,[430] Nebraska,[431] South Carolina,[432] Arkansas,[433] and Tennessee[434] all enacted legislation banning one or more of the heartbalm torts.[435]

The deliberations over antiheartbalm legislation in Tennessee, the last state to abolish amatory torts by legislative fiat, illustrate the desuetude into which these claims had fallen by the late 1980s and early 1990s and the attendant attitudes of state legislatures to-

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419. Act of May 31, 1976, ch. 164, § 2, 1976 Okla. Sess. Laws 230, 230 (abolishing claims for alienation of affections and seduction, except seduction claims relating to minors and those of unsound mind).

420. Act of Apr. 7, 1977, 1977 D.C. Stat. 1-107, § 111(a) (abolishing claims for alienation of affections, criminal conversation, and breach of promise to marry).

421. Act of May 31, 1977, ch. 138, § 16, 1977 Ariz. Sess. Laws 645, 656 (abolishing claims for alienation of affections).

422. Act of Mar. 23, 1978, ch. 515, § 2, 1978 Minn. Laws 141, 141 (abolishing all four amatory torts).

423. Act of Mar. 8, 1978, 1978 Ohio Laws 137 (abolishing all four amatory torts, except for seduction as it applies to the seduction of incompetents and minors).

424. Act of June 2, 1979, ch. 584, § 2, 1979 Nev. Stats. 1171, 1171-72 (abolishing claims for criminal conversation).

425. Act of Apr. 4, 1979, No. 86, § 46, 1979 Ga. Laws 466, 496-97 (abolishing claims for alienation of affections and criminal conversation).

426. Act of June 2, 1981, ch. 192, § 1, 1981 N.H. Laws 165, 165-66 (abolishing claims for alienation of affections).

427. Act of Apr. 21, 1982, ch. 240, § 1, 1982 Kan. Sess. Laws 1083, 1083 (abolishing claims for alienation of affections).

428. Act of April 14, 1983, ch. 172, § 9, 1983 N.D. Laws 441, 445-46 (abolishing all four amatory torts).

429. Act of Sept. 18, 1985, ch. 274, § 1, 1985 Mass. Acts 536, 536 (abolishing alienation of affections and criminal conversation).

430. Act of June 14, 1985, ch. 123, § 2, 1985 R.I. Pub. Laws 182, 183 (abolishing alienation of affections, criminal conversation, and seduction).

431. Act of Mar. 31, 1986, LB 877, § 1, 1986 Neb. Laws 1308, 1308 (abolishing alienation of affections and criminal conversation). Several years earlier, the Nebraska Supreme Court had declined to abolish claims for criminal conversation, determining that if such a decision were to be reached, it would have to be made by the state legislature. Kremer v. Black, 268 N.W.2d 582, 584 (Neb. 1978).

432. Act of Mar. 21, 1988, No. 391, § 1, 1988 S.C. Acts 2783, 2783 (abolishing claims for criminal conversation).

433. Act of Nov. 14, 1989, No. 46, § 6, 1989 Ark. Acts 4112, 4114 (abolishing claims for alienation of affections and criminal conversation).

434. Act of June 2, 1989, ch. 517, § 1, 1989 Tenn. Pub. Acts 902, 902 (abolishing tort of alienation of affections); Act of May 1, 1990, ch. 1056, § 1, 1990 Tenn. Pub. Acts 773, 773-74 (abolishing claims for criminal conversation and seduction).

435. In some of these states, the impetus for legislation was likely a court decision that may have reminded legislators of the otherwise easily overlooked fact that the amatory torts remained on the books and capable of mischief. In Nebraska, for example, the legislature abolished the heartbalm torts one year after a majority of the state supreme court recognized the continued vitality of alienation of affections and criminal conversation in that state. Vacek v. Ames, 377 N.W.2d 86, 88-89 (Neb. 1985). In Rhode Island, antiheartbalm legislation was passed around the same time that the state supreme court disallowed a claim seeking recovery for the loss of a parent's affections. Zarrella v. Robinson, 492 A.2d 833, 835 (R.I. 1985).

ward these torts. In deliberations over a proposal to ban alienation of affections suits, one state senator observed that no more than two such cases had been filed in the county containing the state capitol over the preceding ten or twelve years.[436] A state representative claimed to have been practicing law for twenty-one years without having seen an alienation of affections suit filed.[437] Another senator described the alienation of affections tort as "archaic, out of date, [and] unnecessary"[438] and advised his colleagues that it was "time we did away with it."[439] The next year, while addressing another bill that would abolish the tort of criminal conversation, one senator admitted that he "had to go to the textbook in order to make sure that [he] was conversant on what criminal conversation [was]."[440] Clearly, the heartbalm torts had seen better days; their disappearance from the courthouse had made them easy prey for criticism and abolition.

This second campaign against the heartbalm torts also differed from the first in that courts began to assert themselves as agents of the torts' destruction. Outside of Louisiana, where a 1927 court decision ascertained that state law did not recognize alienation of affections claims,[441] judges had played little to no role in the first anti-heartbalm drive. Prior to the mid-1970s, courts demurred in the rare instances in which they had been asked to abolish one of these claims, identifying the issue as more appropriately addressed by their counterparts in state legislatures.[442] Beginning in the bicentennial year, however, courts started to strike down these torts. Between 1976 and today, courts in Pennsylvania,[443] Iowa,[444] Maryland,[445] Oklahoma,[446] South Dakota,[447] Washington,[448] New Hampshire,[449] Idaho, [450] Utah,[451] Mississippi,[452] and Missouri[453] have abol-

436. Audio tape: Deliberations and Debate regarding House Bill 937, Tennessee State Senate, comments of Sen. Lashley (May 2, 1989) (on file with author).

437. Audio tape: Deliberations and Debate regarding House Bill 937, Tennessee House of Representative, comments of Rep. Buck (May 4, 1989) (on file with author).

438. Audio tape: Deliberations and Debate regarding House Bill 937, Tennessee State Senate, comments of Sen. Darnell (May 22, 1989) (on file with author).

439. *Id.*

440. Audio tape: Deliberations and Debate regarding Senate Bill 1087, Tennessee State Senate, comments of Sen. Haynes (April 4, 1990) (on file with author).

441. Moulin v. Monteleone, 115 So. 447, 456-57 (La. 1927).

442. *See*, *e.g.*, Tarquinio v. Pelletier, 266 A.2d 410, 411 (Conn. Super. Ct. 1970); Gorder v. Sims, 237 N.W.2d 67, 71 (Minn. 1975); Felsenthal v. McMillan, 493 S.W.2d 729, 730 (Tex. 1973).

443. Fadgen v. Lenkner, 365 A.2d 147, 152 (Pa. 1976).

444. Bearbower v. Merry, 266 N.W.2d 128, 135 (Iowa 1978).

445. Kline v. Ansell, 414 A.2d 929, 933 (Md. 1980).

446. Lynn v. Shaw, 620 P.2d 899, 902-03 (Okla. 1980).

447. Hunt v. Hunt, 309 N.W.2d 818, 821 (S.D. 1981).

448. Irwin v. Coluccio, 648 P.2d. 458, 461 (Wash. Ct. App. 1982).

449. Feldman v. Feldman, 480 A.2d 34, 36 (N.H. 1984).

450. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

451. Norton v. MacFarlane, 818 P.2d 8, 17 (Utah 1991).

ished criminal conversation actions within their respective states. Courts in Washington,[454] Iowa,[455] Idaho,[456] South Carolina,[457] and Missouri[458] have abolished claims for alienation of affections.[459] The Kentucky Supreme Court has abolished claims for "intentional interference with the marital relation," a cause of action that encompassed facts that, in other states, would give rise to claims for alienation of affections or criminal conversation.[460] Courts in Utah[461] and Kentucky[462] have limited claims for breach of promise to actual economic damages suffered (such as wedding expenses).[463] Finally, Georgia[464] and Alabama[465] courts have abolished claims for the seduction of female minors.[466]

This surge in judicial activity merits notice. For more than four decades, courts stood on the sidelines of the antiheartbalm debate. Suddenly, they jumped into the fray headfirst. This sequence of events probably owes more to the inherent conservatism of courts and judges than to any upswing in judicial activism beginning in the 1970s. Jurists were simply not prepared to abolish the heartbalm torts until a near-consensus emerged that these claims were somehow *categorically* deficient—that is, that the torts implicated *no* injury that was properly compensable in tort, served *no* deterrence function, or were completely out of tune with modern values. Characterizing the torts as overly susceptible to abuse or as too generous to plaintiffs had proved persuasive among legislatures in decades past. These arguments carried less weight with courts because similar criticisms could be lodged against many other causes of action, and courts, unlike legislatures, have to defend their decisions as the products of coherent, neutral rules. If the heartbalm torts were to be abolished because they were misused by extortionists and occasionally

452. Saunders v. Alford, 607 So. 2d 1214, 1219 (Miss. 1992).
453. Thomas v. Siddiqui, 869 S.W.2d 740, 742 (Mo. 1994).
454. Wyman v. Wallace, 615 P.2d 452, 455 (Wash. 1980).
455. Fundermann v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981).
456. O'Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986).
457. Russo v. Sutton, 422 S.E.2d 750, 753 (S.C. 1992).
458. Helsel v. Noellsch, 107 S.W.3d 231, 233 (Mo. 2003).
459. Other courts, meanwhile, recently have declined invitations to abolish this tort. *See, e.g.*, Bland v. Hill, 735 So. 2d 414, 418 (Miss. 1999) (declining to abolish alienation of affections); Veeder v. Kennedy, 589 N.W.2d 610, 616 (S.D. 1999) (same).
460. Hoye v. Hoye, 824 S.W.2d 422, 427 (Ky. 1992).
461. Jackson v. Brown, 904 P.2d 685, 687 (Utah 1995).
462. Gilbert v. Barkes, 987 S.W.2d 772, 776 (Ky. 1999).
463. *Cf.* Stanard v. Bolin, 565 P.2d 94, 98 (Wash. 1977) (refusing to allow for recovery for loss of anticipated post-marriage financial and social position).
464. Franklin v. Hill, 444 S.E.2d 778, 781 (Ga. 1994).
465. Edwards v. Moore, 699 So. 2d 220, 222-23 (Ala. Civ. App. 1997).
466. Decisions by other courts over this span have stopped short of abolishing a heartbalm tort but made it clear that they found the pertinent cause of action distasteful. *See, e.g.*, Breece v. Jett, 556 S.W.2d 696, 707-08 (Mo. Ct. App. 1977) (seduction); Thompson v. Chapman, 600 P.2d 302, 304 (N.M. Ct. App. 1979) (alienation of affections).

produced lucrative awards, judges must have asked, what of the many other claims that also suffered from similar ills? Were they also to go, even though they generated comparatively little controversy?[467] The threat of blackmail was an argument that legislators could accept as an adequate basis for abolishing the heartbalm torts. Judges needed more.

The gradual disappearance of heartbalm suits in the postwar era finally produced the sort of unqualified, categorical arguments—no injury, no utility as a deterrent, no connection with modern morals—that courts could endorse, with the other criticisms of the torts riding shotgun. The rarity of these suits by the mid-1970s, and the often meager returns realized in these cases, bolstered long-circulating[468] arguments that the torts served no useful compensatory[469] or deterrence[470] function, and that the claims vindicated values that society had left behind.[471] The ongoing abrogation of these torts by other state courts and legislatures gave these arguments additional weight, and ensured that courts snuffing out the torts could see themselves as part of an emerging consensus repudiating these causes of action. By striking down these torts, after all, judges were simply conducting formal burials of claims that society had already left for dead.

So what is the state of the heartbalm torts today? As mentioned earlier, alienation of affections and criminal conversation are both holding on in just a handful of jurisdictions, while breach of promise to marry and seduction claims, though nominally available to plaintiffs in about half of the states, are invoked extremely infrequently.

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467. Even back in the 1930s, some observers recognized that the circulating anti-heartbalm rhetoric might prove too much. One journalist wrote, "[I]nsurance companies, railroads and most other large corporations are constantly bled by unjust damage suits. If every law that can be perverted into a racket were repealed, what would become of the courts and all their employees?" *The New Laws to Stop the "Heart Balm" Suits*, *supra* note 366.

468. *See*, *e.g.*, Feinsinger, *supra* note 281, at 995.

469. Fundermann v. Mickelson, 304 N.W.2d 790, 791 (Iowa 1981); *see also* Russo v. Sutton, 422 S.E.2d 750, 753 (S.C. 1992); Hunt v. Hunt, 309 N.W.2d 818, 821 (S.D. 1981). Likewise, one court has discerned that criminal conversation suffers from "[a] fundamental flaw," in that it allows an award of damages "without regard to the viability of the marriage relationship" and notwithstanding the fact that the marital relationship may not have been affected adversely by an affair. Bearbower v. Merry, 266 N.W.2d 128, 135 (Iowa 1978).

470. O'Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986); *Russo*, 422 S.E.2d at 753; *Hunt*, 309 N.W.2d at 822; *see also* Smeath, *supra* note 32 (quoting a North Carolina attorney as saying of heartbalm torts, "It has been my experience in handling some of these cases over the years that it's a very poor vehicle for preserving the institution of marriage. There are other ways that are more effective.").

471. Neal v. Neal, 873 P.2d 871, 874 (Idaho 1994); *Bearbower*, 266 N.W.2d at 135; Hoye v. Hoye, 824 S.W.2d 422, 426 (Ky. 1992); Feldman v. Feldman, 480 A.2d 34, 36 (N.H. 1984); *Hunt*, 309 N.W.2d at 822; Irwin v. Coluccio, 648 P.2d 458, 460 (Wash. Ct. App. 1982).

In North Carolina, virtually the only place in which heartbalm suits (most often, alienation of affections claims) could be described as common enough to have developed a substantial body of modern case law,[472] abolitionist legislation has been introduced, but unlike similar bills in other states, it has not passed[473]—suggesting yet again that a tort stands a better chance in the legislature when it appears in the courthouse, as well.[474] But North Carolina is just about the only bright spot for these claims. The present for the heartbalm torts is dim, and from this vantage point, the future looks dark.[475]

The disappearance of the heartbalm torts teaches that the death of a well-established common law tort may follow only from the serendipitous interaction of multiple contributing factors. For the heartbalm torts, these circumstances began with a host of attributes that exposed the claims to attack, such as the conceptual awkwardness of the breach of promise theory, the absence of meaningful limitations on damages, and a dearth of evidentiary safeguards built into the claims. When the cultural atmosphere surrounding the torts changed, a few forceful agents capitalized on these flaws to circulate arguments that struck a chord with at least one audience, legislatures. Though this initial campaign was a mixed success, it helped induce the gradual disappearance of heartbalm torts from the nation's courtrooms, and in so doing, made the torts more susceptible to another atmospheric shift. The ensuing second campaign against the heartbalm torts did not depend on forceful agents for its success. Rather, the rust that encrusted the heartbalm torts by that time lent credence to arguments, accepted by courts and legislatures alike, that the claims represented archaic holdovers from earlier days. In short, atmosphere, arguments, audiences, agents, and the attributes of the heartbalm torts all have contributed to the demise of these claims.

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472. *See* Scelfo, *supra* note 31, at 57; Tucker, *supra* note 398 (quoting L. Stanley Brown of North Carolina as saying that he has handled "hundreds" of alienation of affections cases).

473. See Christopher Kirkpatrick, *Civil Law Allowing Jilted Spouses to Sue Stays Alive*, HERALD-SUN (Durham, N.C.), Sept. 5, 2001, at C5 (reporting on the failure of a bill that would have abolished criminal conversation and alienation of affections suits in North Carolina).

474. In North Carolina, pro-family groups have rallied to the defense of the heartbalm torts. *See* Scelfo, *supra* note 31, at 57. One such group has said that the torts of "alienation of affections and criminal conversation, erect a wall of protection around marriages from outside interference and adultery." JOHN RUSTIN & JERE Z. ROYALL, PROTECTING MARRIAGE: 10 GOOD REASONS TO PRESERVE MEANINGFUL TORT LAWS 1 (2002) (disseminated by the North Carolina Family Policy Council).

475. *But cf.* Chet Brokaw, *1877 Law Will Stay on Books*, ABERDEEN AM. NEWS (S.D.), Jan. 26, 2002, at 5A (reporting on failure of legislation that would have banned alienation of affections suits in South Dakota).

## VII. CONCLUSION

The three case studies teach a few important lessons regarding the lives and deaths of torts. For one thing, while atmosphere is certainly an important factor in the deaths of torts, it would be a mistake to regard tort law and those who shape it as entirely reactive to changes in the ambient cultural environment. As illustrated by the slow demise of the heartbalm torts, the institutions and individuals that make the law have agendas and limitations that may stymie the extinction of a seemingly doomed tort. Likewise, the disappearance of the tort of insult teaches that law itself is capable of innovations—such as alternative theories of liability—that may contribute to a tort's death. And, as shown by the struggles of the "obesity lawsuit," the fate of a tort may also depend on the character of its friends, its foes, and the claim itself—in other words, on agents and attributes. In sum, atmosphere, arguments, audiences, agents, alternatives, and attributes all may contribute to the disappearance of a tort, and any comprehensive obituary of a cause of action must at least consider the possible impact of each of these factors.

The case studies also suggest that a neglected tort is an endangered tort. Claims for insult and the heartbalm torts have been caught in vicious cycles in which a declining number of suits sent these claims into a death spiral. A reduction in insult suits deprived this tort of needed exposure, making the insult theory increasingly difficult to discern and apply; meanwhile, the disappearance of heartbalm suits from state courts has emboldened legislatures and especially courts to sweep these torts aside with little regret or resistance. Obesity lawsuits likewise have suffered from their novelty and attendant rarity, with few attorneys being willing to fight for the retention of these claims.

And finally, the case studies hint at a possible long-term effect of tort reform campaigns. Although court decisions striking down a tort and legislation abolishing a claim seize headlines, torts die just as often from the actions of thousands of individual prospective plaintiffs who collectively turn their backs on a cause of action. As shown by the sad fate of the heartbalm torts, this mass desertion of a claim may set the stage for its ultimate abrogation. Abandonment commonly occurs when a tort becomes economically unattractive from the plaintiff's perspective. Though the vast majority of tort reform measures do not single out a claim for elimination,[476] by driving up the costs of a suit or reducing its potential returns, many of these

476. *See generally* Ronen Avraham, *Database of State Tort Law Reforms* (Nw. Univ. Sch. of Law, Law & Econ. Research Paper Series, Paper No. 06-08, 2006), *available at* http://ssrn.com/abstracts=902711 (comprehensively listing enacted tort reforms, arranged state-by-state).

laws make certain tort claims less profitable and thus less attractive to plaintiffs and their lawyers. These reforms are sometimes cast as saving tort law from itself, minimizing the threat of an even more severe backlash. But by increasing the costs and lowering the benefits associated with a cause of action, these measures may in fact have the opposite effect, contributing to the disappearance of a tort or torts.