

Seduction and the Myth of the Ideal Woman

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The tort of seduction offers an excellent example of the process of legal evolution. Originating in seventeenth century England as an action by the father of the seduced woman for loss of services, the tort has evolved through both legislative and judicial decision into a moral, rather than an economic cause of action. In modern times, it has fallen into disuse—perhaps even to extinction—at common law, and in some jurisdictions has been abolished by statute. This article is a survey and analysis of the evolution of the tort of seduction from mid-seventeenth century England to the present day United States.

The thesis advanced is that the prevalent conception of women and their social role—the myth of the ideal woman—has controlled the evolution of the tort of seduction. In the eighteenth and early nineteenth centuries, women were seen as property, economically valuable for the services they could provide. Accordingly, the cause of action for seduction belonged to the father and was an action for loss of services, usually caused by pregnancy. With the development of the Victorian ideal of the virtuous, delicate, and submissive woman, the tort also changed. Legislation provided for the victim herself to be the plaintiff, and for damages to be based on the loss of virtue, not services. As twentieth century women achieved a measure of sexual autonomy, the tort of seduction became “as musty and out-of-date as Tennyson’s ‘Lady of Shalott.’”¹ Many legislatures abolished or severely limited the tort’s availability, and common law seduction suits became increasingly rare. Today the tort seems moribund.

Seduction is one of four causes of action traditionally grouped under the rubric “heart balm:” they provide legal balms for broken, or at least bent, hearts. The other three “heart balm” actions are criminal conversation, alienation of affections, and breach of promise to marry.

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1. Indianapolis News, Jan. 28, 1935, at 6, col. 6.

Criminal conversation² is the civil cause of action corresponding to the crime of adultery. Originally, only the husband had the right of action,³ but modern courts extended it to the wife.⁴ Alienation of affections, like criminal conversation, was a marital tort, but it did not necessarily involve adultery. It originated as a cause of action used by a husband against one who enticed his wife to leave home, and like seduction, sought to redress the loss of services. Services, however, included consortium. Defendants were not limited to wives' lovers, but could include relatives or anyone else who influenced the wife to leave.⁵ The action for alienation of affections was also extended to women⁶ after, and perhaps because of, the passage of Married Women's Statutes.⁷

Breach of promise to marry is a right of action of one rejected against the former fiancé.⁸ It seems always to have been a woman's cause of action. As Justice Atkins stated, "marriage to a woman especially, is an advancement or preferment . . ."⁹ Seduction, the other nonmarital heart balm action, is the subject of the remainder of this paper.

The first section presents the common law history of seduction as a cause of action in England through the middle of the nineteenth century and in the United States from its earliest occurrences through to the present. The second section covers the changes state legislatures made to the tort in the nineteenth century and its statutory abolition in the twentieth century. The final section explains the evolution of the tort in terms of the development of the myth of the ideal woman. The conclusion speculates on the impact present day changes in social exigencies might have on the law of seduction.

2. For a history of criminal conversation, see Jacob Lippman, *The Breakdown of Consortium*, 30 Colum. L. Rev. 651 (1930); Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 Mich. L. Rev. 979 (1935).

3. The husband possessed valuable but nonreciprocal rights in the wife. 3 William Blackstone, commentaries 138-43 (1768). As the wife could only sue through the husband, to give her a right of action would allow the husband to profit from his own wrong.

4. *E.g.*, *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923). This extension of the right of action to the wife might be attributed to the Married Women's Statutes even though it is not expressly contained in them. See Homer Harrison Clark, *Law of Domestic Relations* 268 (1968).

5. For a history of alienation of affections, see Robert C. Brown, *The Action for Alienation of Affections*, 82 U. Pa. L. Rev. 472 (1934).

6. *E.g.*, *Haynes v. Nowlin*, 129 Ind. 581, 29 N.E. 389 (1891).

7. *E.g.*, Michigan Comp. Laws Ann. §§ 557.1-201 (1855); Ind. Code Ann. §§ 38-101 to -108 (Burns 1852).

8. For a history of breach of promise to marry, see Robert C. Brown, *Breach of Promise Suits*, 77 U. Pa. L. Rev. 474 (1929); Feinsinger, *supra* note 2, at 980-86.

9. *Holcroft v. Dickenson*, 1 Carter 233, 234, 124 Eng. Rep. 933, 934 (C.P. 1672).

I. The Tort of Seduction: Common Law Development

This section examines the history of the tort of seduction as it developed in judicial decisions. The first subsection covers the common law development of the cause of action in England from 1653 to the middle of the nineteenth century. The second subsection covers the common law origins and early development of seduction in the United States. The final subsection covers the common law development of the tort in the United States from the mid-nineteenth century to the present.

A. Common Law Genesis in England

Although this article primarily treats the tort of seduction as it developed in the United States, it is useful to begin with the early English common law decisions, the precursors of the early United States decisions.¹⁰ The tort of seduction originated as an action for damages for the loss of the services of the seduced woman—an action *per quod servitium amisit*, “whereby he lost the service [of his servant].”¹¹ *Norton v. Jason*,¹² the earliest reported case using this theory, left open the possibility of the woman herself bringing suit for the seduction.¹³ In question was the effect of the statute of limitations: if the damage was in the seduction itself, then it applied; if the damage was in the pregnancy, lying-in, and the like, it did not. Chief Justice Roll held that Jason had no cause of action for Norton’s “assaulting his daughter, and getting her

10. Early American cases, e.g., *Foster v. Scoffield*, 1 Johns. 297 (N.Y. 1806); *Wallace v. Clark*, 2 Tenn. (2 Overt.) 93 (1807), had to rely on English cases, there being no developed precedent here. Even after the establishment of an indigenous jurisprudence of seduction, courts continued to cite the major English decisions. See, e.g., *Stevenson v. Belknap*, 6 Iowa 97 (1858); *Keller v. Donnelly*, 5 Md. 211 (1853).

11. Black’s Law Dictionary (5th ed. 1979). E.g., *Norton v. Jason*, 1 Sty. 398, 82 Eng. Rep. 809 (K.B. 1653); *Satterthwaite v. Dewhurst*, 4 Dougl. 315, 316, 99 Eng. Rep. 899, 900 (K.B. 1785) (Lord Mansfield: “[T]here is no precedent of such an action, unless upon a *per quod servitium amisit*.”).

12. 1 Sty. 398, 82 Eng. Rep. 809 (K.B. 1653).

13. There are earlier cases on different theories. For example, the 14th century case of *Lincoln v. Simond*, KB 27/519, m.63 (Coram Rege roll, Hilary 1391), reprinted in Morris S. Arnold, *Selected Cases of Trespass from the King’s Courts, 1307-1399*, at 96 (1985), advances quite a different basis for the father’s suit. Apparently the defendant and plaintiff’s daughter had married clandestinely, against the father’s wishes. The plaintiff father claimed that her marriage “belonged” to him, that the “[defendant] ravished and abducted his daughter Alice found there,” and that because the prior betrothal of his daughter to the defendant prevented him from marrying her to another, that betrothal “ought to be adjudged in law a ravishment of Alice.” Arnold, *supra*, at 96-97. Between that case and 1653, the idea of a daughter’s marriage being a property right in her father seems to have changed. These very early cases surely had little influence on the tort as transported to the United States.

with child, because this is a wrong particularly done to her . . ."¹⁴ Jason's action for loss of services, however, was not barred.¹⁵ Although the implication was that an action by the daughter was not precluded, such a cause was not pursued as civil seduction for some two centuries.¹⁶ Thus, the original basis of the action was loss of services.

A successful plaintiff had to have some proof that services were actually lost.¹⁷ The mere incurring of expense in looking after the woman during pregnancy and birth was not sufficient. For example, where the woman was a servant in the household of another,¹⁸ or where she supported herself independently at the time of seduction,¹⁹ but went home for her pregnancy, the cause did not lie. It follows that although the father²⁰ would be the most common plaintiff,²¹ anyone who suffered a loss of the woman's services would be a suitable plaintiff. Although it was to cause some difficulty in the United States,²² this restriction of proper plaintiffs to those who had actually lost the woman's services was generally accepted by the early English courts. A widowed mother,²³ a

14. 82 Eng. Rep. at 810.

15. Similarly, in *Russell v. Corne*, 2 Ld. Raym. 1031, 92 Eng. Rep. 185 (K.B. 1703), although Chief Justice Holt, in *dicta*, stated that "a man cannot maintain an action against another for assaulting his daughter and getting her with child," he allowed the action for loss of services. 2 Ld. Raym. at 1032, 92 Eng. Rep. at 186.

16. *E.g.*, *Gover v. Dill*, 3 Iowa 337 (1856).

17. In *Russell v. Corne*, 2 Ld. Raym. 1031, 92 Eng. Rep. 185 (K.B. 1703), Chief Justice Holt suggested that the cause of action was really an aggravation of trespass: "[B]ut [the father] may maintain an action against another for entering his house and assaulting and getting his daughter with child per quod servitium amisit, and that is a great aggravation." 2 Ld. Raym. at 1032, 92 Eng. Rep. at 186. This notion had very little practical significance; for example, it would not apply to any case in which the seduction took place off the father's premises.

18. *E.g.*, *Postlethwaite v. Parkes*, 3 Burr. 1878, 97 Eng. Rep. 1147 (K.B. 1766); *Dean v. Peel*, 5 East. 45, 102 Eng. Rep. 986 (K.B. 1804).

19. *E.g.*, *Grinnell v. Wells*, 7 Man. & G. 1033, 135 Eng. Rep. 419 (C.P. 1844).

20. The mother of the victim could not be the plaintiff as she had no independent legal identity. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ." 1 William Blackstone, *Commentaries* 430 (1766).

21. The father has "the benefit of his children's labour while they live with him." *Id.* at 441.

22. *E.g.*, *Coon v. Moffitt*, 3 N.J.L. 169 (1809).

23. *E.g.*, *Satterthwaite v. Dewhurst*, 4 Dougl. 315, 99 Eng. Rep. 899 (K.B. 1785). The plaintiff, a widowed mother, failed to allege either loss of services or the minority of her daughter (in which case she might have had the benefit of a presumption of loss of services). Lord Mansfield dismissed the case with these striking words: "This is an action brought by a third person for the incontinence of two people, both of whom may possibly be of age; at least it does not appear that they are otherwise. We are all of the opinion that this action cannot be maintained." 4 Dougl. at 317, 99 Eng. Rep. at 900. The court made no mention of the plaintiff's status. In the much cited case of *Bedford v. McKowli*, 3 Esp. 119, 170 Eng. Rep. 560

guardian,²⁴ an aunt for whom the niece worked as a servant,²⁵ and an uncle in whose household the woman lived,²⁶ were all acceptable plaintiffs.²⁷

Because a loss of the service was the basis of the action, usually only seductions resulting in pregnancy were actionable. There was at least one exception. In *Manvell v. Thomson*,²⁸ the plaintiff's niece, after her abandonment by defendant, "was in a state of very great agitation, and continued so for some time: that she received medical attendance, and was obliged to be watched, lest she should do herself some injury."²⁹

One would expect that temporary injury to a son, for example through a beating, would have similarly yielded damages for loss of services. On the contrary, if a man's son were incapacitated, the father did not have to allege or prove the loss of services; "it was sufficient to shew the son lived in and was part of his father's family."³⁰

The origins of the tort of seduction appear to have been constrained mainly by requirements of form. Courts had to find, within the limited range then available, a form suitable for bringing the action. Basing seduction on loss of services soon came to be seen as a "reasonable fiction . . . merely to bring the matter into the Court."³¹ Although the requirement that the plaintiff suffer loss of services was not abandoned, it came to be treated as a formality. Provided that the plaintiff alleged some services lost, their

(N.P. 1800), the plaintiff was the mother and no comment is made thereon, but whether she was widowed is not expressly stated. Later, in *Andrews v. Askey*, 8 Car. & P. 7, 173 Eng. Rep. 376 (N.P. 1837), a widowed mother prevailed.

24. *E.g.*, *Irwin v. Dearman*, 11 East. 23, 103 Eng. Rep. 912 (K.B. 1809). One Abbott, later to become Chief Justice of the King's Bench (better known as Lord Tenterden), argued for defendant that it was anomalous to allow "one person to recover damages for an injury done to another." 11 East. at 24, 103 Eng. Rep. at 912. Compare his opinion as Chief Justice in *Manvell v. Thomson*, 2 Car. & P. 303, 172 Eng. Rep. 137 (N.P. 1826). See *infra* notes 26, 28-29 and accompanying text.

25. *E.g.*, *Edmondson v. Machell*, 2 T.R. 4, 100 Eng. Rep. 2 (K.B. 1787).

26. *E.g.*, *Manvell v. Thomson*, 2 Car. & P. 303, 172 Eng. Rep. 137 (N.P. 1826) (Abbott, C.J.). Representing the defendant was a Mr. Denman who later, as Chief Justice of the King's Bench, led the successful attack on Abbott's landmark opinion in *Gill v. Cubitt*, 3 B. & C. 466, 107 Eng. Rep. 806 (K.B. 1824); see *Crook v. Jadis*, 5 B. & Ad. 909, 110 Eng. Rep. 1028 (K.B. 1834); *Goodman v. Harvey*, 4 Ad. & E. 870, 111 Eng. Rep. 1011 (K.B. 1836).

27. That the plaintiff was a parent, however, could have an impact on damages. *Bedford v. McKowl*, 3 Esp. 119, 170 Eng. Rep. 560 (N.P. 1800). See *infra* note 40 and accompanying text.

28. 2 Car. & P. 303, 172 Eng. Rep. 137 (N.P. 1826) (Abbott, C.J.).

29. 2 Car. & P. at 304, 172 Eng. Rep. at 137. Apparently the cause of the distress and loss of services was not so much the seduction itself as its non-continuance. Nevertheless, plaintiff won 400 pounds damages.

30. *Jones v. Brown*, 1 Esp. 217, 219, 170 Eng. Rep. 334, 334 (N.P. 1794).

31. *Revill v. Sattergit*, Holt 451, 453, 171 Eng. Rep. 301, 303 (N.P. 1816).

required quantity was minimal. "The slightest evidence is sufficient; even milking cows."³² The strictness of the requirement was further ameliorated by holding that if the woman "was living with her father, forming part of his family, and liable to his control and command,"³³ services would be assumed. "The right to the service [was] sufficient."³⁴ Otherwise a wealthy father whose daughter provided no services would have no cause of action for her seduction.³⁵ Nevertheless, the formal requirement had to be met, and failure to do so meant non-suit.³⁶

Once the plaintiff had overcome this formal problem of proof, damage awards bore little relation to the actual value of services lost. In *Tullidge v. Wade*,³⁷ Chief Justice Wilmut, upholding a jury award of 50 pounds, said: "[A]lthough the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."³⁸ Similarly, an award of 400 pounds in 1826 must have far exceeded the value of lost household services of a sixteen-year-old.³⁹ In 1800, Lord Eldon explained:

32. *Bennett v. Allcott*, 2 T.R. 166, 168, 100 Eng. Rep. 90, 91 (K.B. 1787).

33. *Maunder v. Venn*, 1 M. & M. 323, 324, 173 Eng. Rep. 1175, 1175 (N.P. 1829).

34. *Id.* This latter point was taken up enthusiastically in the United States courts to allow a father's action when a minor daughter was seduced while living and working in the home of another. *Coon v. Moffitt*, 3 N.J.L. 169 (1809) (especially the opinion of Pennington, J.); *Martin v. Payne*, 9 Johns. 387 (N.Y. 1812); *Sargent v. Denniston*, 5 Cow. 106, 8 N.Y.C.L. Rep. 590 (1825). The father still had the right to control his daughter's behavior, and thus to command her services. Blackstone, *supra* note 20, at 441. The same argument seems not to have persuaded English courts. In *Grinnell v. Wells*, 7 Man. & G. 1033, 135 Eng. Rep. 419 (C.P. 1844), plaintiff won at trial but lost on appeal because the 14-year-old daughter was working and living elsewhere when seduced, notwithstanding the fact that, once pregnant, she moved home; the seduction caused no loss of services to the father.

35. *E.g.*, *Revill v. Sattergitt*, 1 Holt 451, 171 Eng. Rep. 301 (N.P. 1816).

36. Failure to allege and prove services lost completely barred the action. *Postlethwaite v. Parkes*, 3 Burr. 1878, 97 Eng. Rep. 1147 (K.B. 1766); *Dean v. Peel*, 5 East. 45, 102 Eng. Rep. 986 (K.B. 1804); *Eager v. Grimwood*, 1 Ex. 61, 154 Eng. Rep. 26 (Exch. 1847). The unreality of all this was clearly argued in *Grinnell v. Wells*, 7 Man. & G. 1033, 135 Eng. Rep. 419 (C.P. 1844), which nevertheless followed the rule: no services proven, no damages. The requirements of formality, no matter how atrophied their rationale, proved difficult to eliminate.

37. 3 Wils. 18, 95 Eng. Rep. 909 (K.B. 1769).

38. *Id.* at 19, 95 Eng. Rep. at 909. Justice Clive, concurring, said that he would have upheld an award of 100 pounds.

39. *Manvell v. Thomson*, 2 Car. & P. 303, 172 Eng. Rep. 137 (N.P. 1826). It is not possible to give even a rough modern equivalent of 400 English pounds at the beginning of the 19th century. However, an indication might be gleaned from Goldsmith's lines:

A man he was, to all the country dear,
And passing rich with forty pounds a year.

Oliver Goldsmith, "The Deserted Village," lines 141-42 (1770). Goldsmith was lamenting a passing era, so presumably in 1770, 40 pounds a year would no longer count as rich. But allowing for a twofold error and substantial inflation, a rich

In point of form, the action only purports to give a recompence for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to her child: in such a case . . . the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children, whose morals may be corrupted by her example.⁴⁰

Jury awards of damages for dishonor and distress rather than for the mere loss of services tended to be upheld. In *Andrews v. Askey*,⁴¹ damages "ultra loss of services" were allowed "for the distress and anxiety of mind which the [plaintiff] mother has felt."⁴² As Lord Ellenborough said in *Irwin v. Dearman*,⁴³ although "even in the case of an actual parent, the loss of service [was] the legal foundation of the action," the practice of giving greater damages was "inveterate and [could] not now be shaken."⁴⁴ By the beginning of the nineteenth century, more was involved in the social reality of the tort than mere loss of services.

An exemplary or punitive element in damage awards was also acceptable.⁴⁵ "Actions of this sort [were] brought for example's sake; . . . and if A.B. brings another action against defendant for the breach of promise of marriage, so much the better; he ought to be punished twice."⁴⁶ Thus, it was appropriate to take into consideration the wealth and social status of the defendant. For example, in *Edmondson v. Machell*,⁴⁷ the defendant's commission as a captain in the militia required 300 pounds a year, and the jury awarded the same amount in damages.⁴⁸ English judges, however, resisted setting up strict rules to determine damages in seduction suits: "[I]f there was any case in which great latitude might be allowed to juries, it was in this species of action."⁴⁹ By

man's annual income must have been on the order of no more than one or two hundred pounds in the early part of the 19th century.

40. *Bedford v. McKowl*, 3 Esp. 119, 120, 170 Eng. Rep. 560, 560 (N.P. 1800). The court approved 400 pounds in damages.

41. 8 Car. & P. 8, 173 Eng. Rep. 376, (N.P. 1837).

42. *Id.* at 9, 173 Eng. Rep. at 377.

43. 11 East 23, 103 Eng. Rep. 912 (K.B. 1809).

44. *Id.* at 24, 103 Eng. Rep. at 912.

45. *Elliott v. Nicklin*, 5 Price 641, 146 Eng. Rep. 719 (Exch. 1818) (opinion of Baron Garrow).

46. *Tullidge v. Wade*, 3 Wils. 18, 19, 95 Eng. Rep. 909 (K.B. 1769) (Lord Chief Justice Wilmot).

47. 2 T.R. 4, 100 Eng. Rep. 2 (K.B. 1787).

48. *Id.* at 4, 100 Eng. Rep. at 3; see also *Andrews v. Askey*, 8 Car. & P. 8, 173 Eng. Rep. 376 (N.P. 1837).

49. *Elliott*, 5 Price at 645, 146 Eng. Rep. at 721 (summary of opinion of Baron Graham).

the early nineteenth century the cause of action seemed more a matter of morals and honor than of economic injury.⁵⁰

The early courts were aware of how easily seduction could be confused with breach of promise to marry. In particular, the question arose whether evidence of defendant's promise to marry the woman should be admissible in seduction trials. It was thought that the jury ought not to award damages related to breach of promise to marry to the father when the woman herself could still bring an independent action. In *Tullidge v. Wade*,⁵¹ the court held that evidence of a promise of marriage was admissible to demonstrate the defendant's seductive artifices and intentions, but could not be considered in assessing damages. Recognizing that a jury would have difficulty drawing such a distinction, Lord Ellenborough, in oft-quoted language, further limited admissible testimony: "I think you may ask her whether he paid his addresses to her in an honourable way. Further than that you can on no account go."⁵² This rule was not considered inflexible,⁵³ and it was later held that evidence of a promise to marry may be admitted where it "is not relied on as a prominent part of the case, but is merely collateral to the main object of the action [as, for example, to] vindicate the character of the young woman."⁵⁴

This illustrates the confusion between seduction as an economic and as a moral offense. If the action were based solely in the economic offense of deprivation of services,⁵⁵ then the nature of the defendant's wiles or the woman's character should have been completely irrelevant. Only paternity would have been at issue. The confusion generated by this transition is exemplified by Lord Ellenborough's opinion in *Dodd v. Norris*:⁵⁶ not only did he

50. The confusion caused by this transition is apparent in damage awards. In 1809 Lord Ellenborough had expressly upheld a damage award "ultra the mere loss of service," *Irwin v. Dearman*, 11 East 23, 24, 103 Eng. Rep. 912, 912 (K.B. 1809). Nine years later, in 1818, an award of 1,000 pounds was upheld where plaintiff, a father of seven, was a poor publican, and defendant the son of "a man of considerable property." *Elliott*, 5 Price at 642, 146 Eng. Rep. at 720. The pregnancy was also said to have been difficult and the delivery dangerous.

51. 3 Wils. 18, 95 Eng. Rep. 909 (K.B. 1769).

52. *Dodd v. Norris*, 3 Camp. 519, 520, 170 Eng. Rep. 1467, 1467 (N.P. 1814).

53. *Elliott*, 5 Price at 647, 146 Eng. Rep. at 721 (opinion of Baron Garrow who had been of counsel for the plaintiff in *Dodd*, 3 Camp. at 519, 170 Eng. Rep. at 1467. He noted in *Elliott* that "Lord Ellenborough on that occasion did not . . . lay it down as an inflexible rule." 5 Price at 647, 146 Eng. Rep. at 721).

54. 5 Price at 647, 146 Eng. Rep. at 721.

55. Economic loss was also at issue in the 14th century case *Lincoln v. Simond*, KB 27/519, m.63 (Coram Rege roll, Hilary 1391), reprinted in Arnold, *supra* note 13, at 96, where the action was based on the deprivation of the valuable right to the daughter's marriage.

56. 3 Camp. 519, 170 Eng. Rep. 1467 (N.P. 1814).

hold that the woman may say only whether the defendant's addresses were honorable and not whether he promised to marry her (a permission based on morality), he also held that she did not have to answer whether at the time she had "been criminal with other men"⁵⁷ (a limitation based in economics).

In early nineteenth century England, the tort of seduction was well on the way to being based in morality and honor despite its historical roots in the economics of lost services. This then was the common law tort of seduction that was imported into the United States.

B. Early Common Law Development in the United States

In the United States the earliest case law developed concurrently with the English, and in much the same way.⁵⁸ The same transition from the purely economic basis of *per quod servitium amisit* to the offense against morality and honor is evident. The United States courts developed these themes in much the same way, though somewhat more forthrightly, than the English courts.

In the United States, the formal basis of the tort of seduction in loss of services seems originally to have been taken more seriously than in England,⁵⁹ but the avoidance of the harsh effects seems correspondingly to have been more overt. Fathers were the standard plaintiffs, and others *in loco parentis*, after some early resistance,⁶⁰ were also acceptable.⁶¹ The required relationship was

57. *Id.*

58. For example, the 1791 New Jersey case, *Stout v. Prall*, 1 N.J.L. 93 (1791), was a typical suit by a father based on loss of services. The defendant appealed the award of excess damages, especially in light of his poverty. With no reference to English decisions, the court said that damages need not equal "the pecuniary loss to the parent," but that the jury properly "might give exemplary damages, such as would amply recompense the plaintiff for the cruel and severe injury of disturbing the peace of his family, and destroying his parental prospects." *Id.* at 94. The award was 100 pounds. Given the time, this opinion was concurrent with, if not a little ahead of, King's Bench thinking. Defendant's poverty was held irrelevant. Damages based on the moral offense were called "exemplary," but, as the irrelevance of defendant's economic standing shows, were not openly considered punitive.

59. Occasional early opinions, however, recognized its fictional character and expressed disapproval. See, e.g., *VanHorn v. Freeman*, 6 N.J.L. 322 (1796).

60. See, e.g., *Vossell v. Cole*, 10 Mo. 634 (1847) (holding that a widowed mother had no cause of action when the father was alive at the time of seduction). *Contra* *Coon v. Moffitt*, 3 N.J.L. 169 (1809); Justice Pennington's opinion is a textbook of the law at that time, *id.* at 175, and convincingly refutes the Missouri Supreme Court's reasoning. Nevertheless the latter did not change position 18 years later in *Heinrichs v. Kerchner*, 35 Mo. 378 (1865).

61. The earliest and most acceptable plaintiff was the widowed mother. E.g., *Coon*, 3 N.J.L. at 169; *Keller v. Donnelly*, 5 Md. 211 (1853). Also accepted were a brother, *Millar v. Thompson*, 1 Wend. 447 (N.Y. 1828) (but plaintiff failed to prove

that the woman be subject to the plaintiff's control so that he could, if he wished, call upon her services. Absent such legal control, plaintiff would have to show actual services lost. This distinction between using the seduced woman's services and having the right to use them was developed with a great deal more precision in the United States than in England.

If the woman were a minor, then the father was almost always entitled to her services, even when she was away from home working for another. In *Martin v. Payne*,⁶² the woman was living at her uncle's, working casually, but with no intention of returning home.⁶³ The decision held to the rule that, where the woman was under twenty-one, "[s]he was [her father's] servant *de jure*, though not *de facto* . . ."⁶⁴ The following year, the same New York court reinforced this position by reversing, *per curiam*, a jury verdict for the plaintiff on very similar facts, but with the daughter over the age of twenty-one.⁶⁵ If the daughter had attained her majority, actual services owed to the plaintiff had to be proved.⁶⁶ Where services had to be proved, the United States courts uniformly followed the English view that "slight evidence will suffice, such as making tea, mending clothes, or other such like acts."⁶⁷

Where the woman was under the age of majority the plaintiff father could only fail to benefit from the presumption of services *de jure* if he had expressly contracted his rights to another, as by indenture or apprenticeship. In such a case, the master to whom the parental right had been granted would be the appropriate

actual services lost where his sister was 22 years old); a cousin, *Davidson v. Goodall*, 18 N.H. 423 (1846); a brother-in-law, *Wilson v. Sproul*, 3 Pen. & W. 49 (Pa. 1831); *Ball v. Bruce*, 21 Ill. 161 (1859).

62. 9 Johns. 387 (N.Y. 1812).

63. The facts are remarkably similar to those in *Dean v. Peel*, 5 East. 45, 102 Eng. Rep. 986 (K.B. 1804), and an earlier case, *Postlethwaite v. Parkes*, 3 Burr. 1878, 97 Eng. Rep. 1147 (K.B. 1766). The two cases were both commonly noted by the United States courts; the latter case, however, was compromised, Lord Mansfield deliberately avoiding a decision in order to save assessing costs against the impoverished plaintiff. The New York court in *Martin v. Payne* noted *Dean* with disapproval but distinguished it thus: in *Dean*, it was said, the woman had been contractually obligated to her employer and only went home when pregnant, whereas in *Martin*, she had only a casual working relationship with her uncle.

64. 9 Johns. at 390.

65. *Nickleston v. Stryker*, 10 Johns. 115 (N.Y. 1813).

66. *Id.* See also *Applegate v. Ruble*, 9 Ky. 128 (1819); *Moran v. Dawes*, 4 Cow. 412, 8 N.Y.C.L. Rep. 432 (1825); *Wilson v. Sproul*, 3 Pen. & W. 49 (Pa. 1831); *Keller v. Donnelly*, 5 Md. 211 (1853).

67. *Ball v. Bruce*, 21 Ill. 161, 162 (1859); see also *Wallace v. Clarke*, 2 Tenn. (2 Overt.) 93 (1807); *Wilson*, 3 Pen. & W. at 49; *Keller*, 5 Md. at 211. Where plaintiffs failed, as in *Wilson*, it seems to have been a failure in pleading or offering proof rather than in an attempted proof's not meeting the standard.

plaintiff.⁶⁸ The rule was strictly construed by the courts. For example, in *Clark v. Fitch*,⁶⁹ such an employment arrangement was characterized from the parent's point of view as merely a license, not a contract, and thus revocable at will. What was required was that the plaintiff parent have granted his parental authority to another.

Even when such a grant of parental authority had been made, the courts found ways to maintain the viability of the plaintiff parent's suit. In *Emery v. Gowen*,⁷⁰ the seduced woman had, at sixteen, been indentured to her uncle, and the indenture was still intact at the time of her seduction and the litigation. However, she had left her uncle's house when he beat her, and, with no intention of returning home,⁷¹ had gone to live with her grandfather, with whom she stayed until returning home pregnant at age twenty. The trial court summarily dismissed the seduction action. The Maine Supreme Court reversed, saying that the decision depended on plaintiff father's having transferred his parental rights. Both the uncle and the father had not treated the indenture as such a transfer; thus, the father retained the right to the daughter's services as a matter of law.⁷²

In *Sargent v. Denniston*,⁷³ the plaintiff, a widowed mother, had indentured her daughter Eliza as a servant at age eleven. At age sixteen, Eliza returned home pregnant, her indentures cancelled by her employer for that reason. In a well-reasoned opinion, Justice Sutherland used the timing of the loss of services to avoid the effect of the supposed rule: no services were lost at the time of the seduction itself, but only at the time of lying-in and birth. To determine who was the proper plaintiff solely at the time of seduction would be to deny a cause of action to the parent of a daughter who changed employment after seduction but before lying-in. In such circumstances, the loss would be the same but

68. *Keller*, 5 Md. at 211; *Emery v. Gowen*, 4 Me. 30, 4 Greenl. 33 (1826). This again is stronger than the basis on which *Dean v. Peel* was distinguished by the New York court in *Martin v. Payne*. See *supra* note 63 and accompanying text. In *Dean*, all the court required was that the woman have a contractual employment relation with the other.

69. 2 Wend. 459, 10 N.Y.C.L. Rep. 195 (1829).

70. 4 Me. at 30, 4 Greenl. at 33.

71. Just as in *Dean v. Peel*, 102 Eng. Rep. 986, but the Maine court followed the United States rule (as in *Clark v. Fitch*, 2 Wend. 459, 10 N.Y.C.L. Rep. 195 (1829)) rather than the English.

72. 4 Me. at 37, 4 Greenl. at 40. Had the daughter remained in the employ of her uncle then he, and not the father, would have had the cause of action. *Id.* at 40, 4 Greenl. at 43.

73. 5 Cow. 106, 8 N.Y.C.L. Rep. 590 (1825).

there would be no proper plaintiff.⁷⁴

It cannot, therefore, be necessary to the theory or just principles by which this action is regulated, that the parent, in order to sustain it, should be entitled to the services of the daughter at the very instant when the act is committed which subsequently results in a loss of service or necessary pecuniary disbursements.⁷⁵

On this argument, provided the young woman actually went home once pregnant, no assignment of rights or employment contract could inhibit the cause of action. If she did not return home, then her employer would be the proper plaintiff.

These developments led the Illinois Supreme Court to say in 1846 that for a woman under the age of majority, basing the tort of seduction in loss of services had virtually disappeared: "But this doctrine has latterly been so completely frittered away by numerous decisions, both in this country and in England, that hardly a vestige of it now remains."⁷⁶ This obituary seems to have been premature. The court must have been unaware of the survival of the strict traditional doctrine in English decisions.⁷⁷ In 1850, the New York Court of Appeals⁷⁸ followed the English⁷⁹ rather than the United States cases to the opposite conclusion. It expressly rejected Justice Sutherland's argument⁸⁰ as insupportable "without an entire departure from the principle on which the action rests. There was no relation of master and servant between the plaintiff and the daughter, either actual or constructive at the time of the seduction."⁸¹ Chief Justice Bronson's long opinion held the tort to

74. *Id.* at 117, 8 N.Y.C.L. Rep. at 594; Justice Pennington made a similar argument in 1809: "Supposing a person should be bound a servant to A. for a month, and by the same indenture, also be bound to serve B. for a certain time, immediately succeeding the expiration of the service to A., and should be beat and wounded at the last hour of expiration of the service to A., by which he would not be able to perform the service due to B.; could B. maintain an action for this loss of service? I can perceive no reason why B. should not maintain this action" *Coon v. Moffitt*, 3 N.J.L. 169, 177 (1809).

75. 5 Cow. at 117-18, 8 N.Y.C.L. Rep. at 594.

76. *Anderson v. Ryan*, 8 Ill. 583, 586 (1846).

77. *E.g.*, *Grinnell v. Wells*, 7 Man. & G. 1033, 135 Eng. Rep. 419 (C.P. 1844) (a stepfather who purported to indenture his stepdaughter to serve another was not a proper plaintiff, but would have been if he had been the natural father).

78. *Bartley v. Richtmyer*, 4 N.Y. 38 (1850); *see also* *Heinrichs v. Kerchner*, 35 Mo. 378 (1865) (a mother had no parental authority over, or right of action for, her daughter's seduction where the father was alive at the time of the seduction but died before the birth).

79. *Grinnell*, 7 Man. & G. at 1033, 135 Eng. Rep. at 419; *Eager v. Grimwood*, 1 Ex. 61, 154 Eng. Rep. 26 (Exch. 1847).

80. *Sargent v. Denniston*, 5 Cow. 106, 8 N.Y.C.L. Rep. 590 (1825). *See supra* note 73 and accompanying text.

81. *Bartley v. Richtmyer*, 4 N.Y. at 46. The tone of the opinion is very hostile to the cause of action and in illustrations accepts the very hypothetical Justice Suther-

be founded strictly in the loss of services,⁸² requiring a master-servant relationship between the plaintiff and the woman, but only at the time of the seduction. Yet in similar circumstances, the Illinois Supreme Court wrote: "Our laws cannot be subjected to the reproach that they afford no remedy for so flagrant a wrong"⁸³ Clearly, the confusion that developed during the evolution of the tort from a purely economic foundation to a moral one was rife in the United States courts.

The early United States common law decisions also kept to the historical basis in limiting the range of allowable defenses and correspondingly, the types of evidence admissible. If the cause of action was for services lost because of pregnancy resulting from the defendant's seduction of the woman, then her chastity at or prior to the time of seduction should have been irrelevant. Similarly, the seductive artifices used by defendant, especially a promise of marriage, should also have been irrelevant. This reasoning was followed in the United States more strictly than in England, and evidence of these matters of morality was generally excluded.

When a defendant tried to put the moral character of the seduced woman in issue, the early United States decisions drew an interesting distinction.⁸⁴ If the evidence was intended as a defense it was inadmissible as irrelevant,⁸⁵ but if it was introduced for the purpose of reducing damages for loss of honor or mental and familial distress, then it was relevant and admissible.⁸⁶ Only if the plaintiff sought such damages would the defendant be permitted to challenge the woman's virtue, and then the appropriate evidence would be of her reputation rather than actual sexual activity.⁸⁷ This position seems to have been generally accepted.⁸⁸

land regarded as outrageous: the woman's employer is the seducer, but terminates the employment once she becomes pregnant; the parent, who suffers both in honor and pocket, has no cause of action. Termination of employment, in the view of Chief Justice Bronson of the New York Court of Appeals in 1850, would insulate the defendant. *Id.*

82. There is a note of morality at the end where Bronson suggests that the woman's willingness at the time of the seduction would be a defense. 4 N.Y. at 50.

83. *Ball v. Bruce*, 21 Ill. 161, 163 (1859) (action for seduction may be maintained not only by a natural parent but also by a guardian standing *in loco parentis* to the person seduced).

84. *E.g.*, *Akerley v. Haines*, 2 Cai. R. 291 (N.Y. Sup. Ct. 1805); *Seagar v. Sligerland*, 2 Cai. R. 218 (N.Y. Sup. Ct. 1804); *Wallace v. Clark*, 2 Tenn. (2 Overt.) 93 (1807).

85. *E.g.*, *Drish v. Davenport*, 2 Stew. 266 (Ala. 1830); *Wallace*, 2 Tenn. (2 Overt.) at 93; *Akerley*, 2 Cai. R. at 291.

86. *E.g.*, *Akerley*, 2 Cai. R. at 291; *Wallace*, 2 Tenn. (2 Overt.) at 93.

87. *E.g.*, *Drish*, 2 Stew. at 266.

88. A counter indication can be found in *Haynes v. Sinclair*, 23 Vt. 108 (1850), where the court held that a plaintiff could only give evidence of the woman's prior

This position rests on the assumption that damages ultra services are for actual suffering and are not exemplary or punitive. To some extent this may have been because the defendants in some circumstances were subject to criminal prosecution for seduction or fornication.⁸⁹ For example, in an early New Jersey case defense witnesses were excused from testifying as to their relations with the plaintiff's daughter because of the possibility of prosecution for fornication.⁹⁰ Thus, the seduced woman's morality was not generally at issue. However, the plaintiff parent's consent to the woman's "debauchery" was, predictably, an admissible and effective defense.⁹¹ Actual parental consent was required; mere lack of ordinary prudence in supervising the young woman would not do.⁹²

Unlike their English predecessors, United States courts also tended to take an unequivocal attitude toward the admissibility of evidence of the defendant's promise of marriage. From the very earliest cases, the possibility that the jury might award damages for breach of promise of marriage when the seduced woman still had an independent cause of action in her own right for that breach resolved the question.⁹³ Promise of marriage as a weapon of seduction was not mentionable at a trial.⁹⁴ This position was held more firmly than in the English courts,⁹⁵ and a special instruction to the jury would not suffice.⁹⁶

Damage awards in the early United States decisions were similar to the English. Damages bore little relation to actual serv-

virtue if it had been attacked by defendant, thus indicating that such an attack might be acceptable.

89. Such prosecutions were rare at these early dates and seem only to have become common under state statutes in the second half of the 19th century.

90. *Vaughn v. Perrine*, 3 N.J.L. 299, 2 Penning. 728 (1811). In *Wilson v. Sproul*, 3 Pen. & W. 49 (Pa. 1831), it was held irrelevant that the defendant had previously been prosecuted for "fornication and bastardy" with the fine going to the seduced woman.

91. *E.g.*, *Akerley v. Haines*, 2 Cai. R. 291 (N.Y. Sup. Ct. 1805); *Seagar v. Sligerland*, 2 Cai. R. 218 (N.Y. Sup. Ct. 1804); *McCrae v. Lilly*, 23 N.C.(1 Ired.) 118 (1840); *Hollis v. Wells*, 3 Clark 169, 5 Pa. Law J. 30 (1845).

92. *E.g.*, *Parker v. Elliott*, 6 Va. 867, 6 Munf. 587 (1820).

93. *E.g.*, *Foster v. Scofield*, 1 Johns. 297 (N.Y. 1806).

94. *E.g.*, *Drish v. Davenport*, 2 Stew. 266 (Ala. 1830); *Gillet v. Mead*, 7 Wend. 193, 11 N.Y.C.L. Rep. 102 (1831); *Clark v. Fitch*, 2 Wend. 459 (N.Y. 1829); *Foster*, 1 Johns. 297; *Haynes v. Sinclair*, 23 Vt. 108 (1850). But see *Mudd v. Clements*, 17 F. Cas. 954 (C.C.D.C. 1826) (No. 9900) (promise of marriage was admissible to show a means of seduction).

95. Compare *Tullidge v. Wade*, 3 Wils. 18, 19, 95 Eng. Rep. 909, 909 (K.B. 1769) (admission into evidence of promise of marriage during seduction suit was erroneous but not reversible error).

96. *E.g.*, *Kip v. Berdan*, 20 N.J.L. 239 (1843).

ices lost and appealing their excess was ineffective.⁹⁷ Exemplary damages were accepted,⁹⁸ although they were characterized as compensation for distress and loss of honor.⁹⁹ On occasion, courts openly acknowledged that seduction damages could be punitive.¹⁰⁰ In such cases, evidence of the defendant's economic and social position was admissible because "wealth and standing in society will, in a considerable degree, determine the amount of damages."¹⁰¹ For example, where a defendant was shown to have a net worth of \$18,000, a damage award of \$1,800 was held appropriate.¹⁰² As with the English cases, the United States decisions tended to ignore the economics of lost services in favor of honor and morality when the question turned to damages.

The tort of seduction evolved in the United States from the same roots as it did in England. Although theoretically and procedurally the tort provided a remedy for the loss of services consequent upon seduction and pregnancy, morality was inescapably involved, especially in damage awards. The United States decisions tended to be more formal in characterizing the action and in determining the admissibility of evidence, using a strict, historical theory of the action. They were, however, more imaginative in justifying exceptions to the formal constraints of that theory. For example, the more adventuresome jurists argued on the basis of actual losses for a liberalization of the class of possible plaintiffs. Nevertheless, despite the intrusion of morality in some of its aspects, the tort still remained rooted to the old writ: *per quod servitium amisit*. No appellate cases seeking damages simply for the loss of virginity or family honor in the absence of a subsequent pregnancy or other incapacity can be found in the early common law period. Nor are there reports of actions brought by the seduced woman on her own behalf.¹⁰³

97. *E.g.*, *Applegate v. Ruble*, 9 Ky. 563 (1819); *McRae v. Lilly*, 23 N.C. (1 Ired.) 118 (1840); *Keller v. Donnelly*, 5 Md. 211 (1853).

98. *E.g.*, *Stout v. Prall*, 1 N.J.L. 93 (1791); *Clark*, 2 Wend. at 459; *Applegate*, 9 Ky. at 563; *Stevenson v. Belknap*, 6 Iowa 97 (1858).

99. *E.g.*, *Stout*, 1 N.J.L. at 93.

100. *E.g.*, *Grable v. Margrave*, 4 Ill. 372 (1842); *Stevenson*, 6 Iowa at 97.

101. *Grable*, 4 Ill. at 373.

102. *Applegate*, 9 Ky. at 563.

103. However, by midcentury, seduction had begun to appear in breach of promise to marry actions as a source of increased damages. Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 45-49 (1985).

C. *The Development of the Tort in Common Law
After 1850*

As of the middle of the nineteenth century, the common law tort of seduction had reached a relatively stable compromise between its origins in the writ of *per quod servitium amisit* and the moral offense, but the formal basis in loss of services was still dominant. Statutory revision¹⁰⁴ began in Michigan and Virginia in 1846 and 1849 respectively, with the the passage of statutes removing the requirement of alleging loss of services.¹⁰⁵ Alabama and Iowa followed; in 1852 Alabama permitted the seduced woman to sue in her own right,¹⁰⁶ and in 1851, Iowa provided for both of these revisions.¹⁰⁷ Clearly, these statutes directed attention away from the economic basis and toward the moral; the same refocusing occurred in the courts.

From the mid nineteenth century on, the moral and honorific aspects of seduction became progressively more dominant in the common law, but until very recently, never quite displaced the economic roots. Today, seduction remains a common law tort in eighteen states¹⁰⁸ and the District of Columbia. In most of these jurisdictions the cause of action is now moribund, if not necessarily extinct.

The first noticeable change after the initial common law period exemplifies the gradual shift from economic to moral offense. Many decisions kept to the traditional requirement of proof of a loss of capacity to work;¹⁰⁹ mere shame and dishonor were not enough.¹¹⁰ Thus, a pregnancy or incapacitating venereal infection consequent upon the seduction was essential to the action.¹¹¹ The seductive technique of the defendant and the consent of the woman were utterly irrelevant.¹¹² However, courts also began to em-

104. See *infra* notes 209-36 and accompanying text.

105. Mich. Rev. Stat. §§ 6195-6197 (1846); Va. Code tit. 44, ch. 148, § 1 (1849).

106. Ala. Code pt. 3, tit. 1, ch. 1, § 2133 (1852).

107. Iowa Code tit. 19, ch. 100, §§ 1696-1697 (1851). Many states enacted similar provisions in the latter part of the 19th century.

108. Arkansas, Arizona, Connecticut, Hawaii, Kansas, Maine, Maryland (in 1857 Maryland enacted a statute—now part of Md. Fam. Law Code Ann. § 5-206 (1984)—expressly recognizing the common law cause of action), Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Wisconsin.

109. *E.g.*, *Abrahams v. Kidney*, 104 Mass. 222 (1870); *Wendt v. Lentz*, 197 Wis. 569, 222 N.W. 798 (1929).

110. *E.g.*, *Knight v. Wilcox*, 14 N.Y. 413 (1856), *rev'd* 15 Barb. 279 (N.Y. App. Div. 1853).

111. *E.g.*, *White v. Nellis*, 31 Barb. 279 (N.Y. App. Div. 1859), *aff'd*, 31 N.Y. 405 (1865).

112. *E.g.*, *Koenke v. Bauer*, 162 Mo. App. 718, 145 S.W. 506 (Ct. App. 1912); *Auley v. Birkhead*, 35 N.C. 28 (1851); *Reed v. Williams*, 37 Tenn. (5 Sneed) 580 (1858).

phasize the everyday notion of seduction, holding that unless the plaintiff could show that it was the defendant's use of some seductive artifice that made the woman submit despite her better judgment, the cause of action failed.¹¹³ On this view, the woman's consenting to intercourse would be a relevant defense,¹¹⁴ as would her prior lack of chastity.¹¹⁵ Yet, despite this shift of emphasis (and in the absence of statutory authorization), there is a paucity of cases involving no incapacity or loss of some services.¹¹⁶ The plaintiff still had to allege and show loss of services or the right thereto.¹¹⁷

As the emphasis shifted from the economic basis of services to morals, and as legislatures began to recognize that the cause of action should belong to the woman, one would also expect that the courts would have begun to entertain suits by the seduced woman. This would surely have been the reasonable course where the offense was moral and the woman an emancipated adult. Yet the courts steadfastly continued to refuse to recognize the woman victim as plaintiff.¹¹⁸ There are really only two true exceptions, but a number of pseudo-exceptions also are instructive.

The first exception was *Smith v. Richards*,¹¹⁹ an 1860 Connecticut Supreme Court decision with facts as egregious as can be imagined. Involved were two fourteen-year-old girls, both orphans, both in the care of a charitable home.¹²⁰ Richards was in the practice of obtaining such girls on the pretense of offering them a suitable home and protection in return for services, but in reality to seduce, debauch, and introduce them to prostitution. The court found that the young women were damaged, not by

113. *E.g.*, *Bell v. Rinker*, 29 Ind. 267 (1868); *Smith v. Young*, 26 Mo. App. 575 (Ct. App. 1887); *Franklin v. McCorkle*, 84 Tenn. 609, 1 S.W. 250 (1886); *Rockwell v. Day*, 101 Wash. 580, 172 P. 754 (1918).

114. *E.g.*, *Lawyer v. Fritcher*, 130 N.Y. 239, 29 N.E. 267 (1891).

115. *E.g.*, *White v. Murtland*, 71 Ill. 250 (1874); *Owens v. Fanning*, (Mo. Ct. App. 1918) (defendant was not permitted to introduce evidence of the woman's reputation "after her ruin"); *Finch v. Gibson*, 140 Tenn. 134, 203 S.W. 759 (1918) (prior virginity a material element).

116. *But see Ogborn v. Francis*, 44 N.J.L. 441 (1882).

117. *E.g.*, *Simpson v. Grayson*, 54 Ark. 404, 16 S.W. 4 (1891); *Beaudette v. Gagne*, 87 Me. 534, 33 A. 23 (1895) (when the daughter is of the legal age of majority, she must be in plaintiff's household); *Greenwood v. Greenwood*, 28 Md. 369 (1868); *Blagge v. Ilesley*, 127 Mass. 191 (1879); *Tillotson v. Currin*, 176 N.C. 479, 97 S.E. 395 (1918); *Mohry v. Hoffman*, 86 Pa. 358 (1878).

118. The first genuine extension of the right of action to the seduced woman did not occur until 1977. *See Breece v. Jett*, 556 S.W.2d 696 (Mo. Ct. App. 1977).

119. 29 Conn. 232 (1860).

120. The suit was brought by the girls' next friend on a promissory note given in settlement of the prior seduction action; the defense was want of consideration, there being no action for seduction available to the party seduced. Thus, the propriety of the victims' seduction action was directly in issue.

pregnancy or venereal infection, but in their "disgrace, and in loss of virtue and of character and of peace of mind, and . . . greatly injured . . . health."¹²¹ The court's outrage is readily apparent. Although the opinion states that "there may be circumstances connected with the act of such a character as to take the case out of the general rule"¹²² for seduction suits, the actual basis for its decision was the identification of the cause of action with fraud and deceit.¹²³

The second true exception, *Graham v. Wallace*,¹²⁴ is almost as egregious. The plaintiff was orphaned at fourteen; the defendant, the husband of a relative, was her court-appointed guardian. There was no claim of pregnancy or other incapacity. The court said: "There being no parent or master to bring the action, if the ward may not maintain it, no one else can."¹²⁵ Furthermore, in these circumstances "the guardian into whose custody and control the court delivered the infant may claim and exercise the privilege of seducing his ward without becoming responsible to the infant in a civil action for damages for the wrong and injury."¹²⁶ There is a discussion of guardianship law, including the obligation of the guardian to "promote the moral welfare" of the ward—a duty the ward cannot waive—so that her alleged consent "under such circumstances is no consent, and should stand for naught."¹²⁷ Thus the court found, as an exception to the general rule, that "[h]e has willfully corrupted her morals where it was his duty to guard and protect them, and he must make some reparation, though inadequate, by being held to answer to her in damages."¹²⁸ Who could disagree?

Just how narrowly the exception in *Graham v. Wallace* was construed is shown by the Minnesota Supreme Court's decision in *Welsund v. Schueller*.¹²⁹ The plaintiff was, at the time of seduction, a sixteen-year-old immigrant who spoke no English and had only one relative in the United States, an uncle who depended on

121. 29 Conn. at 234. In an unnumbered footnote, the court approved of this language used in the declarations in the suits.

122. *Id.* at 240.

123. *Id.* at 241. An additional reason pertains to the negotiable instrument: at the time of its making the defendant recognized the value of the consideration.

124. 50 App. Div. 101, 63 N.Y.S. 372 (1900). The facts are, however, matched in this respect by those of *Strider v. Lewey*, 176 N.C. 448, 97 S.E. 398 (1918), another case of the seduced woman as plaintiff but coming under North Carolina's special exception, discussed at *infra* notes 141-51 and accompanying text.

125. 50 App. Div. at 102, 63 N.Y.S. at 373.

126. *Id.*

127. *Id.* at 108, 63 N.Y.S. at 377.

128. *Id.*

129. 98 Minn. 475, 108 N.W. 483 (1906).

her for support. The defendant was the son of the family for whom she worked as a servant. Included in his repertoire of seductive devices were threats of dismissal from employment. When the young woman became pregnant, the defendant left, returning after five years to be greeted with her seduction suit. The Minnesota court noted both the statutory exceptions and the Connecticut Supreme Court's decision in *Smith v. Richards*, but nevertheless affirmed the summary dismissal of the young woman's suit.¹³⁰

It is noteworthy that the courts in both of the true exception cases—*Smith v. Richards* and *Graham v. Wallace*—took pains to describe their decisions in terms of possible causes of action other than seduction. In *Smith v. Richards* it was fraud and deceit;¹³¹ in *Graham v. Wallace* it was breach of duty under guardianship law.¹³²

Although not many such cases reached the appellate level, in most of those that did, courts had little difficulty in rejecting the suit of the seduced woman. As the emphasis shifted from the economic loss of services to the moral offense, however, the reason for barring the woman's suit also changed. No longer was she the servant whose services were lost rather than the one deprived of the services;¹³³ now she was barred because she had consented to the act.¹³⁴ Being *in pari delicto*, she was precluded by the doctrine of *volenti non fit injuria*.¹³⁵

We do not pretend that this makes sense; quite the contrary. As the tort developed, actual seduction became a prerequisite: the woman had to have "been induced to consent to unlawful sexual relations by persuasion and the promise to marry," to be "deceived

130. *Id.*

131. 29 Conn. 232, 241 (1860).

132. 50 App. Div. at 103-09, 63 N.Y.S. at 374-77. The theme of using other tort actions in an action by the seduced woman was taken up explicitly by the Florida Supreme Court in *Kirkpatrick v. Parker*, 136 Fla. 689, 187 So. 620 (1939). For the seduced woman to succeed as plaintiff, the court said, there would have to be some independent "tortious trespass" upon her. As she had not alleged "undue influence, force, duress or other overpowering influence or dominating or fiduciary control over her by the defendant, and there [was] no direct allegation that the defendant *promised* to marry the plaintiff," she failed in her seduction action. 136 Fla. at 697, 187 So. at 623-24.

133. *E.g.*, *Roper v. Clay*, 18 Mo. 383 (1853).

134. *E.g.*, *Hamilton v. Lomax*, 26 N.Y. Sup. Ct. (Barb.) 615, 617 (1858) ("[She cannot] maintain an action for such seduction, because the person seduced assents thereto.") See also *Colly v. Thomas*, 99 Misc. 158, 163 N.Y.S. 432 (1917); *Hutchins v. Day*, 269 N.C. 607, 153 S.E.2d 132 (1967); *Oberlin v. Upson*, 84 Ohio St. 111, 95 N.E. 511 (1911).

135. "One who consents cannot receive an injury." See, *e.g.*, *Kirkpatrick*, 136 Fla. at 689, 187 So. at 620; *Paul v. Frazier*, 3 Mass. 71 (1807); *Hamilton*, 26 N.Y. Sup. Ct. at 615; *Hutchins v. Day*, 269 N.C. 607, 153 S.E.2d 132 (1967); *Colly*, 99 Misc. at 158, 163 N.Y.S. at 432.

by arts and blandishments, corrupted and drawn aside from the right path."¹³⁶ In other words, the seduction may have involved consent, but under diminished responsibility or incapacity induced by seductive artifices.¹³⁷ Actual, willing consent was thus a defense. How then could this diminished consent bar the woman from suing in her own right? Clearly, judges were struggling to find a way to justify a decision fitting the cause of action as it had come down to them in the precedents. Now, however, the original rationale no longer applied.¹³⁸ So long as one did not have to juxtapose the contradictory elements in the same opinion, expediency was effective, at least for a reasonable time.

This brings us to the first of the pseudo-exceptions to the general rule that a woman could not sue for her own seduction: actions involving statutory rape. If the seduced woman was, at the time of the seduction, under the legislatively determined permissible age,¹³⁹ she was, by statute, incapable of consenting to sexual intercourse. Under the new fiction that she was barred as a plaintiff in seduction because of her consent, a woman legally incapable of consent had to be excepted. Thus, where the seduction was statutory rape, a jury verdict in favor of the seduced woman could be upheld.¹⁴⁰

The most interesting group of pseudo-exceptions comes from North Carolina. North Carolina judges were well aware of the fictional nature of the historical basis of the tort of seduction. The father's right to sue for loss of services was "a figment of the law,

136. *Breece v. Jett*, 556 S.W.2d 696, 705 (Mo. Ct. App. 1977) (citing *Clemons v. Sheba*, 131 Mo. App. 378, 379, 111 S.W. 522, 523 (1908); *State v. Wheeler*, 108 Mo. 658, 662, 18 S.W. 924, 925 (1892)). See also *Hutchins v. Day*, 269 N.C. 607, 153 S.E.2d 132 (1967).

137. It thus became a significant question whether a seduction action would lie in a case of rape—where there is no consent at all. Courts answered in the affirmative: *Monahan v. Clemons*, 212 Ky. 504, 279 S.W. 974 (1926); *Kennedy v. Shea*, 110 Mass. 147 (1872); *Dalman v. Koning*, 54 Mich. 320, 20 N.W. 61 (1884). One would have thought that it would take considerable chutzpa to defend and appeal on this ground, but there are a number of such cases reported.

138. Thus in both the true exceptions, *Smith v. Richards*, 29 Conn. 232 (1860) (fraud and deceit), and *Graham v. Wallace*, 50 App. Div. 101, 63 N.Y.S. 372 (1900) (breach of duty under guardianship law), rather than meet the problem head on the courts struggled to find theories other than seduction on which to base the appropriate holding.

139. In *Colly v. Thomas*, 99 Misc. 158, 163 N.Y.S. 432 (1917), the applicable statute, N.Y. Penal Law § 2010 (Consol. 1909), made sexual intercourse with a woman under the age of 18 "rape in the second degree."

140. *E.g., Colly*, 99 Misc. at 158, 163 N.Y.S. at 432; *Huempfer v. Bailly*, 36 S.D. 533, 156 N.W. 78 (1916) (a case in which the causes of action for seduction and breach of promise of marriage get thoroughly confused); *Robinson v. Moore*, 408 S.W.2d 582 (Tex. Civ. App. 1966) (Texas allows the rape victim a civil remedy).

to open to him the door for the redress of his injury,"¹⁴¹ but was, nevertheless, "the substratum, on which the action is built. The actual damage, which he has sustained . . . exists only in the humanity of the law, which seeks to vindicate his outraged feelings. He comes into the court as a master—he goes before the jury as a father."¹⁴² Later, however, the 1868 North Carolina Constitution provided that "feigned issues" should be abolished;¹⁴³ this was reinforced by legislation providing that "an action should be brought by the real party in interest."¹⁴⁴

When in 1892 Ellen Hood sued her seducer¹⁴⁵—the son of her employer—for damages resulting from her pregnancy and "sorrow and distress upon herself and her family,"¹⁴⁶ she found the North Carolina Supreme Court ready to recognize the contradictions inherent in the prevailing theory and to implement these constitutional and statutory provisions. Of the theory that the woman's suit was barred by her consent, Justice Clark wrote that "consent procured by fraud is not consent."¹⁴⁷ The cause should, and henceforth in North Carolina would, "rest on the true issue of damages for the wrong done."¹⁴⁸ Accordingly, "it should be beyond controversy that where an action is for seduction of a woman of full age, she, and not the father, is the proper one to bring the action."¹⁴⁹ This would have been a fine and sensible decision if decided purely under common law, but it is notable that it took a constitutional provision reinforced by a general statute to wrench the judiciary away from the force of precedent, however irrational. *Hood v. Sudderth* became the law in North Carolina¹⁵⁰ and was extended to a minor woman in 1918.¹⁵¹

141. *Briggs v. Evans*, 27 N.C. (5 Ired.) 16, 20 (1844). Even earlier, in *McClure v. Miller*, 11 N.C. (4 Hawks) 133, 137 (1825) (Taylor, C.J.), that the father was the injured party was called "one of the quaintest fictions in the world."

142. *Briggs*, 27 N.C. (5 Ired.) at 20.

143. N.C. Const. art. IV, § 1.

144. 1 N.C. Code, ch. 10, tit. 4, § 177 (1883).

145. *Hood v. Sudderth*, 111 N.C. 215, 16 S.E. 397 (1892).

146. *Id.* at 216, 16 S.E. at 398.

147. *Id.* at 219-20, 16 S.E. at 399.

148. *Id.* at 219, 16 S.E. at 399.

149. *Id.*

150. *E.g.*, *Tillotson v. Currin*, 176 N.C. 479, 97 S.E. 395 (1918); *Hyatt v. McCoy*, 194 N.C. 25, 138 S.E. 405 (1927).

151. *Strider v. Lewey*, 176 N.C. 448, 97 S.E. 398 (1918). Plaintiff was a remarkably naive child; defendant was her recently widowed grandfather, with whom she had lived and slept since she was an infant. In addition to claiming that the minor woman plaintiff had no right to sue, the defendant also argued her equal criminality in incest, a defense avoided by diminished responsibility. The court's outrage is shown by its description that defendant "took advantage of her youth and inexperience and, with wicked and diabolical design upon her innocence and virtue, induced

While other states have similar constitutional and statutory provisions, it was not until 1974¹⁵² and 1977¹⁵³ that other courts made similar use of them.¹⁵⁴ The Michigan Supreme Court in 1883¹⁵⁵ found a right of action in the seduced woman implied in the statutes¹⁵⁶ eliminating services and allowing her to authorize a relative to sue on her behalf. This, however, was really a statutory rather than a judicial innovation and will be discussed below.¹⁵⁷

Two other cases that are sometimes cited as exceptions, *Doe v. Horn*¹⁵⁸ and *Comer v. Taylor*,¹⁵⁹ are really the result of the confusion of seduction with breach of promise to marry. As more states by statute permitted the seduced woman to sue,¹⁶⁰ and as

her to submit to his wishes and have sexual intercourse with him." *Id.* at 449, 97 S.E. at 398-99.

152. *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974). The provision was art. I, § 9 of the Wisconsin Constitution: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character." In extending the cause of action to the seduced woman, the court added a limitation: "A woman may recover damages for her seduction where the act or acts of seduction are induced by false or fraudulent representations." 62 Wis. 2d at 312, 215 N.W.2d at 18-19.

153. *Piggott v. Miller*, 557 S.W.2d 692 (Mo. App. 1977) (used Missouri's "real party in interest" statute, Mo. Rev. Stat. § 507.010 (1969)).

154. The Florida Supreme Court declined to use constitutional and statutory provisions in *Kirkpatrick v. Parker*, 136 Fla. 689, 187 So. 620 (1939).

155. *Watson v. Watson*, 49 Mich. 540, 14 N.W. 489 (1883).

156. Mich. Comp. Laws, tit. 30, ch. 194, §§ 6195-97 (1872).

157. See *infra* notes 214-17 and accompanying text.

158. *Doe on the Demise of Hutchinson v. Horn*, 1 Ind. 363 (1849). This was actually an ejectment action. Jourdan had arrived in Indiana, apparently a bachelor, married Matilda Beard, set up a farm, and had two children. He still, however, had a wife in Virginia. Ten years later a creditor obtained a judgment against him; in order to avoid losing his land, Jourdan told Matilda of his prior marriage, assigned the land to her, and disappeared. Matilda knew nothing of the creditor. The question, therefore, was whether "the deceit and injury he had inflicted upon her" counted as consideration for the assignment. *Id.* at 364. The court held that it did, but in so doing approved, among others, the jury instruction: "[T]he seduction of an innocent woman, under such circumstances as were disclosed in the present case, entitles the injured party to a compensation in money, and will be deemed in law a valuable consideration for a grant." *Id.* at 365. Matilda and Horn, her new husband, kept the land and this strange case became an "exception" to the general rule barring the seduced woman from suing.

159. 82 Mo. 341 (1884). The father sued for seduction, seduction under promise of marriage, and scandal and infamy; he was awarded damages for all three. The Missouri Supreme Court reversed, saying he had only one cause of action—seduction. Regarding the second count, "seduction accomplished under a breach of promise of marriage," the court said: "For such breach of contract the woman alone could maintain action." *Id.* at 344. Thus the Missouri court rejected the potential double recovery that Chief Justice Wilmot had contemplated with such equanimity in *Tullidge v. Wade*, 3 Wils. 18, 95 Eng. Rep. 909 (K.B. 1769). This was a breach of promise to marry, not a seduction decision.

160. By 1890 Alabama, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Mississippi, North Dakota, and Oregon all had such statutes; see *infra* notes 209-36 and accompanying text.

the occasional judicial exception appeared, courts began to confuse these distinct actions.¹⁶¹ In actions for breach of promise to marry (in which the woman herself had long been the proper plaintiff), damage awards for seduction¹⁶² became more frequent during the latter part of the nineteenth century.¹⁶³ This is, perhaps, the source of the common but erroneous conflation of seduction to seduction under breach of promise to marry.¹⁶⁴ The two causes of action—seduction and breach of promise—were distinct.

It took until 1977 for a common law court, the Missouri Court of Appeals, to take issue directly with the traditional rule banning suit by the seduced woman.¹⁶⁵ The plaintiff was a thirty-year-old divorced woman who was seduced and embezzled under promise of marriage. Chief Judge Simeone, in writing a veritable treatise on the tort, noted the paucity of precedential cases in Missouri (eighteen) and the length of time since the last case (fifty years).¹⁶⁶

The facts were such as would sway the heart of any normal person, and so it was with the court, but it faced two problems: how could a divorced mother of an eight-year-old daughter be previously chaste? Also, could the woman herself sue? The question of the chastity of a divorced woman had been addressed and resolved by many other courts. Chastity is not the same as virginity; a woman may "fall" but subsequently reform so as once more to be the potential victim of the seducer's wiles.¹⁶⁷ "Seduction presupposes chastity, but it would not do to hold that chastity once lost can never be regained."¹⁶⁸

In addressing the question of the woman's right to sue, Chief

161. In earlier cases the promise to marry was, like other seductive artifices, inadmissible as irrelevant. See *supra* notes 93-96 and accompanying text.

162. For example, in *Lichliter v. Russell*, 89 Ill. App. 62, 63 (App. Ct. 1899), the Illinois Court of Appeals affirmed a judgment for the woman based on breach of promise of marriage "aggravated by seduction."

163. Grossberg, *supra* note 103, at 45-49 (1985). Professor Grossberg shows clearly the connection of this development in law and the changing conception of the moral role of women.

164. *E.g.*, *Boedges v. Dinges*, 428 S.W.2d 930 (Mo. Ct. App. 1968).

165. *Breece v. Jett*, 556 S.W.2d 696 (Mo. Ct. App. 1977). In a 1968 case confusing seduction and breach of promise actions brought by the seduced woman and both her parents, the same court with little discussion upheld an award of \$400 to the parents for medical expenses and \$12,500 to the woman for the breach and perhaps, for the seduction. *Boedges*, 428 S.W.2d at 930.

166. The last reported case was *Owens v. Fanning*, 205 S.W. 69 (Mo. Ct. App. 1918). Chief Judge Simeone notes in *Breece v. Jett* the possible exception of *Boedges v. Dinges*. *Breece*, 556 S.W.2d at 707.

167. *E.g.*, *Fulgham v. Gatfield*, 72 Idaho 367, 241 P.2d 824 (1952); *Kralick v. Shuttleworth*, 49 Idaho 424, 289 P. 74 (1930); *Haeissig v. Decker*, 139 Minn. 422, 166 N.W. 1085 (1918); *Breon v. Hinkle*, 14 Or. 494, 13 P. 289 (1887).

168. *Haeissig*, 139 Minn. at 423, 166 N.W. at 1085. "[T]he law gives her an opportunity to repent and reform." *Id.*

Judge Simeone first provided a history of the tort and the reason for barring the woman's suit—namely, her consent to the “illicit intercourse.”¹⁶⁹ He dealt with the basis in services as fictional, but did not address the contradiction in the newer justification of consent. Rather, he based the extension of the cause to the seduced woman on precedents developed in other jurisdictions for special circumstances:¹⁷⁰

If it were alleged that the defendant committed a tortious trespass upon her person in which she was not *particeps criminis* or *in pari delicto* and there was undue influence, force, duress, overpowering influence or a dominating fiduciary control over her or where there was a promise of marriage, the woman could maintain the action for seduction in her own name.¹⁷¹

These are just the factors necessary to turn ordinary consensual intercourse into tortious seduction, so the extension of the cause of action to the seduced woman is clearly general. This is a long way from the early cases treating the woman only as a servant and requiring proof of services. It was, however, a very long time in coming, and perhaps, as Chief Judge Simeone himself suggests,¹⁷² arrived only at a time more suitable for the final extinction of the tort.¹⁷³

Apart from this extension of the right of action to the seduced woman, little else changed in the common law tort of seduction from the mid-nineteenth century to the present. It became commonplace to account for damages as exemplary or punitive,¹⁷⁴ and to allow evidence of defendant's wealth so that the jury might determine the appropriate amount of damages.¹⁷⁵ Emotional distress, suffering, and loss of honor displaced loss of services as the

169. *Breece*, 556 S.W.2d at 705.

170. *Id.* The precedents used are those discussed above and perhaps *Bowman v. Hart*, 161 Tenn. 402, 33 S.W.2d 58 (1930), a case falling squarely under the long-standing Tennessee statute (Tenn. Code § 4501 (1896), modeled on Ala. Code § 2133 (1852)), giving the seduced woman the right to sue. These statutes scarcely support the more liberal development in this case.

171. 556 S.W.2d at 705 (citing *Kirkpatrick v. Parker*, 136 Fla. 689, 187 So. 620 (1939)). The sources of the last part of this language are *Paul v. Frazier*, 3 Mass. 71 (1807), a case confusing seduction and breach of promise, as well as the statutory rape case of *Colly v. Thomas*, 99 Misc. 158, 163 N.Y.S. 432 (1917).

172. 556 S.W.2d at 707-08.

173. Chief Judge Simeone's opinion was adopted within six weeks in *Piggott v. Miller*, 557 S.W.2d 692 (Mo. Ct. App. 1977), although the court in that case bolstered the position with an argument under Missouri's “real party in interest” statute, Mo. Rev. Stat. § 507.010 (1969).

174. *E.g.*, *Graham v. Smith*, 46 Tenn. App. 549, 330 S.W.2d 573 (Ct. App. 1959) (\$20,000 held not to be an excessive award); *Lavery v. Crooke*, 52 Wis. 612, 9 N.W. 599 (1881).

175. *E.g.*, *Lavery*, 52 Wis. at 612, 9 N.W. at 599; *Marshall v. Taylor*, 98 Cal. 55, 56, 32 P. 867, 868 (1893) (\$25,000 award sustained where defendant was a married “man of mature years, [and] large property interests”).

significant aspect of damages,¹⁷⁶ with a high of \$25,000 being reached in the 1915 South Dakota case, *Eller v. Lord*.¹⁷⁷ As proof of seduction in the moral sense became relevant, evidence of promises of marriage, importunings of love, and other sundry seductive devices became the rule rather than the exception,¹⁷⁸ and were even held to be an essential part of the plaintiff's case.¹⁷⁹

Two state supreme courts, those of Illinois and Massachusetts, have greatly limited the availability of seduction as a cause of action. In both states, the decisions involved statutes peripheral to seduction. In 1947, Illinois adopted legislation limiting recovery in alienation of affections, breach of promise, and criminal conversation actions to actual damages, barring consideration of such factors as the defendant's wealth or injury to the plaintiff's feelings.¹⁸⁰ Although seduction was not explicitly abolished or limited by this legislation, the preamble indicates a preference for the criminal law, rather than tort law, for seduction actions.¹⁸¹ The preamble merely states policy, not law. As the statute expressly limits the other heart balm actions, it appears that the abolition of civil seduction was not intended. Yet in *Smith v. Hill*,¹⁸² the Illinois Supreme Court held that a woman cannot bring a cause of action for her own seduction, and that seduction was merely evidence of aggravation of damages in actions for breach of contract to marry.¹⁸³ Thus the Supreme Court of Illinois so en-

176. *E.g.*, *Haeissig v. Decker*, 139 Minn. 422, 166 N.W. 1085 (1918); *Dwire v. Stearns*, 44 N.D. 199, 172 N.W. 69 (1919).

177. 36 S.D. 377, 154 N.W. 816 (1915) (the 15-year-old daughter's personality changed and she now wanted liquor, cigarettes, and the like).

178. In most 20th century cases this hitherto inadmissible evidence was a part of the case.

179. *E.g.*, *Seamons v. Spackman*, 81 Idaho 361, 341 P.2d 442 (1959); *Breece v. Jett*, 556 S.W.2d 696 (Mo. Ct. App. 1977).

180. Ill. Ann. Stat. ch. 40, §§ 1901-1907 & 1954-1957 ch. 89, §§ 25-33 (Smith-Hurd 1980).

181. The preamble states:

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 limiting the damages recoverable in such actions, and by leaving any punishments of wrongdoers guilty of seduction to proceedings under the criminal laws of the state, rather than to the imposition of punitive, exemplary, vindictive or aggravated damages in actions for breach of promise or agreement to marry.

Ill. Ann. Stat. ch. 40, § 1801 (Smith-Hurd 1980).

182. 12 Ill. 2d 588, 147 N.E.2d 321 (1958).

183. *Smith v. Hill* involved a suit for breach of promise to marry, as well as for seduction, and challenged the constitutionality of the statute. The court upheld the statute and denied aggravated damages. There was a detailed dissent. 12 Ill. 2d at 598, 147 N.E.2d at 877. In *Siegall v. Solomon*, 19 Ill. 2d 145, 166 N.E.2d 5 (1960), the court also upheld the constitutionality of the 1947 Act as applied to an alienation of affections action.

twined seduction with the other heart balm actions that it could no longer stand alone as a tort action, despite the fact that seduction had previously been an independent common law cause of action in Illinois.¹⁸⁴

In 1938, Massachusetts enacted legislation abolishing the cause of action for breach of promise to marry.¹⁸⁵ This legislation was attacked in *Thibault v. Lalumiere*,¹⁸⁶ in which the court held that an action for seduction cannot be maintained independent of an action for breach of promise for marriage.¹⁸⁷ Since the 1938 legislation had abolished causes of action for breach of contract to marry, it followed that no action for seduction was available.¹⁸⁸ Thus, as in Illinois, the Massachusetts court moved from seduction as an independent tort to seduction as a mere aggravation of damages, although in neither state did a statute explicitly limit seduction.¹⁸⁹

In the last twenty-five years, there has been little significant appellate action in the common law jurisdictions. Seduction, in its classical form, was held to be a valid cause of action in Pennsylvania in 1960, and the plaintiff was given twenty days to amend his complaint to allege the loss of his daughter's services.¹⁹⁰ In 1962, the Arizona Supreme Court affirmed a judgment for the plaintiff on a statute of limitations question.¹⁹¹ The Texas Court of Appeals reiterated the traditional parties requirement in 1966, but as the plaintiff was below the statutory age and thus incapable of consent at the time of seduction, she was permitted to proceed.¹⁹² In 1967, the North Carolina Supreme Court found that the plaintiff had failed to prove that the "intercourse [was] induced by deception, enticement or other artifice" and affirmed the

184. *Mighell v. Stone*, 175 Ill. 261, 51 N.E. 906 (1898).

185. 1938 Mass. Acts ch. 350, § 1 (codified at Mass. Ann. Laws ch. 207, § 47A (Michie/Law Co-op. 1981)).

186. 318 Mass. 72, 60 N.E.2d 349 (1945).

187. The court had an ancient Massachusetts oddity, *Paul v. Frazier*, 3 Mass. 71 (1807), for support.

188. 318 Mass. at 75, 60 N.E.2d at 351. In *DeCicco v. Barker*, 339 Mass. 457, 159 N.E. 2d 534 (1959), however, the court, in allowing a suit to recover engagement rings, questioned the broad language in *Thibault* and noted that "the statement was too inclusive." *Id.* at 459, 159 N.E.2d at 535.

189. Should a suitable case arise, however, these opinions could easily be distinguished, allowing the courts to entertain seduction actions, much as the New Jersey court boldly found a judicial exception to a statute clearly abolishing seduction actions in *Blackman v. Iles*, 4 N.J. 82, 71 A.2d 633 (1950).

190. *Whiteman v. Sarmiento*, 10 Ches. Co. Rep. 27, 22 Pa. D. & C.2d 384 (Pa. Comm. Pl. 1960).

191. *Skousen v. Nidy*, 90 Ariz. 215, 367 P.2d 248 (1962).

192. *Robinson v. Moore*, 408 S.W.2d 582 (Tex. Civ. App. 1966).

trial court's nonsuiting of her seduction claim.¹⁹³

The Missouri courts have entertained no less than four appellate cases in this period. The first, *Boedges v. Dinges*,¹⁹⁴ was a breach of promise action, with seduction possibly exacerbating damages. In 1977, two court of appeals panels permitted actions by the seduced woman, the first¹⁹⁵ on common law principles alone, the second¹⁹⁶ bolstering the argument with Missouri's "real party in interest" statute.¹⁹⁷ Finally, in 1980, the Missouri Court of Appeals found Massachusetts law applied and that Massachusetts had abolished the cause of action.¹⁹⁸

Slawek v. Stroh,¹⁹⁹ a 1974 Wisconsin case, was a declaratory judgment action by a young man seeking to have his rights as a father determined; the defendant mother counterclaimed in seduction. The court held that the Wisconsin Constitution required her, as the real party in interest, to be a permissible party plaintiff.²⁰⁰ The most recent common law seduction case was in 1980 in North Carolina where the court again found that the plaintiff had failed to prove "deception, enticement, or other artifice."²⁰¹ Six of the jurisdictions in which the common law cause of action survives have had appeals of seduction cases since 1960.²⁰² Thirteen have not.²⁰³

Despite its anachronistic flavor, the common law cause of action for seduction thus survives today unaffected by legislative or judicial abolition in nineteen jurisdictions.²⁰⁴ In *Breece v. Jett*, Chief Judge Simeone summed up the modern form of the tort as follows:

1. The action in this, unlike other states, is based upon the common law and is not a statutory action;

193. *Hutchins v. Day*, 269 N.C. 607, 609, 153 S.E.2d 132, 134 (1967).

194. 428 S.W.2d 930 (Mo. Ct. App. 1968).

195. *Breece v. Jett*, 556 S.W.2d 696 (Mo. Ct. App. 1977).

196. *Piggott v. Miller*, 557 S.W.2d 692 (Mo. Ct. App. 1977).

197. Mo. Rev. Stat. § 507.010 (1969).

198. *Greco v. Anderson*, 615 S.W.2d 429 (Mo. Ct. App. 1980).

199. 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

200. See *supra* note 17 and accompanying text.

201. *McCraney v. Flanagan*, 47 N.C. 498, 499, 267 S.E.2d 404, 405 (N.C. Ct. App. 1980).

202. Arizona, Missouri, North Carolina, Pennsylvania, Texas, and Wisconsin. See *supra* notes 190-201 and accompanying text.

203. Arkansas, Connecticut, Hawaii, Kansas, Maine, Maryland, Nebraska, New Hampshire, New Mexico, Rhode Island, South Carolina, Vermont, and the District of Columbia.

204. Arkansas, Arizona, Connecticut, Hawaii, Kansas, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Wisconsin, and the District of Columbia. See *supra* note 108 and accompanying text.

2. Today, unlike the common law, the woman, whether a minor or an adult, may maintain the action in her own name provided that she is unmarried at the time of the seduction — she may be a divorced woman;
3. The conduct of the defendant must consist of solicitations, importunities, misrepresentations, knowingly false promises or artifices, including a false promise to marry for the purpose of seduction, which lead the plaintiff, a chaste unmarried woman, to deviate from the path of rectitude;
4. The deviation must occur because of the false solicitations, importunities, false promises or false promise to marry;
5. The plaintiff, having a right to rely upon the artifices or false promises, relied upon such promises or artifices;
6. Relying on such false promises or artifices, the plaintiff consented to unlawful sexual intercourse; and
7. The action is a species of fraud and the evidence to support a judgment must be clear, cogent and convincing.²⁰⁵

His account may be unduly optimistic in assuming the total demise of the old paternalistic form of the action,²⁰⁶ and it is probably incorrect to add the modifier "unlawful" in paragraph 6, there being, among adults, few non-forceable acts that count as "unlawful sexual intercourse." Otherwise, his account is substantially accurate.

II. Legislative Modifications of the Common Law

There have been three great periods of legislative reform in the field of heart balm actions. In the second half of the nineteenth century, many states enacted statutes specifically addressed to seduction, and in the 1930s and 1970s, there were waves of legislation abolishing heart balm actions.²⁰⁷ By 1983,²⁰⁸ fifteen states had legislatively abolished or limited seduction as a cause of action, and six more had abolished the remaining three heart balm actions without expressly touching seduction. The first part of this section examines the legislation promoting the cause of action for seduction, while the second section examines legislation abolishing or limiting it. The latter section concludes with a survey of judicial decisions under state statutes in the last twenty-five years, and a summary of the present state of legislative impact on the tort.

205. 556 S.W.2d 696, 707 (Mo. Ct. App. 1977).

206. See, e.g., *Robinson v. Moore*, 408 S.W.2d 582, 583 (Tex. Civ. App. 1966) ("The Courts of this State seem committed to the rule that a seduced female may not maintain a civil action against her seducer for the seduction alone.")

207. Some of these statutes addressed only criminal conversation, alienation of affections, and breach of promise of marriage, and not seduction.

208. The most recent abolition was North Dakota's in 1983; Act of April 14, 1983, ch. 172, § 9, 1983 N.D. Laws 441, 445-46 (codified at N.D. Cent. Code § 14-02-06 (Supp. 1985)).

A. Legislation Liberalizing Seduction Actions

Between 1846 and 1913, some nineteen states or territories enacted statutes liberating seduction from its common law limitations.²⁰⁹ During this period, there were only two statutes that expressly recognized the tort without modifying it,²¹⁰ and no legislation abolished it. The legislation follows a predictable pattern, coincident with the development of the common law conception of the tort. Recognizing that the wrong was essentially one of morals and honor, and not of the economics of service, the statutes abolished the requirement of alleging or proving services, and extended the right of action to the real party in interest—the seduced woman.²¹¹

Michigan was first, in 1846, with a complicated statute eliminating the loss of services as an element of the cause of action.²¹² The class of permissible plaintiffs was stated as the seduced woman's "father, mother, or guardian" for a minor, but then extended in a unique way: "and if such female be of full age, the action may be brought by her father or any other relative who shall be authorized by her to bring the same."²¹³ The point of this extension is explained in the 1883 case, *Watson v. Watson*.²¹⁴ The successful plaintiff was the seduced woman, and that was one of the grounds of appeal.²¹⁵ The court said of Michigan's seduction statute: "These several provisions point unmistakably and clearly

209. Alabama—Ala. Code pt. 3, tit. 1, ch. 1, § 2133 (1852); Alaska—Comp. Laws of the Territory of Alaska tit. XIII, ch. 3, § 864 (1913); California—Cal. Civ. Proc. Code § 375 (1872); Georgia—Ga. Code § 2951 (1861); Idaho—Rev. Stat. of Idaho Territory § 4097, 4098 (1887); Indiana—Ind. Rev. Stat. pt. 2, ch. 1, §§ 24, 25 (1852); Iowa—Iowa Code tit. 19, ch. 100, §§ 1696, 1697 (1851); Kentucky—Ky. Gen. Stat. ch. 1, § 2 (1873); Michigan—Mich. Comp. Laws §§ 6195-97 (1872); Mississippi—Miss. Rev. Code §§ 1508, 1509 (1880); Montana—Mont. Civ. Code §§ 11, 12 (1877); Nevada—Nev. Rev. Laws §§ 4994, 4995 (1912); Oregon—Or. Codes & Gen. Laws tit. III, ch. 1, §§ 35, 36 (1892); South Dakota—S.D. Rev. Code §§ 2976-2977 (1919); Tennessee—Tenn. Code §§ 2801, 2802 (1858); Utah—Utah Comp. Laws tit. I, §§ 231, 232 (1888); Virginia—Va. Code tit. 44, ch. 148, § 1 (1849); Washington—Wash. Code §§ 10, 11 (1881); West Virginia—W. Va. Code ch. 148, § 1 (1860).

210. Md. Code ch. 122, art. 75, § 28(30) (1888); N.D. Civ. Code § 1973 (1877).

211. Five states, Georgia, Kentucky, Michigan, Virginia, and West Virginia, eliminated services from the cause of action but did not extend it to the seduced woman; only one state, Alabama, extended it to the seduced woman without mentioning services. Thirteen states, Alaska, California, Idaho, Indiana, Iowa, Mississippi, Montana, Nevada, Oregon, South Dakota, Tennessee, Utah, and Washington, did both. See *supra* notes 209-10.

212. See Mich. Comp. Laws § 6195 (1876). Sections 6196 and 6197 elaborate on pleadings and ensure that the common law theory is not abrogated.

213. *Id.* § 6195.

214. 49 Mich. 540, 14 N.W. 489 (1883).

215. She had, until her majority, lived in defendant's household as "his adopted daughter, although not in fact formally adopted." 49 Mich. at 541, 14 N.W. at 489.

to the conclusion that the design and intention was to give the person seduced the right to recover damages for the injury she had sustained and thus do away with the unjust rule that prevailed at common law."²¹⁶ Why, then, did the legislature not say so expressly? Until 1861, Michigan rules of evidence prohibited a plaintiff from testifying; thus, to make the seduced woman the plaintiff in a seduction action would be self-defeating.²¹⁷ Allowing her to authorize another to sue on her behalf avoided this dilemma. Once the rules of evidence changed, the implication of legislative intent could be given effect, and the court did so.

Virginia's 1849 statute eliminating services from the cause of action was a model of brevity, simply stating that "allegation or proof of the loss of the service of the female" was unnecessary.²¹⁸ West Virginia in 1869,²¹⁹ and Kentucky in 1873,²²⁰ followed Virginia's model; in 1861, Georgia adopted more complicated language, but of similar effect.²²¹ These five were the only states to eliminate the services requirement without giving a right of action to the seduced woman.

Alabama, in 1852, was the only state to give the cause of action to the woman without mentioning services. The statute provided: "An unmarried female may prosecute as plaintiff an action for her own seduction, and may recover such damages as may be assessed in her favor."²²² This straightforward language became a model for other states.²²³

The dominant pattern throughout this period was to enact both provisions: the extension of the right of action to the seduced woman and the abolition of the requirement that some services be proven lost. As noted, Alabama's language was the model for extending the cause of action to the seduced woman. Iowa, in 1851, the first state to enact both provisions, set the pattern for the elim-

216. *Id.* at 544, 14 N.W. at 490.

217. *Id.* at 545, 14 N.W. at 491.

218. Va. Code tit. 44, ch. 148, § 1 (1849): "An action for seduction may be maintained without any allegation or proof of the loss of the service of the female, by reason of the defendant's wrongful act."

219. W. Va. Code ch. 103, § 1 (1869).

220. The language has insignificant variations on Virginia's: "An action for seduction may be maintained without any allegation or proof of the loss of service of the female, by reason of the wrongful act of the defendant." Ky. Gen. Stat. ch. 1, § 2 (1873).

221. Ga. Code § 2951 (1861).

222. Ala. Code pt. 3, tit. 1, ch. 1, § 2133 (1852).

223. Indiana and Tennessee used the same language, with Indiana referring to Alabama's statute as the source. Alaska, Oregon, and Washington modified it by requiring the woman to be 21. California, Idaho, Montana, and Utah inserted "pecuniary or exemplary" after "damages." Nevada followed California but required the woman to be under 21.

ination of services: "The father, mother, or guardian, as the case may be, may also bring suit for the seduction of a minor daughter or ward though such daughter or ward be not living with nor in the service of the plaintiff and though there be no loss of service."²²⁴ One significant variation on this language is the omission of the restriction to *minor* women. Of the eighteen jurisdictions abolishing services as an element of the cause of action, only seven²²⁵ restricted the statute to minors.²²⁶ In those seven states, the classical common law theory would probably survive where the seduced woman was over the age of majority, but since all seven also extended the right of action to the woman, there is no case law to bear this out.

Nevada was unique in its legislation extending the right of action to the seduced woman. It was the only state to limit the age of seduced women plaintiffs to *under* twenty-one. One might guess that the consistent intent, even then, was to abolish the cause of action for women aged twenty-one or over. However, there has never been a reported appellate decision in Nevada to support or refute this speculation.

There were minor variations more explicitly specifying the proper plaintiff,²²⁷ and barring actions by one of the possible plaintiffs where suit had already been brought by another.²²⁸ Iowa had a unique addendum providing that "where the action is brought by the guardian the damages recovered shall enure to the sole benefit of the ward."²²⁹ Twelve jurisdictions also added provisions for such damages as the jury might award,²³⁰ and seven expressly con-

224. Iowa Code tit. 19, ch. 100, § 1697 (1851); *see also* Ind. Rev. Stat. pt 2, ch. 1, § 25 (1852); Miss. Rev. Code § 1509 (1880).

225. Idaho, Indiana, Iowa, Montana, Nevada, Tennessee, and Utah.

226. More recently, California in 1939 and Washington in 1973 amended their statutes by inserting such a limitation. *See infra* notes 249-50 and accompanying text.

227. Cal. Civ. Pro. Code § 375 (1872): "A father, or in the case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward" This pattern is followed in other jurisdictions: Comp. Laws of the Territory of Alaska tit. XIII, ch. 3, § 864 (1913); Rev. Stat. of Idaho Territory § 4098 (1887); Mont. Civ. Code § 12 (1877); Nev. Rev. Laws § 4995 (1912); Or. Codes & Gen. Laws tit. III, ch. 1, § 35 (1892); Utah Comp. Laws tit. I, § 232 (1888); Wash. Code § 11 (1881). Tenn. Code § 4502 (1896) provided for the "father or widowed or deserted mother" to be plaintiff, and S.D. Rev. Code § 2976 (1919) provided that the "father, mother, sisters, brothers and any person in loco parentis may maintain an action against the seducer."

228. Alaska, California, Idaho, Mississippi, Montana, Nevada, Oregon, South Dakota, Tennessee, Utah, and Washington. *See supra* notes 209, 227.

229. Iowa Code § 1697 (1851).

230. Alabama, Alaska, California, Idaho, Indiana, Iowa, Montana, Nevada, Oregon, Tennessee, Utah, Washington. *See supra* note 209.

templated exemplary damages.²³¹

The jurisdictions modifying the requirements for a seduction action in these ways were all recognizing the lack of rationality in the common law cause of action. By legislation, they brought the cause of action into line with its actual, social basis. They provided for the true victim to be the plaintiff, for the recognition of the morality that makes seduction tortious, and for damages in accord with this reality. That so many legislatures took such actions accords with the constant trend toward morality in the opinions of common law judges and the awards of juries. The changes in societal mores that brought about such a shift in emphasis at that time are the subject of section three, below. It is, for the present, noteworthy that after Alaska's 1913 statute, there was no further new legislation in favor of seduction as a tort. This legislation was, essentially, a late nineteenth-century phenomenon.

The impact of this legislation can be seen in the illustrative Iowa case of *Gover v. Dill*,²³² decided a mere five years after the enactment of Iowa's statute. The plaintiff was the seduced woman, and she alleged no pregnancy or other incapacity: the claim was for the loss of virtue. The court held that she had to show not just the fact of intercourse, but that the defendant induced her so to join him "by some promise or artifice, . . . by his flattery or deception."²³³ Her willingness to take part would be a defense, as would her prior lack of chastity (or as the court put it, "that she had previously prostituted herself to the embraces of other men"²³⁴). Although the plaintiff had not affirmatively proven her prior virginity, her claim to have been unmarried was left unchallenged, and thus she had the benefit of the presumption, also unchallenged, that an unmarried woman is chaste. The tone is highly moralistic throughout. For example, the court quoted with approval a jury instruction that "the person seduced must have been previously of chaste character—that she yet preserved that priceless jewel that is the peculiar badge of the virtuous *unmarried female*."²³⁵ Virtue itself, not services, was the valuable at stake.²³⁶

231. California, Georgia, Idaho, Montana, Nevada, South Dakota and Utah. See *supra* note 209.

232. 3 Iowa 337 (1856).

233. *Id.* at 340.

234. *Id.* at 342.

235. *Id.* at 343 (emphasis in original).

236. The plaintiff asked for damages of \$5,000; the Iowa Supreme Court affirmed the lower court, although the opinion does not say how much the jury awarded. *Id.* at 337-43.

B. Legislation Abolishing the Tort of Seduction

In 1935 a national movement began in Indiana, resulting within the year in the enactment of statutes in seven jurisdictions that abolished, or severely limited, causes of action for seduction, alienation of affections, breach of promise to marry, and criminal conversation.²³⁷ Three more states passed similar legislation in the next five years,²³⁸ and Florida followed in 1945.²³⁹ Many more states introduced anti-heart balm statutes in 1935 but failed to pass them.²⁴⁰

There was very little activity at the appellate level in the tort of seduction in the years prior to this revolution. For example, in New York from 1901 to 1935 there were only five appellate decisions, the most recent being in 1917.²⁴¹ Indiana courts had heard only two seduction appeals in the same period, the most recent being in 1931.²⁴²

The statutes abolishing heart balm actions were usually intro-

237. Alabama—Act of Sept. 7, 1935, No. 356, 1935 Ala. Acts 780 (presently codified at Ala. Code § 6-5-331 (1975)); Illinois—Heart Balm Act, 1935 Ill. Laws 716 (codified at Ill. Rev. Stat. ch. 38, §§ 246.1-6 (1937)) (found unconstitutional under the Illinois Constitution in *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946), re-enacted in revised form, Acts of July 18, 1947, 1947 Ill. Laws 796-801; Act of July 8, 1947, 1947 Ill. Laws 1181, and presently codified at Ill. Ann. Stat. ch. 40, §§ 1801-1810, 1901-1907 & 1951-1957 (Smith-Hurd 1980 & Supp. 1986)); Indiana—Heart Balm Act, ch. 208, 1935 Ind. Acts 1009 (presently codified at Ind. Code § 34-4-4-1 (1982)); Michigan—Act of June 3, 1935, No. 127, 1935 Mich. Pub. Acts 201 (presently codified at Mich. Comp. Laws Ann. § 600.2901 (1968)); New Jersey—Act of June 27, 1935, ch. 279, 1935 N.J. Laws 896 (presently codified at N.J. Stat. Ann. §§ 2A:23-1 to 2A:23-6 (1952)); New York—Act of Mar. 29, 1935, ch. 263, 1935 N.Y. Laws 732 (*repealed by* Act of Apr. 4, 1962, ch. 308, § 10001), 1962 N.Y. Laws 1297, 1549 (presently codified at N.Y. Civ. Prac. Law § 10,001 (McKinney 1981)), *re-enacted in revised form by* Act of Apr. 4, 1962, ch. 310, § 65, 1962 N.Y. Laws 1650, 1677 (presently codified at N.Y. Civ. Rights Law §§ 80-a to 84 (McKinney 1976)); Pennsylvania—Act of June 22, 1935, No. 189, 1935 Pa. Laws 450 (presently codified at Pa. Stat. Ann. tit. 48, §§ 170-177 (Purdon 1965)).

238. California—Act of May 10, 1939, ch. 129, §§ 1-4, 1939 Cal. Stat. 1245 (presently codified at Cal. Civ. Code §§ 49 (West 1982)); Colorado—Act of Apr. 27, 1937, ch. 111, 1937 Colo. Sess. Laws 403 (presently codified at Colo. Rev. Stat. §§ 13-20-201 to 13-20-208 (1974)) (note that §§ 13-20-202 and 13-20-203 were amended in 1979); and Massachusetts—Act of May 24, 1938, ch. 350, 1938 Mass. Acts 326 (presently codified at Mass. Ann. Laws ch. 207, § 47A (Michie/Law Co-op. 1981) (abolishing only breach of contract to marry)).

239. Act of June 11, 1945, ch. 23,138, No. 624, 1945 Fla. Law 1342 (presently codified at Fla. Stat. Ann. §§ 771.01-.08 (West 1964)).

240. Feinsinger, *supra* note 2, at 997-98. Feinsinger lists Arizona, Connecticut, Idaho, Maryland, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Washington, and Wisconsin (14 states!). He missed Ohio. See *infra* notes 246-47 and accompanying text.

241. Colly v. Thomas, 99 Misc. 158, 163 N.Y.S. 432 (N.Y. Sup. Ct. 1917).

242. Burke v. Middlesworth, 92 Ind. App. 394, 174 N.E. 432 (1930).

duced as bills to promote public morals. Preambles typically contained language such as this:

To promote public morals, by abolishing civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and certain causes of action for seduction²⁴³

[Heart balm actions] have 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 victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment²⁴⁴

The legislation was typically introduced and supported by women. Indiana's pioneering bill was introduced by Roberta West Nicholson, at the time Indiana's only woman legislator.²⁴⁵ Republican Blanche E. Hower and Democrat Alma Smith²⁴⁶ virtually raced to introduce similar legislation in Ohio.²⁴⁷

These early "heart balm" (or, sometimes, "anti-heart balm") statutes followed three patterns. Four states—Colorado, Florida, New Jersey, and New York—completely abolished all four causes of action. The standard text was: "The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are hereby abolished."²⁴⁸ Four states—Alabama, California, Indiana, and Michigan—abolished alienation of affections, criminal conversation, and breach of promise to marry, and abolished seduction only for women above a specified age.²⁴⁹ Indiana's

243. This preamble language is found in Colorado (1937 Colo. Sess. Laws 403, 403) and Indiana (1935 Ind. Acts 1009, 1009) law.

244. This preamble language comes from Florida law (1945 Fla. Law 1342, 1342); similar language was used by New York (1935 N.Y. Laws 732, 733) and New Jersey (1935 N.J. Laws 896, 896).

245. She was the Democratic Representative from Marion, Indiana. The 1935 session was the third in which she introduced the bill; her campaign for the legislature began in 1931.

246. Indianapolis Star, Feb. 3, 1935, at 6, col. 4.; *id.*, Feb. 6, 1935, at 1, col. 7. Ms. Hower prevailed.

247. Ohio did not, however, enact the legislation until 1978. See Act of Mar. 8, 1978, 137 Ohio Laws 2225 (presently codified at Ohio Rev. Code Ann. § 2305.29 (Page 1981)).

248. Florida, New Jersey, and New York used this language. See Fla. Stat. Ann. § 771 (West 1964); 1935 N.J. Laws 896, 896; 1935 N.Y. Laws 732, 732. Colorado's version was: "All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation and seduction are hereby abolished." 1937 Colo. Sess. Laws 403, 403.

249. In Alabama the age was 21 years or over (Act of Sept. 7, 1935, No. 356, 1935 Ala. Acts 780), but it has since been lowered to 19 (Ala. Code § 6-5-331 (1975)). California used "under the age of legal consent," Cal. Civ. Code § 49 (West 1982); Indi-

language was typical: "[A]ll civil causes of action for breach of promise to marry, for alienation of affections, for criminal conversation, and for the seduction of any female person of the age of twenty-one years or more are hereby abolished . . ." ²⁵⁰ Of the remaining three states that enacted legislation in this pioneer period, two—Illinois and Pennsylvania—abolished actions for breach of promise to marry, alienation of affections, and criminal conversation, but left seduction untouched. ²⁵¹ The Illinois Supreme Court subsequently found in this legislation an implied abolition of seduction. ²⁵² Massachusetts abolished only the cause of action for breach of contract to marry, but this of itself was found to imply the abolition of seduction. ²⁵³ The Illinois statute was unique in that it was a criminal statute prohibiting any person, including one acting as attorney, to file or threaten to file an action in alienation of affections, criminal conversation, or breach of contract to marry. ²⁵⁴

Clearly, the tort of seduction was not the primary target of this anti-heart balm legislation. ²⁵⁵ It is significant, however, that only with respect to seduction is there any variation in the effect of the statutes. Legislatures thus must have been paying special attention to seduction while working on the overall anti-heart balm program. Why this should be so, and why there should have been such a wave of legislation at that time, is addressed in section three, below.

All these early anti-heart balm statutes, except that of Illi-

ana "the age of twenty-one years or more," Heart Balm Act, ch. 208, 1935 Ind. Acts 1009, 1009; and Michigan "the age of eighteen years or more," Act of June 3, 1935, No. 127, 1935 Mich. Pub. Acts 201, 201.

250. Heart Balm Act, ch. 208, 1935 Ind. Acts 1009, 1009. Alabama and Michigan used almost identical language, changing only the age. See Act of Sept. 7, 1935, No. 356, 1935 Ala. Acts 780; Act of June 3, 1935, No. 127, 1935 Mich. Pub. Acts 201, 201. California simply amended its previous statute liberalizing the cause of action. Cal. Civ. Pro. Code §§ 374, 375 (West 1954), *repealed by* Act of Aug. 17, 1967, ch. 1231, 1967 Cal. Stat. 2998. It also amended its statement of personal rights, Cal. Civ. Code § 49 (West 1982), by inserting the age limit and added a stylistic variant of Indiana's language to Cal. Civ. Code § 43.5 (West 1982).

251. 1935 Ill. Laws 716; 1935 Pa. Laws 450; see *supra* note 237.

252. See *supra* notes 180-84 and accompanying text.

253. See *supra* notes 185-88 and accompanying text.

254. Heart Balm Act, 1935 Ill. Laws 716, 716: "It shall be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed, in any court in this State, any pleading or paper setting forth or seeking to recover upon any civil cause of action based upon alienation of affections, criminal conversation, or breach of contract to marry . . ." (effective May 4, 1935).

255. See Note, *Abolition of Actions for Breach of Promise, Alienation of Affections, Criminal Conversation and Seduction*, 5 Brooklyn L. Rev. 196 (1936).

nois, survived constitutional challenge in the courts.²⁵⁶ The Illinois statute was a criminal one entitled "An act in relation to certain causes of action conducive to extortion and blackmail"²⁵⁷ The caption did not specifically mention the three actions prohibited by the statute; the text of the statute failed to mention blackmail or extortion. However, the Illinois Constitution of 1870 required that the title of the statute reflect the contents.²⁵⁸ Thus, in *Heck v. Schupp*,²⁵⁹ an alienation of affections action, the Illinois Supreme Court struck down the statute in its entirety. In addition, the Illinois Constitution of 1870 required that there be "a certain remedy in the laws for all injuries and wrongs."²⁶⁰ Not only did the statute violate this provision, it "tend[ed] to put a premium on the violation of moral law, making those who violate the law a privileged class, free to pursue a course of conduct without fear of punishment even to the extent of a suit for damages."²⁶¹ Clearly, the moral conscience of the court had been offended. In the following year, 1947, the Illinois legislature enacted three new statutes, not abolishing heart balm actions, but limiting recovery to actual damages without consideration of such factors as the defendant's wealth or injury to the plaintiff's feelings. Again, seduction was not mentioned.²⁶²

New Jersey's 1935 anti-heart balm statute met with quite different treatment in the state's supreme court. In the 1950 case, *Blackman v. Iles*,²⁶³ the court held, despite the clear language of the statute,²⁶⁴ that it did not prohibit an action by a parent for loss

256. See *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967); *Pennington v. Stewart*, 212 Ind. 553, 10 N.E.2d 619 (1937); *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936), *appeal dismissed*, 301 U.S. 667 (1937); *Hanfgarn v. Mark*, 248 App. Div. 325, 289 N.Y.S. 143 (1936), *appeal dismissed*, 272 N.Y. 671, 5 N.E.2d 386 (1936), *aff'd*, 249 App. Div. 776, 292 N.Y.S. 1012 (1936) (statute unconstitutional), *rev'd*, 274 N.Y. 22, 8 N.E.2d 47 (1937), *remittitur amended*, 274 N.Y. 570, 10 N.E.2d 556 (1937), *appeal dismissed*, 302 U.S. 641 (1937) (statute constitutional); see Note, "Heart Balm" Legislation and the Constitution, 1 Wyo. L.J. 75 (1947).

257. Heart Balm Act, 1935 Ill. Laws 716, 716 (codified at Ill. Rev. Stats. ch. 38, § 246 (1937)).

258. Ill. Const. of 1870, art. IV, § 13, states "No act . . . shall embrace more than one subject, and that shall be expressed in the title."

259. 394 Ill. 296, 68 N.E.2d 464 (1946).

260. Ill. Const. of 1870, art. II, § 19.

261. 394 Ill. at 299-300, 68 N.E.2d at 466.

262. Act of July 18, 1947, 1947 Ill. Laws 796-801, 1181, and presently codified at Ill. Ann. Stat. ch. 40, §§ 1801-1810, 1901-1910, & 1951-1960 (Smith-Hurd 1980 and Supp. 1986).

263. 4 N.J. 82, 71 A.2d 633 (1950).

264. See *supra* note 248 for the New Jersey statute. Since 1926, New Jersey has had a statute—presently N.J. Stat. Ann. § 9:1-1 (West 1976)—providing that the parents of a child have a cause of action for "the loss of the wages or services of their minor child" as a result of deliberate or negligent injury, but not specifically mentioning seduction.

of services due to seduction. New Jersey's is the only state supreme court to have created such an exception in the face of a statutory abolition.²⁶⁵ Six years later, the exception was limited in *Magierowski v. Buckley*,²⁶⁶ where the language of the statute was held to apply when the seduced woman was not a minor.

The final wave of legislation abolishing or limiting heart balm actions began in 1972.²⁶⁷ By 1983, nine more states had enacted such statutes.²⁶⁸ The forms the legislation took were very similar to those of the previous period. Five states—Delaware, Minnesota, North Dakota, Virginia, and Wyoming—completely abolished all four heart balm actions.²⁶⁹ Two states—Ohio and Oklahoma—abolished all heart balm actions but with specific exceptions for minor or incompetent victims of seduction,²⁷⁰ and for alienation of affections.²⁷¹ The other two states—Georgia and Oregon—abolished actions for alienation of affections, criminal conversation, and breach of promise, but not seduction. The language

265. See Note, *Avoidance of the Incidence of Anti-Heartbalm Statutes*, 52 Colum. L. Rev. 242, 252-53 (1952).

266. 39 N.J. Super. 534, 121 A.2d 749 (1956).

267. In the interim, Wisconsin in 1959 abolished actions for breach of promise to marry, but not for seduction. Act of Oct. 28, 1959, ch. 595, § 73, 1959 Wis. Laws 740, 765 (presently codified at Wis. Stat. Ann. § 768.01 (West 1981)). That Wisconsin still recognizes seduction as a tort is clear from its statute providing for arrest of persons likely to flee the jurisdiction pending certain civil actions, specifically including seduction. Wis. Stat. Ann. § 818.02(1)(a) (West Supp. 1985).

268. Delaware—Act of July 5, 1972, ch. 489, 58 Del. Laws 1601 (presently codified at Del. Code Ann. tit. 10, § 3924 (1975)); Georgia—Act of Apr. 4, 1979, No. 86, § 46, 1979 Ga. Laws 466, 496-97 (presently codified at Ga. Code, § 51-1-17 (1982); see also Ga. Code § 51-1-16 (1982)); Minnesota—Act of Mar. 23, 1978, ch. 515, 1978 Minn. Laws 141 (presently codified at Minn. Stat. Ann. § 553.01-03 (West Supp. 1985)); North Dakota—Act of Apr. 14, 1983, ch. 172, § 9, 1983 N.D. Laws 441, 445-46 (presently codified at N.D. Cent. Code § 14-02-06 (Supp. 1985)); Ohio—Act of Mar. 8, 1978, 137 Ohio Laws 2225 (presently codified at Ohio Rev. Code Ann. § 2305.29 (Page 1981)); Oklahoma—Act of May 31, 1976, ch. 164, 1976 Okla. Sess. Laws 230 (presently codified at Okla. Stat. Ann. tit. 76, § 8.1 (West Supp. 1987)); Oregon—Act of July 2, 1975, ch. 562, 1975 Or. Laws 1285 (presently codified at Or. Rev. Stat. §§ 30.840, 30.850 (1983)); Virginia—Act of Apr. 1, 1977, § 2, ch. 617, 1977 Va. Acts 1052, 1083 (presently codified at Va. Code § 8.01-220 (1984)); and Wyoming—Act of Mar. 10, 1977, § 1, ch. 24, 1977 Wyo. Sess. Laws 771, 871-72 (presently codified at Wyo. Stat. §§ 1-23-101 to 1-23-104 (1977)).

269. Delaware, Minnesota, North Dakota, Virginia, and Wyoming. See *supra* note 267.

270. Ohio law provides that "no person shall be liable in civil damages for any breach of promise to marry, alienation of affections, or criminal conversation, and no person shall be liable in civil damages for seduction of any person eighteen years of age or older who is not incompetent." Ohio Rev. Code Ann. § 2305.29 (Page 1981).

271. Oklahoma has this exception for both seduction and alienation of affections: "[T]he alienation of the affections of a spouse of sound mind and legal age or seduction of any person of sound mind and legal age is hereby abolished as a civil cause of action in this state." Okla. Stat. Ann. tit. 76, § 8.1 (West Supp. 1987).

used was, with the exception of Oklahoma's, the same as, or stylistic variations on, that of the 1930s legislation.

Two states—Alaska and Washington—that had previously enacted statutes liberalizing the cause of action, enacted amendments to inhibit severely future use of seduction as a cause of action.²⁷² Both states had abolished the element of services that had been required in classical seduction actions, Washington generally, and Alaska for minors. In 1973, Washington amended this provision by substituting "child" for "daughter," thus making it both gender neutral and age restrictive.²⁷³ Both states had also provided for the seduced woman to be the plaintiff. Both repealed these provisions, Washington in 1973²⁷⁴ and Alaska in 1974.²⁷⁵ The effect should be a return to classical seduction law, except for minor women where loss of services is not an element of the cause of action. Thus, a seduction action might still be possible for the parent of an adult woman if loss of services were shown. Under common law principles, the courts might still be free to extend the right of action to the seduced woman herself, as did the Missouri Court of Appeals.²⁷⁶ In the face of this history of legislation, however, it is unlikely that such actions would succeed. The legislative intent seems to have been to abolish the cause of action except in the specific circumstances contemplated by the surviving statutes.

Louisiana is unique as a civil law jurisdiction in the United States. It does not have a provision in its code directly addressing seduction, but has had two related cases, *Brunet v. Deshotels* and *Manuel v. Deshotels*.²⁷⁷ Both actions were brought under a provision making parents responsible for the wrongful acts of their children.²⁷⁸ The court in *Brunet* held that the mother of the seduced woman had a cause of action against the alleged seducer and his father.²⁷⁹

272. See *supra* notes 224-31 and accompanying text.

273. Act of Apr. 24, 1973, ch. 154, § 5, 1973 Wash. Laws 1st Ex. Sess. 1118, 1125 (amending Wash. Rev. Code Ann. § 4.24.020 (1963)).

274. Act of Apr. 24, 1973, ch. 154, § 121, 1973 Wash. Laws 1st Ex. Sess. 1118, 1197-1198 (repealing Wash. Rev. Code Ann. § 4.24.030 (1962)).

275. Act of May 17, 1974, ch. 127, § 64, 1974 Alaska Sess. Laws ch. 127, p. 1, 12 (repealing Alaska Stat. § 09.15.030).

276. See *supra* notes 165-73 and accompanying text.

277. *Brunet v. Deshotels*, 160 La. 285, 107 So. 11 (1926); *Manuel v. Deshotels*, 160 La. 652, 107 So. 478 (1926).

278. La. Civ. Code Art. 2318 (West 1979 & Supp. 1985).

279. *Brunet*, 160 La. at 285, 107 So. at 111. Although these are the only seduction cases reported in Louisiana, there is another heart balm opinion of historical interest: In 1850 the judge remarked in a breach of promise action that "[s]uch suits are not infrequently the mere instruments of extortion . . ." *Morgan v. Yarborough*, 5 La. Ann. 316, 323 (1850); this judge wrote this some 80 years before such opinions became popular.

In the last twenty-five years, there have been only three seduction actions appealed in states where the tort is governed by statute. Surprisingly, these cases have been in New York and California, states that have abolished the cause of action. In the two New York cases, the statute was held to bar the cause of action.²⁸⁰ A California case in 1983²⁸¹ upheld the statutory bar on seduction actions by adult women, but was resolved on a fraud rather than a seduction theory. No cases have been reported since 1960 in any of the other eighteen states in which seduction is still a viable cause of action for at least minor women.

A summary of the present state of the tort in states with statutory modifications of common law seduction is as follows. Nine states—Colorado, Delaware, Florida, Minnesota, New Jersey, New York, North Dakota, Virginia, and Wyoming—have abolished the cause of action. Notwithstanding the statute, the supreme court of New Jersey has found that the cause of action is still available to the parents of minor seduced women. Six states—Alabama, California, Indiana, Michigan, Ohio, and Oklahoma—have abolished the cause of action for women over the age of majority (or consent in the case of California). Of these, Ohio and Oklahoma also require that the woman be mentally competent for the abolition to hold. In twelve states—Alabama, California, Georgia, Idaho, Indiana, Iowa, Mississippi, Montana, Nevada, Oregon, Tennessee, and Utah—the seduced woman is permitted to sue as plaintiff. In Nevada only minor women, in Oregon only adult women, and in California only women over the age of consent have the right of action. Of course, in those states that have abolished the tort for adult women, only minors will qualify as plaintiffs. Sixteen states—Alaska, California, Georgia, Idaho, Indiana, Iowa, Kentucky, Michigan, Mississippi, Montana, Nevada, Oregon, Tennessee, Utah, Washington, and West Virginia—have abolished the element of services in classical seduction actions. In Idaho, Indiana, Iowa, Montana, Nevada, Tennessee, Utah, and Washington this is restricted to minor women, and in California to women below the age of consent. Maryland still has in effect its statute recognizing the common law tort. Louisiana has its civil code, which has been interpreted so as to acknowledge actions for damages resulting from seduction.²⁸²

280. *Aadland v. Flynn*, 27 Misc. 2d 833, 211 N.Y.S.2d 221 (1961) was brought by an actress against the estate of the late Errol Flynn. The court made several disparaging remarks on the suit in dismissing it. *See also* *Rappel v. Rappel*, 39 Misc. 2d 222, 240 N.Y.S.2d 692, *aff'd*, 20 App. Div. 2d 850, 247 N.Y.S.2d 995 (1963).

281. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (Ct. App. 1983).

282. *See supra* notes 209-81 and accompanying text.

III. The Ideal Woman and the Tort of Seduction

Seduction as a cause of action has changed a great deal over the last three hundred years, as the first and second sections show. In this section, this article will examine possible explanations of the steps in that evolutionary development. The thesis advanced is that changes in the social conception of women and women's roles brought about changes in the tort of seduction. Alternative explanations of the development of the tort are also examined.

Prior to the development of the basic modern concept of the tort of seduction,²⁸³ there prevailed a social conception of men having property rights in women very closely tied to sexual relations. For example, in the statutes of the sixth-century Kentish king Aethelberht, it was provided that "[i]f [one] freeman lies with the wife of [another] freeman, he shall pay [the husband] his wer-geld [compensation], and procure a second wife with his own money, and bring her to the other man's home."²⁸⁴ Apparently, intercourse with the other so destroyed her nuptial value as to require the wife's replacement.²⁸⁵ Such facts led historian Keith Thomas to the hypothesis that "fundamentally, female chastity has been seen as a matter of property; not, however, the property of legitimate heirs, but the property of men in women. . . . [T]he value of this property is immeasurably diminished if the woman at any time has sexual relations with anyone other than her husband."²⁸⁶ This explanation certainly fits feudal data through at least the fourteenth century case of *Lincoln v. Simond*.²⁸⁷ "The absolute property of the woman's chastity was vested not in the woman herself, but in her parents or husband. And it might be sold by them."²⁸⁸ "[G]irls who have lost their 'honor' have also lost their saleability in the marriage market."²⁸⁹

This "property" basis seems to have become more economic

283. See *supra* notes 12-13 and accompanying text.

284. The Laws of the Earliest English Kings 9 (F.L. Attenborough ed. 1922) (The Laws of Aethelberht, § 31).

285. The laws also provide for substantial compensation (on par with that for a killing) for intercourse with "a maiden belonging to" another man, but does not mention daughters specifically. *Id.* at 5, 7 & 15 (Aethelberht, §§ 10, 14, 16, & 82).

286. Keith Thomas, *The Double Standard*, 20 J. Hist. Ideas 195, 209-10 (1959).

287. K.B. 27/519, m.63 (Coram Rege roll, Hilary 1391), *reprinted in* Arnold, *supra* note 13, at 213.

288. Thomas, *supra* note 286, at 213.

289. *Id.* at 210. This conception has not yet disappeared from the western world: in 1978 a court in Athens, Greece, awarded the parents of seduced 16-year-old 350,000 drachmae (about 9,000 U.S. dollars at the time) in damages "in order to compensate a man of her own economic and social standing for the loss of her virginity." The Times (London), Jan. 21, 1978, at 4, col 5.

and less sexual in later years.²⁹⁰ In the statutes of Henry VII²⁹¹ and Elizabeth I,²⁹² abduction, but only of an heiress, was held criminal. There seems to have been no thought given to the idea of a cause of action in the seduced woman herself, she having no legal identity separate from her father or guardian.²⁹³ When it was realized that there was value in the services of a daughter and cost in the loss thereof through pregnancy, the cause of action arose again, under the established writ of *per quod servitium amisit*. This development does not fit Thomas's concept of property in the woman's chastity, that being irrelevant to the cause of action,²⁹⁴ but it is in accord with the more general hypothesis of men's property in women. As Thomas later notes, "[t]he virtue of women was relative to their function and their function was to cater to the needs of men."²⁹⁵ By the mid-seventeenth century, a father who no longer held his daughter's virginity as a marketable commodity still had a valuable interest in her services.

So far, Thomas's explanation based on fathers (and, after marriage, husbands) having property rights in women fits the historical data well.²⁹⁶ However, Thomas himself asks (but does not answer) whether this merely pushes the explanatory burden back a step.²⁹⁷ Why should chastity be of economic value? This article proposes that the prevailing conception of women and their role provides the appropriate source of explanation.

It is clear that in England through the end of the eighteenth century women were regarded as valuable and marketable property. In 1797, the *London Times* reported:

The increasing value of the *fair sex* is esteemed by several eminent writers as the certain criterion of increasing *civilization*. SMITHFIELD [a market particularly reputed for its sales of

290. "In feudal society there was always somebody with a financial interest in every woman's marriage . . . , but when this situation disappeared it was only the chastity of women with property which continued to be legally protected, because the loss in the case of landless women was nobody's but their own." Thomas, *supra* note 285, at 212. As this article was going to press, Professor Backhouse published an article on the law of seduction in 19th century Canada making an argument similar to Thomas's. See Constance Backhouse, *The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada*, 10 Dalhousie L.J. 45 (1986). Unfortunately, Backhouse's publication came too late to be treated more fully here.

291. 3 Hen. 7, ch. 2.

292. 39 Eliz., ch. 9. See 8 William Searle Holdsworth, *A History of English Law* 427 (1925).

293. See Blackstone, *supra* note 20.

294. See *supra* text accompanying notes 55-57.

295. Thomas, *supra* note 286, at 213.

296. It is argued below that Thomas's account is inadequate as an explanation of the legislative developments in 19th century United States. See *infra* note 317 and accompanying text.

297. Thomas, *supra* note 286, at 210.

women] has, on this ground, strong pretensions to refined improvement, as the price of Wives has risen in that market from half a guinea, to three guineas and a half.²⁹⁸

That this property interest had, at that time, little to do with chastity can be seen from the not uncommon practice of selling wives.²⁹⁹ To own a woman was to own her services, a useful as well as valuable asset.³⁰⁰ The common law form of the cause of action seems quite appropriate when women are thus conceived.

Seduction, in the common law form in which the tort first appeared in the United States,³⁰¹ can be seen as economically based because the value of women was economic. In a pioneering society it was essential that every member work, a necessity that was reinforced by a puritan ethic that regarded idleness as sinful. Women, both single and married, were expected to, and generally did, provide a wide variety of essential productive services.³⁰² The concept of the ideal woman was the "perfect wife," a woman who, as well as being a mother, provided all the goods and services necessary to the maintenance of the male-headed household.³⁰³ In this pioneer society, however, women were also in relatively short supply, especially in frontier areas. "This (from the point of view of women) favorable sex ratio enhanced their status and position."³⁰⁴ Women, both single and married, were more valued and were accorded more social freedom in the United States than in England at that time.³⁰⁵ It is, therefore, not surprising that United States judges were quite forthright in their approach to the irrationality of the cause of action's being for loss of services alone,³⁰⁶ and in permitting a more general basis for damages.³⁰⁷ Where women were in short supply, an unmarried woman's value must have exceeded that of her mere productive potential. Nor would this seem to be

298. *The Times* (London), July 22, 1797, at 2, col. 3.

299. See Viola Klein, *Feminine Character* 7-8 (1946).

300. *Id.* at 8-10.

301. See *supra* notes 58-103 and accompanying text.

302. See generally Elisabeth A. Dexter, *Colonial Women of Affairs* (1931); Elisabeth A. Dexter, *Career Women of America: 1776-1840* (1950); Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson*, 10 *Midcontinent Am. Stud. J.* 5 (1969). At the beginning of the 19th century there was no clothing or food canning or even shoemaking industry in the United States and these functions were typically part of the woman's role, even in wealthier households.

303. *Suffer and be Still: Women in The Victorian Age* at ix (Martha Vicinus ed. 1972) [hereinafter *Vicinus*].

304. Lerner, *supra* note 302, at 5.

305. See *id.* at 5-6; Jane Louise Mesick, *The English Traveller in America: 1785-1835*, at 88-99 (1922).

306. See, e.g., *McLure v. Miller*, 11 N.C. (4 Hawks) 133 (1825).

307. See, e.g., *Stout v. Prall*, 1 N.J.L. 93, 1 *Coxe* 76 (1791). See generally *supra* notes 58-103 and accompanying text.

dependent on the woman's virginity, but it would be seriously disrupted by pregnancy. Thus, the English common law tort, requiring a showing of loss of services—and hence, normally, of pregnancy—but permitting damages to be determined independently of services actually lost, suited the needs of the new United States society reasonably well.

The first half of the nineteenth century was a period of industrialization and rapid economic development in the United States. With this development came a change in social organization, with mobility and status based on ability rather than inheritance, at least for men.³⁰⁸ It was also a period that led to the first statutory revisions of the tort of seduction.³⁰⁹ The changes in social organization and the changes in the tort of seduction are related. Professor Bigelow, writing at the turn of the century,³¹⁰ attributes the statutory liberalization of seduction law to the change in class structure, and in particular to the rise of the middle class:

The [common] law was the expression of that earlier social era when the children of the children of people of the working class *were* the servants of the head of the family; the working class did not make the law,—they were not strong enough,—and those who did make it considered it enough to protect the head of the family from loss of service The higher classes would not be apt to call upon the law; it was better to hush the matter up. But when, in the nineteenth century, the middle class appeared, it was a matter of social pressure that the old view should be modified.³¹¹

While there must be a great deal of truth in this explanation, it is, on its own, insufficient.³¹² Why should the rise of the middle class to numerical and political prominence bring about such social pressure and with it a change in this tort? The answer lies in the change in the conception of woman and her appropriate (or ideal) role that came with the economic and social developments.

As Lerner writes: "The period 1800-1840 is one in which deci-

308. Lerner, *supra* note 302, at 6.

309. See *supra* notes 209-36 and accompanying text. The legislation began with Michigan in 1846 and by Alaska's enactment in 1913, some 19 states or territories had reformed the tort in one or both of two ways: first by eliminating allegation or proof of loss of services as a requirement; second by extending the right of action to the seduced woman.

310. Melville Madison Bigelow, *The Law of Torts* 267-68 (8th ed. 1907).

311. *Id.* at 267-68 (emphasis in original). Bigelow notes, correctly, that the statutes were enacted in "newer States especially."

312. Class structure—and changes in it—fails also to account for the legislation of the 1930s and 1970s abolishing the tort. Bigelow cannot, of course, be held accountable for this failing, but the explanation can.

sive changes occurred in the status of American women."³¹³ By midcentury, the image of the ideal woman had changed from the hard working, capable wife to the delicate, leisured creature having "little connection with any functional and responsible role in society."³¹⁴ "The attributes of True Womanhood, by which a woman judged herself and was judged by her husband, her neighbors and society could be divided into four cardinal virtues—piety, purity, submissiveness and domesticity."³¹⁵ This was also an era of extreme prudery in sexual propaganda,³¹⁶ at least among women,³¹⁷ and the attitude toward sex of the "ideal woman" of the time has been aptly characterized as "passionlessness."³¹⁸ Women were considered constitutionally unfit for intellectual effort³¹⁹ or the rough and tumble of the working or business worlds.³²⁰ As James Fenimore Cooper wrote, the ideal woman "[r]etired within the sacred precincts of her own abode . . . preserved from the destroying taint of excessive intercourse with the world."³²¹

It should be emphasized, as it is by all writers on the subject, that the realization of this conception of the ideal woman was very much confined to the middle class. Poor women were, as before,

313. Lerner, *supra* note 302, at 5.

314. Vicinus, *supra* note 303, at ix.

315. Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 Am. Q. 151, 152 (1966). This oft-cited article is a fascinating documentation of the morality prevailing in the popular magazines and books of the period.

316. "American society from the 1830s to the 1860s was marked . . . by uncompromising and morally relentless reform movements." Carroll Smith-Rosenberg, *Beauty, the Beast, and the Militant Woman*, 23 Am. Q. 562, 563 (1971); see also Welter, *supra* note 315.

317. The double standard continued with great vigor—see generally Thomas, *supra* note 286—as is shown by the prevalence of prostitution: estimates of the number of prostitutes in New York in the 1830s went as high as 20,000; Cincinnati had 7,000 for a population of 200,000 and Philadelphia 12,000, for a population of 700,000 in 1869. Reay Tannahill, *Sex in History* 357 (1980). This double standard and profligate male behaviour were attacked by reformist women's organizations. Smith-Rosenberg, *supra* note 316.

318. Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, 4 Signs 219 (1978). Vicinus takes the title of her anthology on women in the Victorian age, see *supra* note 303, from Sarah Stickney Ellis's famous line that a woman's "highest duty is so often to suffer and be still." Sarah Stickney Ellis, *The Daughters of England* 73 (1845).

319. "The female brain and nervous system, male physicians and educators agreed, were inadequate to sustained intellectual effort." Smith-Rosenberg, *supra* note 316, at 563.

320. Carroll Smith-Rosenberg & Charles Rosenberg, *The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America*, 60 J. Am. Hist. 332 (1973).

321. 1 James Fenimore Cooper, *Notions of the Americans* 140 (1828). No parallel morality was imposed on or expected of men. Tannahill, *supra* note 317, at 355-56. Prostitution was endemic, the usual estimate being one prostitute for every 12 men between the ages of 15 and 60. *Id.* at 356.

working on farms, in factories, and as menials. On the other hand, there were, of course, feminist reformers.³²² But women such as Mary Wollstonecraft, Frances Wright, and Harriet Martineau "were condemned in the strongest possible language—they were read out of the sex. 'They are only semi-women, mental hermaphrodites.'"³²³ It was the middle-class morality, however, that set the influential standards of the time. As Bigelow points out, it was middle-class social pressure that brought about the legislative changes in the tort of seduction.³²⁴ Nor does it matter that reality only rarely matched the ideal. It was the stereotype, the myth rather than the reality, that set the course of that middle-class social pressure.³²⁵

For the middle-class woman, there was little opportunity in the economic sphere. The development of the clothing industry took away one of her primary productive functions.³²⁶ Professionalization of many occupations previously open to women tended to make them exclusively male.³²⁷ The tremendous increase in the use of household servants took away much of the domestic labor.³²⁸ Apart from factory work, the preserve of the lower-class

322. "It is all bosh and nonsense for men to continue the delusion that to introduce women into politics is to debase her." Tennie C. Claflin, *Constitutional Equality, A Right of Woman; Or a Consideration of the Various Relations Which She Sustains as a Necessary Part of the Body of Society and Humanity; With Her Duties to Herself—together with a Review of the Constitution of the United States, Showing that the Right to Vote is Guaranteed to All Citizens. Also a Review of the Rights of Children* 63 (1871).

323. Welter, *supra* note 315, at 173; *see also id.* at 166, where Welter quotes a review in 22 Am. Q. Rev. 38 (1837) of Harriet Martineau's *Society in America* (1837) as "the bold ravings of the hard-featured of their own sex [reading which will] unsettle [American women] for their true station and pursuits, and they will throw the world back again into confusion!"

324. *See supra* notes 310-311 and accompanying text.

325. Patricia Branca, *Image and Reality: The Myth of the Idle Victorian Woman*, in *Clio's Consciousness Raised* 179, 179-80 (Mary S. Hartman & Lois Banner eds. 1974). "Throughout the Victorian period the perfect lady as an ideal of femininity was tenacious and all-pervasive, in spite of its distance from the objective situations of countless women." Vicinus, *supra* note 303, at x. It would be very useful to compare illegitimacy data with the number of seduction actions (rather than reported appeals) for different periods, but unfortunately 19th century data on either is unavailable. Even early in the 20th century, illegitimacy rates were impossible to obtain in some areas. Emma O. Lundberg & Katharine F. Lenroot, *Illegitimacy as a Child-Welfare Problem*, pt. 1, at 20 (1920) (U.S. Dep't of Labor, Children's Bureau Publication No. 66).

326. Lerner, *supra* note 302, at 11.

327. Lerner, *supra* note 302; Smith-Rosenberg, *supra* note 316. The professionalization of medicine and midwifery in particular offers the most striking example. In colonial times many women were practicing physicians and midwifery was a female monopoly; by the mid 19th century women had been completely excluded from both. Lerner, *supra* note 302, at 6-9.

328. Tannahill, *supra* note 317, at 350.

woman, and teaching,³²⁹ there was very little for the middle-class woman to aspire to but the role of dutiful and supportive wife. A woman's primary function was to consume, conspicuously, the household's wealth—to put into evidence her husband's ability to pay.³³⁰

In such a society, the consequences to a single woman of an untimely pregnancy were far worse than the economic problems of single parenthood in less bigoted times. The literature of the time told of such young women not only suffering social humiliation, but wasting away physically, and even dying.³³¹ Typically, their babies were also sickly or dying.³³² Even without pregnancy, premarital intercourse would lead inexorably to depravity and decay.³³³ "[T]o be guilty of such a crime, in the women's magazines at least, brought madness or death."³³⁴ The ideological message is clear: "The woman who broke the family circle . . . threatened society's very fabric."³³⁵

The common law of the tort of seduction was quite out of accord with this social mythology. As the prevailing morality and the state of the law became progressively more incongruent, it was to be expected that the latter would adjust. Thus, the legislative changes in the tort of seduction in the second half of the nineteenth century are not at all surprising. The new version of the tort, divorcing it completely from services, fit the prevailing middle-class morality of that time. Allowing proof of prior unchastity as a defense also fit this moral mythology: loss of innocence itself was the harm. Similarly, permitting the seduced woman, now the party most grievously injured, to sue fit the conception of women in the prevailing morality. Women, although morally superior, were also considered physically and intellectually inferior to men. In seduction she was always the victim of man's base and lustful appetites, never a willing participant.³³⁶ Thus, the legislative re-

329. A teacher shortage and the expansion of common education kept the role of teacher open to women. Lerner, *supra* note 302, at 10. In the latter part of the 19th century the invention of the typewriter created a whole new profession that quickly became a woman's preserve. As with most "woman's work" both these trades are characterized by a lack of promotional prospects. Sheila M. Rothman, *Woman's Proper Place: A History of Changing Ideals and Practices, 1870 to the Present* 42-60 (1978).

330. See Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* 80-85 (1899).

331. Welter, *supra* note 315, at 155-59.

332. *Id.*

333. *Id.*

334. *Id.* at 154.

335. Vicinus, *supra* note 303, at xiv.

336. The popular belief was that any woman, if only her duty would allow,

form of the second half of the nineteenth century is an expectable result of the tension between the moral ideology on the one hand, and the morality and social organization underpinning the common law tort on the other.

Although the legislative changes are not surprising, the inaction of the courts in those states that did not legislate is more difficult to explain. Some of the effects of the legislative changes were achieved by reducing the requirement of services to be lost to a token, and changing the time of loss from that of the seduction to that of the lying in and birth. Even a vestigial service requirement, however, still left the victim of seduction who suffered neither pregnancy nor "loathsome disease" without a remedy. Yet in the morality of the time, her loss was very great. Permitting damage awards unrelated to services lost ameliorated, but could not eliminate, this discrepancy. In the face of this dramatic upheaval in social patterns, one would have expected at least some courts to have permitted suit by the victim herself. Such, however, was not the case. The judges, more than the legislatures, remained the captives of a prior, inapposite, cultural mythology.

Obviously the lot of women was not destined to remain in this sorry state indefinitely. The movement begun at Seneca Falls in 1848³³⁷ continued unabated, although for many years it faced an uphill struggle, even among women.³³⁸ Societal factors also conspired to change the role of women. The latter part of the nineteenth century saw the development of plausible occupations for middle-class single women. Typist, stenographer,³³⁹ and department store salesclerk³⁴⁰ were added to the traditional female occu-

would engage less often in sexual intercourse. Smith-Rosenberg & Rosenberg, *supra* note 320, at 347.

337. The Women's Rights Convention held at Seneca Falls, New York, July 19 and 20, 1848, is commonly considered the beginning of organized feminism in the United States. The convention produced a pioneering statement of women's rights: The Seneca Falls Declaration of Sentiments, *reprinted in* 1 *History of Woman Suffrage* 70-73 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda J. Gage eds. 1881), *in* Anne Fivor Scott & Andrew Mackay Scott, *One Half the People: The Fight for Woman Suffrage* 56-59 (1975), *and in* *The Feminist Papers* 415-20 (Alice S. Rossi ed. 1973).

338. *See* 4 *History of Woman Suffrage* at xxii (Susan B. Anthony & Ida Husted Harper eds. 1902).

339. "In the 1870s, men typically worked as stenographers and scriveners; women composed less than 5 percent of this group. By 1900, the women held fully three-quarters of these jobs." Rothman, *supra* note 329, at 48 (citing Mary Allison, *The Public Schools and Women in Office Service* 6 (1914)). *See generally id.* at 48-51.

340. This occupation tended to be filled more often by lower-class and immigrant women than by middle-class women. Department stores were a post-Civil War development that also revolutionized the purchasing habits of the middle-class woman. *See generally* Rothman, *supra* note 329, at 52-56.

pation of teacher. At the same time, the birthrate continued to decline³⁴¹ and schooling for children increased both in availability and in daily hours.³⁴² Add to this the breakthroughs in domestic technology,³⁴³ and women previously tied to the hearth became freer to pursue employment, or if better off, social goals in the outside world.³⁴⁴

The development of women's education also had a significant influence on women's role. Starting with Vassar in 1865,³⁴⁵ women's colleges, and later the great state colleges of the midwest, began slowly to dispel the myth of women's intellectual inferiority.³⁴⁶ The success of this effort in the early part of the twentieth century was dramatic: by 1920, thirty-four percent of all college alumni were women.³⁴⁷ Yet even this did not precipitate a total revision of the image of woman. Instead, the concept of the professional mother developed. Motherhood was viewed as such an important and difficult art as to require education and organization, both domestic and public.³⁴⁸

The negative aspects of the image of women were gradually softened so that by the 1920s "the college graduate had become the model woman."³⁴⁹ Yet the ideal of purity, piety, and moral superiority of women did not have to change with these developments. The 1870s saw the birth of the Women's Christian Temperance Union,³⁵⁰ an organization aimed not so much at temperance but at the prohibition of drinking, smoking, and prostitution, and at "refining the whole moral climate of the nation and reforming the character of the coarse and vulgar male."³⁵¹ The 1870s also saw

341. Scott & Scott, *supra* note 337, at 27.

342. *Id.*

343. *Id.* Rothman, *supra* note 329, at 14-18.

344. Scott & Scott, *supra* note 337, at 27-28; Ida Husted Harper, *Would Woman Suffrage Benefit the State, and Woman Herself?*, 178 N. Am. Rev. 362, 365 (1904).

345. Rothman, *supra* note 329, at 26-27. Oberlin College had been admitting women since 1834 but without "the rights and privileges of the male students." *Id.* at 27 n.*.

346. *See id.* at 26-42.

347. Rudolph C. Blitz, *Women in The Professions, 1870-1970*, Monthly Lab. Rev., May 1974, at 38. This particular figure, although impressive, may be misleading. Deaths during World War I must have accounted for a large number of male alumni. Thus 34% of surviving alumni in 1920 was still not a very large number of women.

348. Rothman, *supra* note 329, at 97-127.

349. *Id.* at 37.

350. The WCTU was founded in 1873 and by 1890 had 160,000 members. Rothman, *supra* note 329, at 67. Under the dynamic leadership of Frances Willard, it set out to bring the values of the home—that is, feminine morality—into the extra-domestic world. *Id.*

351. Tannahill, *supra* note 317, at 399.

the first legislation prohibiting contraception.³⁵² Much of the revolutionary potential of the educated woman was defused by the notion of education for motherhood.³⁵³

Nor did the suffragist movement argue against the angelic image of women. On the contrary: "Women fought for suffrage in order to bring their special qualities to the ballot box. Women deserved the vote not because they were the same as men, but precisely because they were different."³⁵⁴ If politics were so base and corrupt, then it was time women exposed and remedied that condition.³⁵⁵ Men, in their monopoly of political power, had not proved so successful that the system did not need the elevation women could bring to it.³⁵⁶ By the twentieth century, the themes of natural justice and equality that infuse the Seneca Falls Declaration³⁵⁷ had been replaced by the moral superiority of women and a less congenial argument based on the comparison of women with immigrants, "several millions of plantation negroes," and American Indians.³⁵⁸ Far from requiring a change in the image of woman as a superior moral being, suffragist arguments depended upon it. To be sure, the prevailing social conception of woman was undergoing a change, but not of the kind that required a revision of the tort of seduction.

As noted, this discussion has been substantially confined to middle-class conceptions of middle-class women. So too it was with the suffragist movement. The movement finally succeeded when it brought working-class women³⁵⁹ into its ranks,³⁶⁰ but the

352. *E.g.*, The Comstock Act, ch. 258, 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. § 1461 (1982)) (prohibiting the use of the mails for articles, devices, drugs, etc., for contraception or abortion or for any information pertaining thereto). See Grossberg, *supra* note 103, at 175-78.

353. For an example of the writing of a prominent proponent of this view, see Annie Nathan Meyer, *Woman's Assumption of Sex Superiority*, 178 N. Am. Rev. 103 (1904). Meyer was one of the founders of Barnard College; her reactionary views prompted Ida Harper's lively rebuttal. See Harper, *supra* note 344.

354. Rothman, *supra* note 329, at 127.

355. Claflin, *supra* note 322, at 63-64.

356. Harper, *supra* note 344, at 372-74.

357. See *supra* note 337. For a comprehensive and subtle account of this process, see Aileen S. Kraditor, *The Ideas of the Woman Suffrage Movement, 1890-1920*, at 43-74 (1965).

358. Harper, *supra* note 344, at 366-67. The jingoism and racism of this argument was sometimes less than admirable. For example: "Those who fear the foreign and the colored vote should remember that there are more native-born women in the United States than foreign-born men and women; more white women than colored men and women." *Id.* at 373.

359. Organized labor had long supported woman suffrage, *id.* at 369-70, but it was not until 1913 that working women spoke at the annual meeting of the National American Woman Suffrage Association (NAWSA). Rothman, *supra* note 329, at 131.

middle-class morality, and the middle-class conception of women as the guardian thereof, was not automatically changed by that victory. On the contrary, it took many years for significant changes in woman's social place to occur. The immediate benefits of the franchise were, predictably, in infant and maternal welfare,³⁶¹ education, and protection of women in the workplace.³⁶² In other areas, the old myths remained in place. So too did the old law of seduction.

Thus emancipation was not based on, nor did it generate the kind of change in, the image of women that would require revision of the law of seduction. Indeed, it took another fifteen years for the next round of legislative reform of the tort to begin.³⁶³ In the second half of the 1930s, ten states abolished or severely limited the availability of civil seduction along with the other three heart balm actions.³⁶⁴ It is this partial revolution that must now be explained.

The movement to abolish heart balm actions, including seduction, began in Indiana in 1935 largely through the efforts of Indiana's only woman legislator, Roberta West Nicholson.³⁶⁵ Her campaign caught on quickly,³⁶⁶ and by the end of 1935, similar bills had been introduced in the legislatures of some twenty-three states.³⁶⁷ In many states the reform bills were introduced by women legislators.³⁶⁸ Newspapers of the time reported the measure as largely a women's cause. For example, a United Press story

360. Rothman, *supra* note 329, at 127-32. No doubt this is correct ideologically, but as a practical matter it was state victories (brought about by the strategy designed by Carrie Chapman Catt) that forced previously opposed senators to change their votes in 1918. Maud Wood Park, *The Winning Plan*, in National American Woman Suffrage Association Victory: How Women Won It 121 (1940).

361. The Sheppard-Towner Act (also known as the "Maternity Hygiene Act"), ch. 135, 42 Stat. 224 (1921), *repealed by* Act of Jan. 22, 1927, ch. 53, § 2, 44 Stat. 1024 (effective June 30, 1929).

362. See Rothman, *supra* note 329, at 135-53; William Henry Chafe, *The American Woman: Her Changing Social, Economic, and Political Roles, 1920-1970*, at 4-6 (1972).

363. See *supra* notes 237-81 and accompanying text.

364. See *supra* text accompanying notes 237-54.

365. See *supra* text accompanying note 245.

366. See Indianapolis Times, Mar. 23, 1935, at 2, col. 8, which carried the sub-heading *Mrs. Nicholson's Campaign Now Extends to 14 States of Union*.

367. Bills were introduced in Alabama, Arizona, California, Connecticut, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New York, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin. See Feinsinger, *supra* note 2, at 997-98; see also *supra* note 237.

368. See *supra* text accompanying notes 246-47 (Indiana & Ohio); Indianapolis Times, Mar. 23, 1935, at 2, col. 8 (Maryland, introduced by the state's only woman senator, Mary E.W. Risteau); and Feinsinger, *supra* note 2, at 997 (Nebraska).

stated: "The loudest champions of the legislation are women while the most bitter opponents are men."³⁶⁹ Support, however, came from all segments of society,³⁷⁰ the legislation having generated considerable interest.³⁷¹

Enactment of anti-heart balm statutes began with Indiana's statute being signed into law by Governor McNutt on March 12, 1935;³⁷² those states that were to follow suit did so quickly. The New York Act, patterned after Indiana's, became law on March 29, followed by Michigan (June 3), Pennsylvania (June 22), New

369. Indianapolis Times, Mar. 23, 1935, at 2, col. 8.

370. "A flood of mail—letters from farmers, lawyers, housewives, ministers, living in all parts of the country—has been received by Mrs. Roberta West Nicholson . . ." Indianapolis News, Jan. 31, 1935, at 3, col. 2.

371.

A VALENTINE DAY SENTIMENT



Indianapolis Times, Feb. 14, 1935, at 14, col. 4.

372. See Heart-Balm Act, ch. 208, 1935 Ind. Acts 1009 (presently codified at Ind. Code § 34-4-4-1 (1982)).

Jersey (June 27), Illinois (July 1), and Alabama (September 7).³⁷³ More striking, however, is the number of states that considered, but failed to pass anti-heart balm bills: of the twenty-three states whose legislatures entertained such bills in 1935, only eight enacted them before 1950.³⁷⁴

In 1935, two main explanations were given for the need to abolish heart balm actions. First, the availability of such an action lent itself too readily to blackmail,³⁷⁵ or as Roberta West Nicholson colorfully put it, "itching palms in the guise of aching hearts."³⁷⁶ Second, a monetary damage award was said to be inappropriate for emotional injury.³⁷⁷ The widespread publicity given to suits involving sexual relations also played a role, both in facilitating (supposed) blackmail and in upsetting moral scruples.³⁷⁸ Additionally, "unscrupulous jackleg lawyers"³⁷⁹ were attacked as fostering heart balm litigation for their own meretricious ends.³⁸⁰

373. See *supra* note 237.

374. Seven states passed anti-heart balm bills in 1935: Alabama, Illinois, Indiana, Michigan, New Jersey, New York, and Pennsylvania. See *supra* note 237 and accompanying text. Fifteen states entertained but failed to enact proposed legislation: Arizona, Connecticut, Idaho, Maryland, Minnesota, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Washington, and Wisconsin. See *supra* note 240. Of the 15 states with unsuccessful 1935 bills, Wisconsin was first to remedy the situation in 1959. Act of Oct. 28, 1959, ch. 595, § 73, 1959 Wis. Laws 740, 765 (presently codified at Wis. Stat. Ann. § 768.01 (West 1981)); see also *supra* note 267. No other state followed until Oregon in 1975. Act of July 2, 1975, ch. 562, 1975 Or. Laws 1285 (presently codified at Or. Rev. Stat. §§ 30.840, 30.850 (1983)).

375. Senator McNabe (sometimes reported as "McNaboe"), sponsor of the New York bill, said such suits "in many instances border on blackmail." Indianapolis Times, Mar. 4, 1935, at 6, col. 3. Representative Bauer of Indiana said of that state's bill: "Such a law will stop many shake-downs." Indianapolis News, Jan. 24, 1935, at 5, col. 2.

376. Indianapolis News, Feb. 2, 1935, at 3, col. 3 (speech in support of Indiana's anti-heart balm bill, Feb. 1, 1935).

377. Nicholson stated: "There is no cash value on misconduct and I submit to you that love and respect and affection are not transferrable, negotiable commodities—certainly not recoverable in a court of law." *Id.* Similarly, she declared: "Surely a suit to recover money as damages for the broken romance cannot soothe a woman if love was genuine." Time, Feb. 18, 1935, at 16, col. 1. Senator McNabe, in response to protests that anti-heart balm statutes would obstruct justice, retorted: "Do you think money will bring back virtue?" Indianapolis Times, Mar. 25, 1935, at 6, col. 2. Feinsinger, *supra* note 2, at 979.

378. Feinsinger, *supra* note 2, at 1009. "[S]uits of this sort, with their attendant publicity, are a detriment to public morals and induce a sordid and vulgar conception of marital affairs, in the minds of the immature." Indianapolis Star, Feb. 2, 1935, at 8, col. 2 (statement by Nicholson); see also Indianapolis News, Feb. 2, 1935, at 3, col. 3.

379. Indiana's Senator Wade, speaking in support of the bill: "Thousands on thousands of dollars are being taken by unscrupulous jackleg lawyers in such cases" Indianapolis News, Mar. 8, 1935, at 1, col. 5.

380. "Decent attorneys do not accept suits of this type" Talcott Powell, *A Merit System*, Indianapolis Times, Feb. 18, 1935, at 6, col. 2.

In support of this and the blackmail contention, Nicholson even argued that "at least 90 per cent of these cases never get to court."³⁸¹

Although these arguments may account for the widespread publicity given to the 1935 anti-heart balm movement, they scarcely account for either its arising at that time, or its very limited success.³⁸² Absent a special suitability for publicity, heart balm actions no more lend themselves to exploitation by blackmailers than other tort actions. Yet the public's taste for prurience and the media's willingness to satisfy it was peculiar neither to those states that joined Indiana in banning heart balm actions, nor to 1935. Examples of highly publicized heart balm actions occur in the eighteenth,³⁸³ nineteenth,³⁸⁴ and early twentieth³⁸⁵ centuries. Yet none of these periods generated the least movement to abolish heart balm causes of action.

As for extortion and blackmail, any available cause of action can be misused for such purposes.³⁸⁶ A lawyer also is surely not to

381. Indianapolis Star, Feb. 2, 1935, at 8, col. 2; see also Indianapolis News, Feb. 2, 1935, at 3, col. 3.

382. Feinsinger calls these the "surface explanation[s]," but although he suggests an "underlying explanation" similar to that offered below, the "surface explanation" is the only one he develops. See Feinsinger, *supra* note 2, at 979.

383. The 18th-century criminal conversation action, *Cibber v. Sloper*, Selwyn's *Nisi Prius*, 10 (1738) (referred to by Lord Kenyon in *Dubberly v. Gunning*, 4 T.R. 654 (1792)), involving a renowned beauty and popular actress, would seem difficult to surpass in lasciviousness or notoriety. The attendant publicity gave a great boost to the career of Lord Mansfield, one of the barristers involved. 3 Lord John Campbell, *The Lives of the Chief Justices of England* 234-35 (1874). Another criminal conversation case was sufficiently notorious to make its way into popular fiction. See Herman Melville, *Moby Dick* 574 (1930). Melville took his information from 2 William Scoresby, *An Account of the Arctic Regions, With a History and Description of the Northern Whale-Fishery* 518-21 (1820). The case actually discussed was *Gale v. Wilkinson*. It does not appear to have been reported; Scoresby got his copy of the opinion from Gale. *Id.*

384. In the 1870s the "Beecher-Tilton trial [was] an alienation of affection suit so full of salty detail that it kept the country enthralled for 16 glorious weeks." Tannahill, *supra* note 317, at 397. The *New York Times* carried detailed reports almost daily from July 13 through September 10, 1874 and occasionally thereafter through the end of that year. For a contemporary feminist commentary on the Rev. Henry Ward Beecher's behavior, see Victoria Woodhull, *Vindication of the Beecher-Tilton Scandal*, in Root of Bitterness 256 (Nancy F. Cott ed. 1972), reprinted from *The Beecher-Tilton Scandal Case: The Detailed Statement of the Whole Matter* by Mrs. Woodhull, Woodhull and Claflin's Weekly, Nov. 2, 1872, at 9-13.

385. The 1912 Ohio seduction case, *Young v. Corrigan*, 208 F. 431 (N.D. Ohio 1912), labeled by the judge as reeking of extortion, blackmail, and worse, achieved widespread publicity.

386. Frederick L. Kane, *Heart Balm and Public Policy*, 5 Fordham L. Rev. 63, 66 (1936). With respect to seduction there are only two reported cases in the United States that make any mention of blackmail or extortion: *Morgan v. Yarrowborough*, 5 La. Ann. 316 (1850); *Young v. Corrigan*, 208 F. at 431. Seduction is surely at least as suitable a vehicle for extortion as any of the heart balm causes.

be censured for using a legislatively and judicially approved cause of action to his or her client's benefit.³⁸⁷ As for the inadequacy of a monetary award as a remedy for loss of virtue or spouse, or for a broken heart, surely the same argument applied then, as it does now, to a great many tort actions. Yet monetary damages are the primary form of remedy presently accepted and used in this society. Finally, had all these explanations, separately or collectively, been sufficient grounds for abolishing heart balm actions, then the abolition should have been more widespread than in fact it turned out to be. The failure of fifteen of the twenty-three legislatures that contemplated anti-heart balm bills in 1935 to allow their passage in itself belies both the validity and the persuasiveness of these explanations.

Yet the inadequacy of these contemporary explanations of the anti-heart balm movement of 1935 does not mean that they should be *ipso facto* dismissed. Such explanations themselves are a part of, and symptomatic of, the cultural milieu in which they occurred. To be effective at the time, these arguments had to meet a receptive audience, an audience whose values and social conceptions would make the objective agreeable even if the arguments themselves were not independently adequate. The key to this partial revolution in the law of seduction thus lies in the change in the prevalent conception of woman, her role in society, sexual relations, and the family. What had happened in society since 1920 to bring about the requisite change?

In order to understand the changes in the myth of the ideal woman that prevailed in the 1930s, it is necessary to look back to the immediate post-World War I, post-emancipation period. "Historians have long recognized that, for better or worse, American culture was remade in the 1920's. Robust with business styles, technologies, educational policies, manners, and leisure habits which are identifiably our own, the decade sits solidly at the base of our culture."³⁸⁸ Perhaps most of all, the 1920s was a decade of revolution in sexual mores.³⁸⁹ This was a period of "immense pre-

387. Contrary to Talcott Powell's suggestion, *supra* note 380, it is not the indecent but the professionally irresponsible lawyer who would refuse to make use of available law for his or her client.

388. Paula S. Fass, *The Damned and the Beautiful: American Youth in the 1920's*, at 3 (1977). This book presents one of the most detailed and comprehensive accounts of the change in societal values in the 1920s.

389. "Students of modern sexual behaviour have quite correctly described the twenties as a turning point, a critical juncture between the strict double standard of the age of Victoria and the permissive sexuality of the age of Freud." Fass, *supra* note 388, at 260.

occupation with sex,"³⁹⁰ in literature, conversation, and behavior.³⁹¹ It was also the period during which the first and, because of its ultimate success, the only major campaign to introduce American women to contraception took place.³⁹² By the end of the decade, the old Victorian concept of female morality—of "sexual purity and sacrifice"³⁹³—had been abandoned in favor of a new, equalitarian view. Women sought, and to a marked extent achieved, substantially the same sexual freedoms as had previously been enjoyed only by men.³⁹⁴ "Women born after the turn of the century were twice as likely to have experienced premarital sex as those born before 1900, and the critical change occurred in the generation which came to maturity in the late teens and early 1920's."³⁹⁵ The revolution was in both behavior and the prevailing mythology.

The sexual liberation of women in the 1920s was not a product of the movement that had produced emancipation: quite the contrary. Suffragists had campaigned not on the basis of sexual equality, but on women's moral superiority.³⁹⁶ They had sought the vote, not equality. After emancipation the suffragist movement's main achievement—protective legislation—was felt by many equalitarian feminists to be patronizing.³⁹⁷ According to the older suffragist argument, sexual equality for women was not lib-

390. Walter Lippman, A Preface to Morals 285 (1929).

391. *Id.* at 284-92; see also Fass, *supra* note 388, at 260; Rothman, *supra* note 329, at 177-218; Chafe, *supra* note 362, at 94-95; Robert S. Lynd & Helen Merrell Lynd, *Middletown: A Study in American Culture* 137-46 (1929) [hereinafter *Middletown*]. The last cited work, the first of the justifiably famous *Middletown* series, is a report of an intense study of social relations in Muncie, Indiana in the mid-1920s. The cited passage is especially useful for its comparison with 1890s courting practices.

392. David M. Kennedy, *Birth Control in America: The Career of Margaret Sanger* (1970). Writing in 1929, Walter Lippman argued that contraception was a major cause of the sexual liberation of women in the 1920s. Lippman, *supra* note 390, at 288-92; Margaret Sanger herself argued (among many other arguments) that the role of contraception in "free[ing] the mind of sexual prejudice and taboo" was "most important of all." Margaret Sanger, *Pivot of Civilization* 244 (1923).

393. Carroll Smith-Rosenberg, *Disorderly Conduct* 295 (1985).

394. Rothman, *supra* note 329, at 177-218; Chafe, *supra* note 362, at 94-95.

395. Chafe, *supra* note 362, at 95. Lippman argues that this revolution may have been more in conversation and literature than in actual sexual behaviour. Lippman, *supra* note 390, at 286; see also Paul A. Carter, *Another Part of the Twenties* (1977). Chafe also notes that "[t]here was no way of knowing how many young women actually behaved in the manner described in magazine articles, and some degree of skepticism was probably warranted." Chafe, *supra* note 362, at 94. He goes on, however, to cite a 1938 survey—Lewis M. Terman, *Psychological Factors in Marital Happiness* 321 (1938)—which found that of women born between 1890 and 1900, 74% were virgins at marriage, while of women born after 1910, 31.7% were! Chafe, *supra* note 362, at 95.

396. See *supra* notes 354-58 and accompanying text.

397. Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman's Party*, 71 *J. Am. Hist.* 43, 53 (1984).

eration but degradation: it brought women down to the level of men.³⁹⁸ The suffragist movement, however, failed to maintain its momentum through the 1920s,³⁹⁹ and with the repeal of the Sheppard-Towner Act in 1927,⁴⁰⁰ it lost the last vestiges of influence.⁴⁰¹

The new feminists, the sexual equalitarians, did not fare much better politically. Professor Smith-Rosenberg argues cogently that female sexual liberation was a key to the traditional male politicians' defense against the potential power of women voters.⁴⁰² By characterizing women political reformers as either aggressive lesbians or frustrated, man-hating spinsters,⁴⁰³ men had "redefined the issue of female autonomy in sexual terms."⁴⁰⁴ This, of course, required male acquiescence in a measure of female sexual liberation. Women bought the argument, transforming the drive for political liberation and equality into a drive for sexual liberation, "the right to sexual experimentation and self-expression."⁴⁰⁵

Whatever the merits of this argument, by the end of the decade the sexually liberated "flapper" had become the norm.⁴⁰⁶ A "revolution in morals and manners had occurred in America,"⁴⁰⁷ but it was not a revolution that gained women any significant social, economic, or political equality.

The daughter's quest for heterosexual pleasures, not the mother's demand for political power, now personified female freedom. Linking orgasms to chic fashion and planned moth-

398. Rothman, *supra* note 329, at 178; Smith-Rosenberg, *supra* note 393, at 296; Chafe, *supra* note 362, at 96.

399. Chafe, *supra* note 362, at 25-33.

400. Sheppard-Towner Act, ch. 135, 42 Stat. 224 (1921), *repealed by* Act of Jan. 22, 1927, ch. 53, § 2, 44 Stat. 1024. See *supra* text accompanying note 361.

401. "The rejection of the child labor amendment signaled the end of the flush times of social feminism and the beginning of famine years." J. Stanley Lemons, *The Woman Citizen: Social Feminism in the 1920s*, at 228 (1973). This period also saw the introduction and failure of the first equal rights amendment. See Cott, *supra* note 397, at 56-68.

402. Smith-Rosenberg, *supra* note 393, at 281-96.

403. "Plus ça change . . ." Cf. *supra* note 323 and accompanying text.

404. Smith-Rosenberg, *supra* note 393, at 282-83.

405. *Id.* at 284. "Sexuality was the critical issue for this generation of New Women. They linked it with identity and with freedom." *Id.* at 292.

406. "They lived for fun and freedom, which was seen in terms of automobiles, short skirts, cigarettes, speakeasies, jazz, and wild new dances like the Charleston." Robin Franklin & Tasha Lebow Wolf, *Remember the Ladies: A Handbook of Women in American History* 72 (1984). See generally Fass, *supra* note 388, for a detailed account of young people in the 1920s. This trend upset traditional feminists who saw it as aimless and non-purposive. Chafe, *supra* note 362, at 92-94. Students' loss of interest in social causes and increasingly private, selfish orientation was reflected in college curricula as well as in social organizations. Rothman, *supra* note 329, at 180-84.

407. Chafe, *supra* note 362, at 94.

erhood, male sex reformers, psychologists, and physicians promised a future of emotional supports and sexual delights to women who accepted heterosexual marriage—and male economic hegemony. Only the “unnatural” woman continued to struggle with men for economic independence and political power.⁴⁰⁸

By the end of the 1920s the feminist movement toward equality was a palpable failure.⁴⁰⁹

Woman's role, status, and image need not have remained thus. Sexual liberation might have been just a first step in a movement toward more general equality,⁴¹⁰ had it not been for the advent of the great depression of the 1930s.⁴¹¹ “[J]ust as suddenly as she emerged, the ‘new’ woman seems to have disappeared—a casualty, it would seem, of the Great Crash of 1929, quickly replaced by the ‘forgotten man’ of the thirties.”⁴¹² Priorities changed. Women's lot in life was of relatively little importance to a society faced with massive unemployment. Women were driven from the job market to make way for men,⁴¹³ and, to further that end, the older domestic female image returned. “Congresswoman Florence Kahn spoke for most of her colleagues when she declared that ‘woman's place is not out in the business world competing with men who have families to support,’ but in the home.”⁴¹⁴

Thus, an increase in autonomy and freedom in sexual and social mores was the only benefit of the 1920s revolution that women carried with them into the depression of the 1930s.⁴¹⁵ The traditional social structure remained essentially intact: women were socially, economically, and politically the dependents of men.⁴¹⁶ “[T]he cultural pattern dinned into Middletown's girls and women

408. Smith-Rosenberg, *supra* note 393, at 283.

409. Cott, *supra* note 397, at 56-68; Chafe, *supra* note 362, at 29-47; Smith-Rosenberg, *supra* note 393, at 296; Rothman, *supra* note 329, at 218.

410. It is incorrect to say that United States feminism “collapsed and died” in the 1920s; rather, it just paused. Lemons, *supra* note 401, at vii.

411. Chafe, *supra* note 362, at 107.

412. Susan D. Becker, *The Origins of the Equal Rights Amendment: American Feminism Between the Wars* 6 (1981).

413. Chafe, *supra* note 362, at 107-09.

414. *Id.* at 107.

415. Robert S. Lynd & Helen Merrell Lynd, *Middletown in Transition: A Study in Cultural Conflicts* 176-80 (1937) [hereinafter Lynd & Lynd]. This 1935-36 follow-up study of Muncie, Indiana, provides a perceptive and timely analysis of the changes that had taken place between 1925 and 1935. Cf. *Middletown*, *supra* note 391.

416. See Lemons, *supra* note 401, at 228-44. Illustrative is the lack of independent identity accorded Roberta West Nicholson by the press: she is identified, not solely as the Democratic representative of Marion (as would any of her male counterparts), but as “daughter-in-law of Author-Diplomat Meredith Nicholson” and “ten years married and mother of two.” *Time*, Feb. 18, 1935, at 16, col. 1.

on every hand has no uncertainty as to their different and secondary role, and shows no appreciable change since 1925."⁴¹⁷ But economic dependence in particular denied the completeness of woman's sexual emancipation.⁴¹⁸ Unless she was free to live and support herself as she chose, independently, she could not be sexually autonomous. "By that standard, women in 1940 were still far from being free."⁴¹⁹

This, then, was the conception of womanhood that prevailed in the mid-1930s when legislatures began to contemplate a change in traditional heart-balm law, including the tort of seduction. Woman had the right to vote, she may have been somewhat sexually liberated, and contraception may have freed her from the major personal risks of intercourse, but in all other significant respects she remained inferior—the economic, social, and political dependent of man. Yet, for the heart-balm actions to remain viable, it was essential that woman also not be sexually autonomous. Except for alienation of affections, all the heart-balm causes of action were against men who had taken advantage of women—women who were thus perceived as incapable of looking out for themselves in such respects. The sexually autonomous woman brooks no such patronizing.

It is this development in the sexual autonomy of women that made possible the 1935 legislative reforms in the tort of seduction. Fittingly, the reforms were introduced primarily by women leaders.⁴²⁰ Roberta West Nicholson, the pioneering Indiana congresswoman, also saw heart balm law reform as a matter of woman's rights, although she did not make this the main focus of her speeches. For example, in her speech before the final vote in the Indiana Congress, she said: "We have an opportunity to pass a piece of progressive legislation, in keeping with the times. . . . Women do not demand rights, gentlemen, they earn them, and they ask no such privileges as these which are abolished in this bill."⁴²¹

Opposition to the Indiana anti-heart balm bill came from

417. Lynd & Lynd, *supra* note 415, at 180. The Lynds quote a 1932 editorial: "Women . . . accept general standards of values men have set. They take their views of life as a hand-me-down from men and model their demands on life by those of men." *Id.*

418. Chafe, *supra* note 362, at 109.

419. *Id.*

420. See *supra* notes 245-47 & 368 and accompanying text.

421. Indianapolis News, Feb. 2, 1935, at 3, col. 3. An earlier columnist wrote: "[Roberta West Nicholson's] action is a tribute to the average modern woman of intelligence, who has proved herself as able as her masculine counterpart to withstand the ordinary slings and arrows of mundane existence—without the aid of the courts." Indianapolis News, Jan. 28, 1935, at 6, col. 6.

male senators and was in terms of women's perceived lack of independence, judgment, and capability. Republican Senator William P. Dennigan spoke in exactly such terms: "Do you mean to tell me you will help women by taking away their civil rights against philanderers and men who prey upon them?"⁴²² The test, then, lay in the conception of woman prevalent among the legislators: was she sufficiently emancipated to make responsible decisions as to sexual behavior herself, or did the Victorian image of the angelic victim still hold sway? In Indiana and six other states in 1935, the former conception prevailed.⁴²³

Significantly, legislators on both sides of this issue agreed that, because of youth and inexperience, young women might still, unwittingly, fall victim to the wiles of experienced men. Accordingly, seduction of women below the age of majority was singled out for preservation as a civil cause of action.⁴²⁴ This exception emphasizes the critical role of the sexual emancipation of adult women in the general abolition of heart balm actions.

What, then, of the popular arguments that heart balm actions were given excessive publicity and thus lent themselves unduly to blackmail?⁴²⁵ As noted above, such actions had always been well publicized without thereby engendering any change in heart balm law.⁴²⁶ Thus, the question becomes: why should such publicity be thought so harmful in 1935? The answer again lies in the sexual liberation of women, either in reality or, more importantly, in the popular conception. Prior to World War I, the women who became involved in such publicized actions could only be "creatures of another stamp."⁴²⁷ Only the true meretrix would exploit her honor for pecuniary gain; the girl next door could only be an innocent victim. In the Victorian image, the girl next door would no more fuck her neighbor than show her knees or smoke a cigarette in public. After the revolution in social and sexual mores of the 1920s, all of these became—again, in the popular conception, if not always in reality—viable possibilities. Thus the publicity that had

422. Indianapolis Star, Mar. 8, 1935, at 11, col. 3.

423. Alabama, Illinois, Indiana, Michigan, New Jersey, New York, and Pennsylvania all abolished or eliminated heart balm actions. *See supra* note 237 and accompanying text. California, Colorado, Florida, and Massachusetts had followed suit by the end of World War II. *See supra* notes 238-39 and accompanying text.

424. *See, e.g.,* a description of the Indiana, Alabama, California, and Michigan statutes, *supra* note 249. New York and New Jersey made no exception for younger women, and Pennsylvania and Illinois did not abolish seduction, only the other heart balm actions. *See supra* note 237.

425. *See supra* notes 375-77 & 381 and accompanying text.

426. *See supra* notes 383-85 and accompanying text.

427. Oliver Goldsmith, *She Stoops to Conquer*, act 1, scene 1 (1773).

hitherto been of other, inaccessible social worlds, now was brought closer to home. Accordingly, New York's Senator McNabe, in promoting New York's anti-heart balm bill, used not a glamorous and notorious Hollywood story,⁴²⁸ but a suit by a secretary against her former employer.

Consider, for instance, the suit recently filed in a middle-Western court by a young woman who wants \$100,000 from her former boss for breach of promise. According to her suit, from 1928 to the end of 1934, the boss promised to marry her. At the end of 1934 he changed his mind. By her own admission, this young woman played along with her boss for close to six years. Any girl intelligent and self-respecting enough to make her own way in the world might have been expected to smell a rat long before the boss broke the bad news.⁴²⁹

The general lack of success of the anti-heart balm movement still requires explanation. All of the above-mentioned social changes took place nationwide. They were not exclusive to a handful of midwestern and eastern states. The partial success, but predominant failure, of the anti-heart balm movement is probably best explained by the partial success, but predominant failure, of the woman's equalitarian movement. Women had made great strides in sexual autonomy, but remained far short of equality with men.⁴³⁰ In all other spheres, woman's progress from 1920 to the mid-1930s had been minimal.⁴³¹

Sexual autonomy could not be divorced entirely from dependence in all other spheres. Women were probably still seen as relatively incapacitated creatures, needful of the patronizing protection of men, and, where that might fail, of the legal system. It is also probable that, despite the early publicity, abolishing heart balm actions was not very high on the male legislator's agenda. The Ohio bill, for example, seems to have died from inertia rather than opposition, despite the flurry with which it was introduced.

Throughout the period between the two world wars, there was very little significant appellate action in the tort of seduction. Indeed, if the level of appellate activity is indicative of the level of litigation, then seduction had fallen into relative desuetude. Such is to be expected, given the development in the popular image of woman. As in the nineteenth century, the courts did not follow

428. The personal affairs of stage and screen stars were as popular in the 1930s as in the 18th century, *see supra* note 383, or the present. *See, e.g.*, Indianapolis Times, Mar. 25, 1935, at 1, col. 2.

429. Indianapolis Times, Mar. 4, 1935, at 6, col. 3. This passage illustrates well many of the points made above.

430. *See supra* notes 415-19 and accompanying text.

431. *Id.*

the lead of the legislatures. Rather, in the few opportunities presented them, they upheld the earliest United States form of the tort.⁴³² Male judges, when called upon to look, kept their gazes fixed firmly on the past.

The depression of the 1930s halted any progress that women may have been making toward general equality, either in fact or popular conception. Only a measure of sexual liberation had been permanently established. World War II followed, and women who had been driven from the job market during the previous decade were welcomed back in unprecedented numbers and in unprecedented roles.⁴³³ While there had been no net change in the percentage of women working between 1910 and 1940, the number of working women increased by 50% during the war.⁴³⁴ Of necessity, many women filled traditional male roles.⁴³⁵ "The ease with which women assumed their new responsibilities challenged many of the conventional stereotypes of women's work."⁴³⁶

While in reality women may have been doing work hitherto preserved for men, their image in those jobs was kept in line with prewar stereotypes. Women were not admitted into the professions in significantly greater numbers,⁴³⁷ and jobs that previously promised upward mobility were reclassified.⁴³⁸ From its beginning, the temporary nature of this burst of female employment was recognized and preserved. Official policy, for example, required that child care facilities not be placed too close to the place of employment lest they be "too convenient, outlive the emergency, and encourage women to stay at work."⁴³⁹ While the actual employment pattern changed, the popular image of women as economically, physically, and socially second to and dependent upon men was determinedly preserved.

It is now familiar history that at the end of World War II, women were forced out of their temporary employment to make way

432. For example, in 1939 the Florida Supreme Court upheld the right of a father to recover for the seduction of his daughter. *Shaw v. Fletcher*, 138 Fla. 103, 189 So. 678 (1939). The court, however, refused to extend the right of action to the seduced woman herself. *Kirkpatrick v. Parker*, 136 Fla. 689, 187 So. 620 (1939). It should be noted that this case scarcely presented facts suitable for making such a change even if the court had wanted to.

433. See Rothman, *supra* note 329, at 221-23.

434. Chafe, *supra* note 362, at 135.

435. *Id.* at 137.

436. *Id.* at 138.

437. *Id.* at 152.

438. For example, "skilled" work was reclassified "light and repetitive." *Id.* at 156.

439. Rothman, *supra* note 329, at 223.

for the returning GI's.⁴⁴⁰ The old image of women as inferior to men in all roles but those of wife and mother was reinforced by the popular press and by respectable scientists.⁴⁴¹ The only groups that seemed not to believe the propaganda were working women themselves⁴⁴² and high school girls.⁴⁴³ Women moved back into the home, and the homes moved into the suburbs in an unprecedented fashion.⁴⁴⁴ Whether in advance of, or in justification of a lot they could not avoid, women were forced to believe, along with men, "the Hollywood-Victorian tradition that the state of marriage was itself, in some mysterious way, sufficient recompense even for a lifetime of incompatibility, recalcitrant children, petty back-biting, financial stress, and endless boredom."⁴⁴⁵

Not surprisingly, the post-World War II era was not a period of development in the tort of seduction. With the popular image of women being determinedly returned to that of the turn of the century, it could scarcely be expected that a legislature would treat them to equality in their most personal relations. It is similarly not surprising to find occasional cases of a traditional kind being successful on appeal.⁴⁴⁶ The most striking example is *Blackman v. Iles*,⁴⁴⁷ in which an action by a parent for the seduction of her minor daughter was upheld, despite New Jersey's legislative abolition of the cause of action.⁴⁴⁸ These were atavistic days for the concep-

440. Chafe, *supra* note 362, at 174; Rothman, *supra* note 329, at 222.

441. See, e.g., Ferdinand Lundberg & Marynia F. Farnham, *Modern Woman: The Lost Sex* (1947). For discussions of popular views published in this period, see Chafe, *supra* note 362, at 206; Betty Friedan, *The Feminine Mystique* 18-19 (1963). Not all academics fell dutifully into line. See, e.g., Mirra Komarovsky, *Cultural Contradictions and Sex Roles*, 52 *Am. J. Soc.* 184 (1946); Margaret Mead, *What Women Want*, 34 *Fortune* 172 (1946). For a useful discussion of the psychological theories of women prevalent through 1960, see Naomi Weisstein, *Psychology Constructs the Female*, in *Woman in Sexist Society* 207-22 (Vivian Gornick & Barbara K. Moran eds. 1971).

442. Seventy-five percent of working women wanted to keep their jobs. Chafe, *supra* note 362, at 178.

443. Eighty-eight percent of high school girls wanted careers. *Id.* at 179.

444. See generally Herbert Gans, *The Levittowners* (1967) (sociological study of the postwar suburban development of Levittown, New Jersey).

445. Tannahill, *supra* note 317, at 404.

446. See *Seamons v. Spackman*, 81 Idaho 361, 341 P.2d 442 (1959); *Fulgham v. Gatfield*, 72 Idaho 367, 241 P.2d 824 (1952); *Collis v. Hoskins*, 306 Ky. 391, 208 S.W.2d 70 (1948); *Blackman v. Iles*, 4 N.J. 82, 71 A.2d 633 (1950); *Graham v. Smith*, 46 Tenn. App. 549, 330 S.W.2d 573 (1959); *Caccamisi v. Thurmond*, 39 Tenn. App. 245, 282 S.W.2d 633 (1955).

447. 4 N.J. 82, 71 A.2d 633 (1956); see *supra* notes 263-65 and accompanying text. See also Note, *Avoiding the Incidence of Anti-heartbalm Statutes*, 52 *Colum. L. Rev.* 242 (1952).

448. 4 N.J. at 82, 71 A.2d at 633. The *Blackman* position was limited to minors in *Magierowski v. Buckley*, 39 N.J. Super. 534, 121 A.2d 749 (1956). See *supra* note 266 and accompanying text.

tion of womanhood.

Despite the pervasive popular mythology exalting the family and woman's primary role in it, the reality of the gains made by women in the 1940s was inescapable.⁴⁴⁹ Women soon began to return to work, with the greatest change among married women.⁴⁵⁰ Throughout the "baby boom,"⁴⁵¹ women continued to enter the workforce in increasing numbers. By 1960, forty percent of women over sixteen were employed, and the number of mothers at work quadrupled.⁴⁵² Most significantly, it became acceptable for middle-class women to go to work.⁴⁵³ Educated, middle-income women provided the greatest growth in employment.⁴⁵⁴ World War II had set in motion a change in women's attitudes toward their role in society that the traditional mythology could not withstand. "Once women were propelled out of their traditional role, they would not go back, and the change produced a series of consequences which promised to alter the basic structure of relationships between the sexes."⁴⁵⁵

The crushing boredom and the meaninglessness of their lives created pervasive personal problems—"the problem that has no name" as Betty Friedan dubbed it⁴⁵⁶—for women who lived purely according to the prevailing ideal.⁴⁵⁷ On the other hand, the clash between reality and the prevailing mythology created significant social and psychological tensions for educated women⁴⁵⁸ and women forced by economic necessity to work. "Women found themselves having to work, while having to express a preference for being full-time wives and mothers, or be thought abnormal. This conflict adversely affected both their jobs and their homes."⁴⁵⁹ By

449. Chafe, *supra* note 362, at 181-95, 217-25; Rothman, *supra* note 329, at 229-31.

450. Chafe, *supra* note 362, at 181-82. For example, in California, twice as many women were working in 1949 as has been in 1940.

451. Between 1940 and 1960, the birth rate doubled for third children, and tripled for fourth children. *Id.* at 217.

452. *Id.* at 218. This included mothers of young children: "In 1948, mothers of preschool children made up 10 percent of all women workers; in 1960 they were 19 percent." Rothman, *supra* note 329, at 229. "[Thirty-nine] percent of women with children aged six to seventeen had jobs." Chafe, *supra* note 362, at 218.

453. Chafe, *supra* note 362, at 183.

454. *Id.* at 218.

455. *Id.* at 224-25.

456. Friedan, *supra* note 441, at 15-32.

457. This problem was greatest among educated, middle-class women (from whom Friedan collected much of her data). See Jo Freeman, *The Politics of Women's Liberation* 31 (1975).

458. See generally Mirra Komarovsky, *Women in the Modern World: Their Education and Their Dilemmas* (1953). Predictably this period saw the rise of psychoanalysis as a means of alleviating the tension, having the effect of keeping women in their traditional roles. See generally Phyllis Chesler, *Women and Madness* (1972).

459. Freeman, *supra* note 457, at 26-27.

the end of the 1950s, there was a legacy of "frustration and anger" the result of which "would be the women's revolution of the 1960s."⁴⁶⁰

A healthy and growing economy, an active and effective awareness of civil rights, and a socially engaged government in the early 1960s provided the necessary environment for a renewal of feminist activism.⁴⁶¹ The society of the 1960s "was peculiarly attuned to the need for guaranteeing equality Feminism became a force to be reckoned with in American society."⁴⁶² The addition of a ban of sex discrimination to Title VII of the Civil Rights Act of 1964⁴⁶³ may have been an accident;⁴⁶⁴ the birth of the National Organization for Women (NOW) in 1966 was not.⁴⁶⁵ Sophisticated feminist activism, the reluctant support of the Equal Employment Opportunity Commission, a sharp increase in the education of women,⁴⁶⁶ and the increased availability of child care⁴⁶⁷ made economic equality a serious possibility.⁴⁶⁸ The ready availability of the birth control pill, the most convenient mode of contraception yet,⁴⁶⁹ and the Supreme Court's decision in *Roe v. Wade*⁴⁷⁰ gave women secure control over the choice to reproduce, absent which sexual equality would never be possible.⁴⁷¹ Thus "the feminists of 1975 had accomplished as much in seven years as their suffragist predecessors had accomplished in 70."⁴⁷² Not only was this

460. Rothman, *supra* note 329, at 218.

461. Chafe, *supra* note 362, at 227, 232-37. Whether the civil rights movement aided the women's movement is questionable. See Rothman, *supra* note 329, at 231-32. But it both prepared the audience for equalitarian arguments and provided a training ground for future feminist leaders. Freeman, *supra* note 457, at 27-28; Chafe, *supra* note 362, at 232-37.

462. Chafe, *supra* note 362, at 227.

463. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

464. See Caroline Bird, *Born Female: The High Cost of Keeping Women Down* 1-18 (rev. ed. 1968), for a discussion of the addition of the word "sex" to title VII.

465. See Freeman, *supra* note 457, for a detailed account of the origins of NOW; see also Betty Friedan, *It Changed My Life* 75-86 (1976) (NOW's original Statement of Purpose is reproduced at 87-91).

466. Between 1960 and 1965, "the number of degrees earned by women went up 57 percent compared to only a 25 percent increase for men." Freeman, *supra* note 457, at 29.

467. Between 1965 and 1970 the number of three and four year olds in nursery schools and kindergartens doubled, with the approval of 70% of the public. Chafe, *supra* note 362, at 243.

468. See Rothman, *supra* note 329, at 231-42; Chafe, *supra* note 362, at 226; Freeman, *supra* note 457, at 26.

469. Tannahill, *supra* note 317, at 406-21, argues that the birth control pill was one of the most significant causes of the revolution of the 1960s.

470. 410 U.S. 113 (1972).

471. See generally Betty Friedan, *How to Get the Women's Movement Going Again*, N.Y. Times, Nov. 3, 1985, (Magazine) 26, 98.

472. Tannahill, *supra* note 317, at 420.

a practical achievement, it also produced a dramatic change in the conception of women.

In sum, all of these elements . . . contributed to the formulation of a new definition of woman. They not only rendered the concept of the wife-companion obsolete but offered another one in its stead: woman as active, energetic, fully competent, and capable of self-definition as a person in sexual and in social terms. Woman's essence was no longer to be found in a household role but in her own achievements.⁴⁷³

A woman, thus conceived, could surely not be the victim of a seducer's wiles. A person with intellectual and social faculties on par with men, a person seen as responsible for her actions, sexually as well as economically and socially, does not fit this patronizing description.

It is not surprising, therefore, that another round of legislative abolition of seduction (and the other heart balm actions) began in the 1970s.⁴⁷⁴ Delaware was first in 1972,⁴⁷⁵ followed by Washington in 1973⁴⁷⁶ and Alaska in 1974.⁴⁷⁷ Both Washington and Alaska had previously passed statutes liberalizing the cause of action, which they now amended so as to inhibit its future use.⁴⁷⁸ Washington also made its surviving statute gender neutral.⁴⁷⁹ More drastic legislation in nine other states had, by 1983, abolished or severely limited the cause of action for seduction.⁴⁸⁰

Since 1970, there have been very few reported appellate decisions of actions for seduction,⁴⁸¹ and those that treat the cause of

473. Rothman, *supra* note 329, at 241-42.

474. See *supra* notes 267-76 and accompanying text.

475. Act of July 5, 1972, ch. 489, 58 Del. Laws 1601 (presently codified at Del. Code Ann. tit. 10, § 3924 (1975)).

476. Act of Apr. 24, 1973, ch. 154, § 5, 1973 Wash. Laws 1st Ex. Sess. 1118, 1125 (amending Wash. Rev. Code Ann. § 4.24.020 (1963)).

477. Act of May 17, 1974, ch. 127, § 64, 1974 Alaska Sess. Laws ch. 127, p. 1, 12 (repealing Alaska Stat. § 09.15.030).

478. See *supra* notes 273-75 and accompanying text.

479. See *supra* note 273 and accompanying text. Note that Wisconsin abolished action for breach of promise to marry in 1959. Act of Oct. 28, 1959, ch. 595, § 73, 1959 Wis. Laws 740, 765 (presently codified at Wis. Stat. Ann. § 768.01 (West 1981)). There had been no legislative action in this field for 14 years before this abolition and was to be no more for another 12 years; Wisconsin's legislation thus stands alone.

480. Actions for seduction were limited or abolished in the following states: Delaware (1973), Oregon (1975), Oklahoma (1976), Virginia and Wyoming (1977), Minnesota and Ohio (1978), Georgia (1979), and North Dakota (1983). Ohio and Oklahoma preserved the action for minor women and women of unsound mind. See *supra* notes 269-71 and accompanying text.

481. *E.g.*, Greco v. Anderson, 615 S.W.2d 429 (Mo. Ct. App. 1980) (applying Massachusetts law which abolished the cause of action); Breece v. Jett, 556 S.W.2d 696 (Mo. Ct. App. 1977); Piggott v. Miller, 557 S.W.2d 692 (Mo. Ct. App. 1977); McCraney v. Flanagan, 47 N.C. 498, 267 S.E.2d 404 (1980); Slawek v. Stroth, 62 Wis. 2d

action as still viable stand out like dinosaurs. The Missouri case of *Breece v. Jett*⁴⁸² is the most interesting for its extension of the right of action to the seduced woman herself.⁴⁸³ Amazingly, it was the first case to do so in a pure seduction action.⁴⁸⁴ It took 125 years after the first such legislative action for a common law court to follow suit! The case also provides an extensive discussion of the state of the tort of seduction in modern common law, in the course of which the wisdom of preserving the cause of action is repeatedly questioned.⁴⁸⁵ The court, however, felt unable to take the necessary leap and abolish it. "While we believe that an action for seduction is socially unwise in modern society, we believe that as an intermediate appellate court we cannot abolish the action."⁴⁸⁶ The basis of the court's hostility to the tort was precisely its enlightened view of the modern woman as fully emancipated and responsible for her own actions:

The woman of today is not the woman of yesteryear. She has a new-found freedom. The modern adult woman is sophisticated and mature. The former notion that women belong to the weaker sex has long been abandoned. The modern woman is not "easily beguiled" and does not easily fall to the "wiles" of man. Women desire and should be held to a reasonable responsibility.⁴⁸⁷

IV. Conclusion

This article has argued that the law of seduction is responsive to changes in the social conception of woman and her role—that is, to the myth of the ideal woman. It is not social reality that legislatures and courts react to, but social ideals. The prevailing myth, not the prevailing fact, is the motor of change. "Men do not have with myth a relationship based on truth but on use: they depoliticize according to their needs."⁴⁸⁸

As is shown in the third section, throughout the history of seduction, it was the idealized conception of woman, as found in

295, 215 N.W.2d 9 (1974). For a discussion of these cases, see *supra* notes 199-206 and accompanying text.

482. 556 S.W.2d at 696.

483. *Id.* See *supra* notes 165-73 & 205-06 and accompanying text for a discussion of the opinion.

484. See *supra* notes 118-73 and accompanying text.

485. For example: "Whether an action for seduction should be retained in contemporary society as a matter of judicial policy is highly questionable. . . . Recent social trends and the changing mores of contemporary society concerning sex and morality and the new found status of women may well make the action for seduction a remedy of a bygone era." 556 S.W.2d at 707.

486. *Id.* at 708.

487. *Id.*

488. Roland Barthes, *Mythologies* 144 (Annette Lavers trans. English ed. 1972).

literature, magazine articles, and social propaganda, that controlled the development of the tort. This dominating myth was the product of the middle classes and their social and economic needs. That the poor women of the Victorian era worked long hours in mills, wash houses, and the like mattered not to the prevalence or force of the myth. It was the middle-class myth that motivated the actions of legislatures, not the reality of the poor.

As the myth of true womanhood changed, the cause of action for seduction changed with it. When the conception of women was in terms of economic property, the tort was founded in the economics of lost services. As this gave way to the ideal of woman as morally angelic, physically frail, abhorrent of sex, and mentally and physically incapable of resisting the overtures of men,⁴⁸⁹ so, too, the cause of action changed from one for loss of services to one for loss of virtue. When women finally achieved a serious and general ideal (if not yet reality) of equality, the tort was abolished. The concept of the emancipated, autonomous woman is incompatible with the patronizing concept of victim of seductive male devices.

The myth of the ideal woman changed along with variations in other social exigencies.⁴⁹⁰ The relation, however, runs both ways: just as myth changes to justify reality, so too can a change in myth change reality.⁴⁹¹ As Roland Barthes writes:

[M]yth has the task of giving an historical intention a natural justification, and making contingency appear eternal. . . . What the world supplies to myth is an historical reality, defined, even if this goes back quite a while, by the way in which men have produced or used it; and what myth gives in return is a natural image of this reality.⁴⁹²

Should the image of the ideal woman change again, so too would the law of seduction.

It is to be hoped that the major elements of equality for women have been indelibly written into our social mythology. It is, however, far from clear that this is more than a hope. Without economic autonomy women will never have full sexual autonomy. Economic equality is far from a reality, and resistance to further

489. See *supra* notes 313-30 and accompanying text.

490. See *supra* notes 283-487 and accompanying text.

491. The intensive propaganda used after World War II to get women to return home had this effect. See *supra* notes 440-45 and accompanying text. The reverse efforts of the feminist movement since the mid-1960s have had a similar impact on society, for example, opening it up to women professionals. Neither effort was a complete success.

492. Barthes, *supra* note 488, at 142.

progress is active.⁴⁹³ The converse would also seem true: without full sexual autonomy, women will not be able to achieve economic and social equality.

Unless women have absolute control over reproduction they cannot be sexually autonomous, as free as and equal to men. Likewise, without absolute control over reproduction women cannot be economically and socially autonomous, as free as and equal to men. Thus, contraception and knowledge of it, and the right to abortion, are critical to female equality. Contraception (and the availability of abortion) allow women, like men, to limit the consequences of their sexual behavior in time, and more importantly, their own consciences. With contraception and abortion available, a woman can confidently pursue life plans without the threat of total disruption from normal sexual behavior. Deny that choice, and physiological differences once more invade social, political, and economic domains to which they have no intrinsic relevance.

If contraception, or information on contraception, were denied to women and the choice of abortion limited, then women would be forced once more into a subservient role. Their biology would once more control their destiny. In such circumstances, we would expect a commensurate regression in the concept of the ideal woman, and with it a return of seduction as a viable and active cause of action.

At present, it appears unlikely that a reversion to the Victorian conception of the ideal woman will be achieved by the political efforts of anti-feminist groups.⁴⁹⁴ What, then, might bring it about? Extreme pressure on the job market, such as that which occurred in the 1930s and in the immediate post-World War II period, might. In such an event, one would expect a resurgence of emphasis on the value of the family.⁴⁹⁵ Social scientists might be expected once again to find day care detrimental, and to suggest that children will do better at home. That biology now in no way requires it to be the mother, rather than the father, that takes responsibility for the home would, as in the past, be ignored. Rationality has never been a critical element of arguments for inequality. Organized feminism may thus be deprived of the best weapons for combating such atavism.

493. See Sylvia Ann Hewlett, *A Lesser Life: The Myth of Women's Liberation in America* 70-100 (1985).

494. However, the appearance of advertising extolling the virtues of woman's role in the home is a contrary symptom. See, e.g., *Wall Street Journal*, Mar. 13, 1986, at 32.

495. As in the past, support for "traditional family values" is being used as a code for keeping women at home.

Perhaps a more serious threat lies in the recent reappearance of serious sexually transmitted diseases. In Victorian times, the myth of virtue imposed upon women must have had the effect of channeling childbearing and rearing into the appropriate social institution, the family. The first post-Victorian change in the myth, the revolution in sexual mores of the 1920s, coincided with the first widespread availability of contraceptives. The next great advance—that of the mid-1960s—coincided with the marketing of the contraceptive pill and the increasing availability of abortion. Concepts of female virtue thus seem to have been useful in controlling sexual behavior when it could have results society was not prepared to manage. If cures for genital herpes and Acquired Immune Deficiency Syndrome are not forthcoming, a reintroduction of virtue in virginity would serve a similarly useful preventive function. But would that virtue be of women only, or of both men and women? There is nothing biological to require it to be of women only—as, arguably, there was in the past.⁴⁹⁶ Yet there is a strong historical tradition of women acting not only as the guardians of morality, the repositories of virtue, but also the fomites of vice. If women have indeed achieved a permanent equality, then a revival of the notion of virtue in sexual purity would be gender neutral. The tort of seduction would remain dormant, or, if revived, exist in gender-neutral form.⁴⁹⁷ If, however, the ideal of gender equality is not permanent, then women once again could be subject to unequal restraints and a return to social inferiority. With such inequality we could expect a return to viability of the tort of seduction.

Over the last 200 years, the changes in the myth of the ideal woman have been remarkable. Especially since 1920, this variation—almost decade by decade—has proven a most useful device for preserving male political⁴⁹⁸ and economic hegemony.⁴⁹⁹ It is not necessary to posit a “male conspiracy” theory to explain this history. New ideas will tend to be accepted only to the extent that they fit the needs of the marketplace of ideas. That marketplace, be it the politicians, the judiciary, or the press, has, historically,

496. Only women get pregnant.

497. The present Washington statute is gender neutral. *See supra* note 273 and accompanying text.

498. *See* Smith-Rosenberg, *supra* note 393, at 282-84.

499. This does not appear true of the change to the Victorian ideal in the mid-19th century. Unwanted pregnancy was, perhaps, the most oppressive of the burdens on women. Smith-Rosenberg & Rosenberg, *supra* note 320, at 343-47. Abortion was commonplace, with estimates as high as one-third of all pregnancies ending in abortion. *Id.* at 344. Thus use of the image of delicacy and aversion to sex worked to women's advantage.

been a male preserve. It is not surprising, then, that the most successful developmental ideas were those that most furthered male interests.

The history of the tort of seduction shows it to have been adaptive to the prevalent myth of the ideal woman. Clearly the tort was not the cause of the changes in that myth; changes in the myth, themselves the result of changing social circumstances, brought changes in the tort. The connection lies in society's mechanism for dissemination and popularization of social mythology—the marketplace for ideas. If women are to control their lot in a changing world they must remain active competitors in that marketplace.