A NEW TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS: GENDER AND EROTIC TRIANGLES IN *LUMLEY v. GYE*

SARAH SWAN*

INTRODUCTION

At the intersection of tort, property, and contract law sits a strange tort.[1] It began in 1853, in London, England, from a ferocious rivalry between two competing opera-house owners.[2] Johanna Wagner, a celebrated soprano star, had agreed to perform at Benjamin Lumley's opera house, but before she began her engagement, she accepted a better offer from Lumley's rival, Frederick Gye, to perform at his venue instead. Lumley pursued remedies in

* J.S.D. Candidate, Columbia University. Thanks to Elizabeth Emens, Robert Ferguson, Katherine Franke, John Hogarth, Sasha Russell, Carol Sanger, and Sharon Sutherland for their contributions in comments and conversations.

[1] Gary D. Wexler, Note, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 282 (1994).

[2] S.M. Waddams, *Johanna Wagner and the Rival Opera Houses*, 117 LAW Q. REV. 431, 431 (2001).

contract against Wagner, but also sought to bring a suit in tort against Gye.[3] In *Lumley v. Gye*, a case heard on demurrer, the court extended the ancient action of enticement, and held that this kind of inducing or procuring a contractual breach could constitute a wrong capable of redress in the form of tort.[4] Generally called interference with contractual relations in America,[5] this tort is now a common cause of action in commercial litigation.[6] It also formed the basis for one of the largest civil jury awards in American history.[7]

Despite its popularity among litigants, academics routinely decry the tort and advocate its alteration, abandonment, or abolishment.[8] They offer a compelling laundry list of the tort's most problematic aspects. Among other issues, the tort violates the doctrine of privity of contract by imposing rights and obligations on non-contractual parties, transforms an in personam right in contract into an in rem right in tort, treats the breaching promisor as the property of the original promisee, and ignores the breaching promisor's role

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[3] Lumley's suit against Wagner gave rise to the Lumley rule, which holds that a negative injunction may be awarded in circumstances where specific performance cannot be granted. *See* Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.) 687. Lea VanderVelde explores how gender influenced the subsequent development of this rule in *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity,* 101 YALE L.J. 775 (1992) [hereinafter VanderVelde, *Gendered Origins*].

[4] Lumley v. Gye, (1853) Eng. Rep. 749 (Q.B.) 750. In a demurrer, one party argues that the facts as alleged do not establish a legal cause of action.

[5] The RESTATEMENT (SECOND) OF TORTS § 766 (1979) offers the following generic definition of interference with contractual relations:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

[6] Although *Lumley v. Gye* is an English case, it did not take long for American law to incorporate the principle into its own jurisprudence. Indeed, in an 1894 case, *Angle v. Chicago, St. P., M. & O. Ry.*, the Supreme Court of the United States cited *Lumley v. Gye* and noted that case law had "repeatedly held" that the cause of action existed in America. Angle v. Chicago, St. P., M. & O. Ry., 151 U.S. 1, 13–14 (1894). Now, "[t]he tort of interference with contract is one of the most pervasive causes of action in American business litigation." Wexler, *supra* note 1, at 280.

[7] In *Texaco v. Pennzoil*, the plaintiff was awarded $7.5 billion in compensatory damages and $3 billion in punitive damages. 729 S.W.2d 768, 784 (Tex. Ct. App. 1987). The punitive damage award was lowered to $1 billion on appeal. *Id.* at 866.

[8] *See, e.g.*, Harvey Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 62 (1982) (arguing that tort liability should be limited to instances where the defendant's act was independently wrongful); Wexler, *supra* note 1, at 282 (arguing for legislative abrogation of the tort); Dan Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 337 (1980) (arguing for a more narrow basis of liability). Indeed, Dobbs compares the tort to the "unspecified crime" in Franz Kafka's *The Trial*, "the nature of which cannot be, and is not ever revealed" to the accused protagonist. Dobbs, *supra* at 346 (referencing FRANZ KAFKA, THE TRIAL (Willa Muir & Edwin Muir trans., London, Secker and Warburg 1945) (1925)).

in causing the breach.[9] Most importantly, the tort infringes upon the liberty and autonomy of the breaching party, both by disregarding her freedom to choose whether to perform or breach and by impeding her ability to enter into new and more beneficial agreements.[10]

The problems associated with the tort are easy to identify, but how it became a viable cause of action in spite of its deeply troubling features has been a more difficult question.[11] In this Article, I show how an understanding of the tort's gendered origin illuminates many of the doctrinal puzzles surrounding the tort.[12] Specifically, I connect interference with contractual relations to the structure of an erotic triangle, a cultural archetype in which two rivaling men compete for a desired woman.[13]

Part II of this Article sets out the factual, cultural, and legal background of *Lumley v. Gye*. It describes the intense personal rivalry between the two men, sets out the prevalence and significance of erotic triangles in Victorian England, and explains how the law regulated gendered triangular conflicts in the causes of action that formed the legal precedents for *Lumley v. Gye*.

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[9] Wexler, *supra* note 1, at 281 (listing various problems with the tort, including that it "hinders market efficiency, produces erroneous liability rulings, and fosters uncertainty in the law"); Dobbs, *supra* note 8, at 351, 361 (stating the tort is problematic in that it binds non-contractual parties); J.W. Neyers, *The Economic Torts As Corrective Justice*, 17 Torts L.J. 162, 164 (2009) (listing several issues inherent in the tort, such as its conversion of in personam rights to rights in rem and its violation of privity of contract). As these scholars note, the tort also acts as a limitation on the inducer's right to freedom of speech, negatively impacts the free functioning of the market, and is so unworkable in application that it is nearly impossible to predict whether particular acts will result in liability or not.

[10] Neyers, *supra* note 9, at 164; Wexler, *supra* note 1, at 281; Dobbs, *supra* note 8, at 361.

[11] As Dobbs notes, "No real reasons seem to have been given why a third person should be liable for the honest persuasion of another . . . ." Dobbs, *supra* note 8, at 344.

[12] The phrase "gendered origins" comes from the title of Lea VanderVelde's article, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, *supra* note 3. In addition to finding much inspiration in VanderVelde's work, I also adopt her definition of "gendered" as encompassing "a broad range of gender-specific elements," including "sexist behavior, sex role typing, unequal treatment, charged language of a gender-specific nature, and sexual harassment." *Id.* at 778.

[13] This Article takes a broad view of Western culture, and draws from Anglo American literary, legal, and cultural sources throughout. The close connection between the Anglo and American versions of Victorian culture and the ties between their legal systems warrants such an approach. Jane Larson explains:

> Most of the provinces of Canada, like virtually all the states of the United States, were part of the Anglo-American common law system. Moreover, nineteenth-century Canada shared with the United States, Britain, and Australia a "Victorian" culture embodying distinctive views of sexuality and sex roles. Extending across national borders, Victorian values were shared by English-speaking people throughout the Western world.

Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit:'" A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374, 383 n.31 (1993). *See also* Saskia Lettmaier, Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800–1940 13 (2010).

Part III examines how the gendered scenario underlying *Lumley v. Gye* influenced the way the court understood the case. The court focused on the relationship and rivalry between Lumley and Gye, and downplayed the role of Wagner in the triangular dispute. The male-centered approach allowed the court to break the doctrine of privity of contract and carve out a new source of tortious liability. Further, Wagner's status as a woman caught in the middle of this rivalry permitted the court to rely on previous legal fictions about causation, consent, and women, to ignore her role in causing the breach, and to treat her as though she were the property of the original promisee.

Part IV explores how the underlying gendered dispute in *Lumley v. Gye* created a tort that was facially neutral, but often deployed as an effective means of oppression over marginalized groups. The tort commodified the original promisor and her labor in a way that obscured her freedom of contract and facilitated her exploitation. Exploitation occurred in various contexts: the tort was used as a tool to restrict the mobility of recently freed slaves in the southern United States, as a means to squash attempts at labor union organization, and as a way to restrict employee mobility.

Part V offers a restructuring of the tort that neutralizes its gendered nature and resolves many of the problems associated with interference with contractual relations. Re-conceiving the tort as one in which both the promisor and the inducer play significant roles and are connected through a theory of joint liability ensures that the relationship between the contractual wrong and the tortious one is more compatible with private law principles. Also, the causation analysis of this version of the tort does not require a legal fiction to support it, and the breaching promisor is not treated as the property of the original promisee. This new view also advocates limiting the damages to those available under contract law principles in order to reflect a non-gendered understanding of the nature of the injury.

Ultimately, it is hoped that this Article reinforces the potential for feminist scholarship to enrich our general understanding of private law and clarify areas of doctrinal confusion. Focusing a feminist light on interference with contractual relations allows us to see how a tort that appears facially neutral is actually premised upon deep gender biases. Applying a feminist perspective also leads to re-envisioning the tort in a way that addresses these problems and offers a cohesive and coherent version of interference with contractual relations.

I. Lumley v. Gye

A. Factual Background: The Rivalry

Long before Benjamin Lumley and Frederick Gye arrived at the Court of Queen's Bench in 1853, the two men had been engaged in an intense,

longstanding rivalry. Lumley's opera house, Her Majesty's Theatre, "had been 'practically the sole home of Italian opera'" until Gye's venue, Covent Garden, opened in 1847, and "in the succeeding years each opera house attempted to take over the other's business."[14] The rivalry was not limited to the business context, but was also deeply personal. In his diary, Gye tellingly wrote, "I have heard bad things of Lumley & now find him a devil incarnate—the most dreadful rascal with the smoothest face & manner I ever in the whole course of my life met . . . ."[15] The feeling was evidently mutual, as Gye also wrote that Lumley had vowed that "there would be war to the knife & he would crush me and Covent Garden too!!!"[16]

Each man considered Johanna Wagner to be an important acquisition if they were to best the other, and they both desperately wanted to book the rising soprano star. As Gye described her in his diary:

> Mdlle Wagner is a tall, handsome woman about 24, fair, with beautiful eyes hair and teeth & very graceful—her voice is of great compass, is clear powerful and good in all parts; she sings perfectly in tune and acts well but wants a little good Italian tuition—she would hold an excellent position in London or Paris & bids fair to be one of the first singers in Europe.[17]

Lumley echoed these sentiments in his memoirs, describing her as:

> A magnificent voice, a broad and grand school of vocalization, and a marvellous [sic] dramatic power, joined to a comely person, were confidently asserted to form the almost unequalled attractions of this young lady, on whose co-operation the future fortunes of the establishment were now considered in a great measure to depend.[18]

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[14] Waddams, *supra* note 2.

[15] *Id.* at 432 (quoting Diary of Frederick Gye, entry for December 25, 1851).

[16] *Id.* (quoting Diary of Frederick Gye, entry for February 18, 1852). Ten years after *Lumley v. Gye*, Lumley could not resist insulting Covent Garden in his memoirs about the opera. When lamenting the loss of recent operatic singing talents, Lumley accused Covent Garden of amplifying the orchestral sound so as to drown out the frailties of the talent: "The orchestra, having been augmented in proportion as vocal talent has waned, now constitutes the leading feature, especially at Covent Garden, where its masses of sound serve but to cover the deficiencies of artists whose voices it should assist and support." BENJAMIN LUMLEY, REMINISCENCES OF THE OPERA ix (1864). Interestingly, when Lumley writes of the case, he appears most focused on Johanna Wagner's perceived betrayal of him, referring to her trickery, etc. *Id.* at 331–32. This may be because a jury ultimately found Gye not liable, on the basis that Gye honestly believed that the contract between Lumley and Wagner was terminated, and Lumley did not want to dwell on the fact that his nemesis ultimately beat him in court. *See* Waddams, *supra* note 2 at 455–56.

[17] Waddams, *supra* note 2, at 433–34 (quoting Travel Diary of Frederick Gye, entry for January 5, 1850).

[18] LUMLEY, *supra* note 16, at 328.

In pursuit of Wagner, Lumley and Gye engaged in vigorous wooing and "extraordinary efforts" to attract her to their venues.[19] Gye visited her in Berlin in 1851, and shortly thereafter a representative of Lumley visited her as well.[20] Lumley made her an offer, and negotiations began, which ultimately resulted in an agreement of engagement.[21] However, Lumley failed to make an advance payment when it became due, and Wagner, who now regretted the agreement with Lumley and had negotiated with Gye to earn more performing at his theatre, considered the contract to be in default.[22] She communicated to Lumley that she now considered their contract over, and refused to perform at his opera house. Lumley then turned to the courts for a remedy. He brought two suits: one seeking to enjoin Wagner from performing at Covent Garden (*Lumley v. Wagner*), and another seeking damages against Gye (*Lumley v. Gye*).[23]

Because of the novelty of the claim Lumley asserted, Gye challenged him on demurrer and argued that there was no legally recognized claim.[24] Lumley argued that the old action of enticement, which prohibited a man from enticing away another's servant, was broad enough to encompass the kind of factual scenario before the court.[25] In a complex and often contradictory decision, and despite a powerful dissent by Lord Coleridge, a majority of the Court of Queen's Bench agreed with Lumley, and the new tort of interference with contractual relations was born.[26]

B. Cultural Background: Erotic Triangles

Two men fighting over a woman, i.e. an erotic triangle, was not a new scenario in Victorian England, nor would it be today.[27] Erotic triangles are a resilient and enduring archetype, found in the cultural productions of all periods of Western civilization, from Homer's *The Iliad*, to Flaubert's *Madam Bovary*, to the 2010 Man Booker Prize winning novel, *The Finkler Question*,

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[19] Waddams, *supra* note 2, at 433.

[20] *Id.* at 434.

[21] *Id.*

[22] *Id.* at 438. Wagner's father acted as her advisor in these matters, and the negotiations indicated that all involved were sophisticated parties. *Id.* at 434.

[23] As Waddams explains, Gye was also "named as a defendant" in *Lumley v. Wagner*, and "the injunction was issued against him personally, as well as against Wagner." *Id.* at 446.

[24] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 751 (argument by Willes on behalf of Gye).

[25] *Id.* at 751 (argument by Cowling on behalf of Lumley) ("[I]t cannot be said that the action for procurement is an anomaly confined to the case of master and servant.").

[26] *Id.* (Crompton, J., Erle, J. & Wightman, J.).

[27] The love triangle is still an extremely common trope. *New York Magazine* declared 2010 to be "The Year of the Onscreen Love Triangle," citing movies like *The Twilight Saga: Eclipse* (Summit Entm't 2010) and HBO's television series *True Blood: Season 3* (HBO 2010) as examples. Kyle Buchanan, *2010*: *The Year of the Onscreen Love Triangle*, N.Y. MAG. (Dec. 30, 2010, 3:15 PM), http://nymag.com/daily/entertainment/2010/12/love_triangles_slideshow.html.

by Howard Jacobson.[28] Erotic triangles are embedded in our cultural narrative and form an important part of our lived experience.[29]

In Victorian culture, the erotic triangle was a hugely popular and highly salient structure. Many books, plays, and operas appearing at that time featured erotic triangles, and the marital/adultery iteration of the triangle proved particularly fascinating to Victorian audiences.[30] In *Between Men: English Literature and Male Homosocial Desire*, Eve Kosofsky Sedgwick used René Girard's study of nineteenth century literature to show how gender and power function in these structures.[31] The triangles are premised on the bond between the two rivaling men, and this male relation of rivalry constitutes a particular "calculus of power" from which the desired object is altogether excluded.[32] Although at first glance it may appear like erotic triangles arise because two men happen to desire the same woman, the second man actually desires the woman because of her connection to the rival; it is not her innate qualities, but rather her link to the other man, that makes her the rival's desired object.[33] The bond between the men is the triangle's most significant bond, an "intense and potent" connection that is "more heavily determinant of actions and choices, than anything in the one between either of the lovers and the beloved . . . ."[34] Sedgwick termed this bond "homosocial," meaning

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[28] HOMER, THE ILIAD (T.A. Murray trans., Harvard University Press 1999); GUSTAVE FLAUBERT, MADAME BOVARY (Merloyd Lawrence trans., Houghton Mifflin 1969) (1856); HOWARD JACOBSON, THE FINKLER QUESTION (2010).

[29] While the paradigmatic male-male-female triangle is continually explored in cultural productions, various permutations and transformations of the model appear as well, adding to the rich complexity of this popular structure. In the late 1990s, a series of films including AS GOOD AS IT GETS (TriStar Pictures 1997), CHASING AMY (Too Askew Prod. Inc 1997), THE OPPOSITE OF SEX (Rysher Entm't 1998), and THE OBJECT OF MY AFFECTIONS (Twentieth Century Fox Film Corp. 1998) featured neo-homosocial triangles in which a gay man or lesbian competed with a straight man for the affections of a heterosexual woman. *See* Judith Halberstam, *The Good, the Bad, and the Ugly: Men, Women and Masculinity*, *in* MASCULINITY STUDIES & FEMINIST THEORY: NEW DIRECTIONS 344, 346–51 (Judith Kegan Gardiner ed., 2002) (discussing how the neo-homosocial triangles in these films reinforce rather than criticize traditional standards of femininity and masculinity); *see also* TODD W. REESER, MASCULINITIES IN THEORY: AN INTRODUCTION 64–70 (2010) (examining different permutations of the homosocial triangle). Litigator Jeffrey Greenstein summarizes: "Indeed, the love triangle is everywhere. As one author noted not too long ago, '[p]ick up almost any novel, go to almost any film or play, listen to a popular song, and the chances are high that it will deal centrally with adultery.'" Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 725 (2004) (quoting ANNETTE LAWSON, ADULTERY: AN ANALYSIS OF LOVE AND BETRAYAL 17 (1988)). Greenstein lists FATAL ATTRACTION (Paramount Pictures 1987), DANGEROUS LIAISONS (Lorimar Film Entm't 1988), INDECENT PROPOSAL (Paramount Pictures 1993), and DOCTOR ZHIVAGO (Metro-Goldwyn-Mayer 1965) as examples of famous films that feature marital/adultery triangles. *Id.*

[30] *See* Larson, *supra* note 13, at 392.

[31] EVE KOSOFSKY SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 21 (1985) (citing RENE GIRARD, DECEIT, DESIRE, AND THE NOVEL: SELF AND OTHER IN LITERARY STRUCTURE (Yvonne Freccero trans., The Johns Hopkins Univ. Press 1976) (1961)).

[32] *Id.*

[33] *Id.*

[34] *Id.*

a kind of social bond between persons of the same sex, one that incorporates the entire spectrum of sexual and non-sexual desire.[35]

These homosocial bonds play important roles in structuring the relationships between men, and in constructing masculine subjectivity. Recent masculinities studies have provided the insight that masculine identity is defined through a process of constant competition and rivalry, a "process of comparison, of measuring, that puts each man against all others."[36] Masculinity is performed for other men; male peers and male authority figures are the judges who determine whether the performance was successful.[37] A failed performance will likely result in feelings of humiliation, and it is the very fear of this humiliation that prompts much of the competition itself.[38] Even a successful performance offers little peace, for no sooner is masculinity proved once "that it is again questioned and must be proved again—constant, relentless, unachievable."[39]

Choosing another man as a rival can come from a place of love, hate, or anything in between.[40] The rivalry can be a sort of euphemism for the desire to identify with or emulate the other, or it can be the classic, negative version of rivalry, in which one man seeks to defeat or best the other.[41] "[M]en often collaborate, cooperate and identify with one another in ways that display a shared unity and consolidate power between them," but their relationships "can also be characterized simultaneously by conflict, competition and self-differentiation in ways that highlight and intensify the differences and divisions between men."[42] They can use erotic triangles as a means of strengthening social ties, or as a way of challenging another's masculinity. Traditional marriage is perhaps the best example of an erotic triangle used to solidify a relationship: a father historically gave his daughter to another man as a way of aligning two families. Conversely, when one man challenged

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[35] *Id.* at 1–2.

[36] Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 233 (2008) [hereinafter Dowd, *Masculinities*]. *See also* Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in* THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 25, 33 (Michael S. Kimmel ed., 2005); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, *in* FEMINISM & MASCULINITIES 57, 61–62 (Peter Murphy ed., 2004)

[37] Michael S. Kimmel, *Masculinity as Homophobia*, *in* RACE, CLASS, AND GENDER IN THE UNITED STATES 80, 86 (Paula S. Rothenberg ed., 7th ed. 2007).

[38] Dowd, *Masculinities*, *supra* note 36, at 209 (citing David Leverenz, *Manhood, Humiliation, and Public Life: Some Stories*, 71 SOUTHWEST REV. 442 (1986)).

[39] Kimmel, *supra* note 37, at 82.

[40] REESER, *supra* note 29, at 56.

[41] *Id.*

[42] David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, *in* THE MASCULINITIES READER 144, 162 (Stephen M. Whitehead & Frank J. Barrett eds., 2001).

another by attempting to take a woman from him, such actions historically led to violence and blood feuds between families.[43]

In either scenario, though, women function as objects of exchange, rather than full persons. As the "locus of a more or less competitive exchange between two men," the woman is subordinated to a passive role;[44] the rivalry and relationship between the two men occurs "over" the woman, and she is the point beneath. Men retain their status as active subjects, while women are essentially transformed into commodities. Commodification, broadly speaking, is the "reduction of the person (subject) to a thing (object)."[45] Commodification has implications for the power structure of a society; "[o]ften, those whom commodification objectifies become entrenched as society's subordinated class. Conversely, those who control the terms of commodification secure their position as society's ruling class."[46] Law plays an important role in determining who is commodified and who does the commodifying.[47]

C. Legal Background

Erotic triangles have long been part of our legal narrative. Indeed, the understanding that relationships between men are often triangulated through women (and through certain other men occupying the lower ranks of the patriarchal hierarchy) was incorporated into ancient Roman law.[48] In that system, the *paterfamilias*, or head of the household, was entitled to bring an action for violence or insults inflicted upon his wife, children, or slaves.[49] It was understood that violence or insults to a person under the control of the *paterfamilias* was actually "only another form of insult to the *paterfamilias* himself."[50] In other words, one man would get at another through a third person, a member of the challenged man's household.

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[43] The seduction action, for instance, was meant as a legal substitute for the patriarchal violence and retribution that normally would have accompanied the rape or seduction of a young woman. *See* Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 831–32 (1996) [hereinafter VanderVelde, *Legal Ways of Seduction*].

[44] Luce Irigaray, *The Sex Which is Not One*, *in* FEMINISMS: AN ANTHOLOGY OF LITERARY THEORY AND CRITICISM 363, 368 (Robyn R. Warhol & Diane Price Herndl eds., 1997).

[45] Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification*, *in* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 8, 8 (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter RETHINKING COMMODIFICATION]

[46] *Id.*

[47] Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification, in* RETHINKING COMMODIFICATION, *supra* note 45, at 1–2.

[48] *See* Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923).

[49] *Id.*

[50] *Id.*

By the mid-thirteenth century, English law had incorporated the idea that one man may strike at another through the body of a third person.[51] A lord could bring two types of actions against a person who harmed the members of his household: one for the loss of services he suffered when a dependent member of his household was injured, and the second for the insult to the lord himself.[52] In this second type of action, although the physical harm was inflicted on the body of another, the law interpreted that as an insult to the lord himself, an injury compensable to the lord regardless of whether or not the physical harm to his wife or servant resulted in an actual loss of services.[53]

By the time William Blackstone wrote of the "three great relations" of English life in the mid-eighteenth century, each of these relationships was specifically protected against the kind of injury and insult described above.[54] The three great relationships, master-servant, father-child, and husband-wife, came with legal actions that compensated the challenged male when another man caused the loss of services of his servant, child, or wife.[55] These actions also included the legal recognition that the challenged man suffered a personal insult when a rival violently or insultingly interfered with the members of his household. The protections surrounding these three "great" relationships formed the legal precedents upon which the *Lumley v. Gye* decision was based.

1. *Master-Male Rival-Servant: Enticement*

In medieval times, the common law offered protection against three separate interferences in the master-servant relationship.[56] The three causes of action were as follows: first, *per quod servitium amisit* allowed a master to recover damages against a third party who beat his servant.[57] Second, a master could recover against a third party who wrongfully retained or harbored his servant.[58] Finally, a master could also recover if a third party enticed or procured away his servant.[59] In this context, men of subordinated status and women occupied the same role of mediating a relationship be-

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[51] *Id.* at 663–64 (citing HENRY DE BRACTON, 3 BRACTON ON THE LAWS AND CUSTOMS OF EARLY ENGLAND, Tr. I, f. 115).

[52] *Id.*

[53] *Id.* at 664.

[54] VanderVelde, *Gendered Origins*, *supra* note 3, at 789 n.62 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *410 (1765)).

[55] These actions are more fully described in the following sections, Part II.C.1–3, *infra*. They are, respectively, enticement, seduction, and criminal conversation.

[56] Gareth H. Jones, *Per Quod Servitium Amisit*, 74 LAW Q. REV. 39, 39–40 (1958).

[57] *Id.*

[58] According to Blackstone, "this, as it is an ungentlemanlike, so it is also an illegal act." 3 BLACKSTONE, *supra* note 54, at *142.

[59] *See* Jones, *supra* note 56, at 40.

tween two men; both females and subordinated males served as the desired object in this context.[60]

In the 1300s, after the Plague had decimated the population of workers, laws governing the master-servant relationship gained a new importance. In addition to the usual common law remedies, the Statute of Labourers of 1351 gave a legislative cause of action to masters, accompanied by severe penalties for disobedient servants.[61] In essence, the Statute "compelled involuntary servitude at pre-Plague wages and criminalized the enticing away of another's servants."[62] It provided a penalty of imprisonment for workers who left their employment, and for the new employers that hired them.[63]

As was pointed out in *Lumley v. Gye*, the Statute was specifically targeted at a lower class of workers; it did not require everyone to work at pre-Plague wages, just those who labored in the traditional sense.[64] Those who held a higher status, like knights, esquires or gentlemen, were not subject to the ordinance.[65] The Statute forced only a lower class of servants to stay with their original employer or face imprisonment. The Statute effectively prevented this class of worker from having any mobility to transfer to a new employer or command a higher wage, and provided the master with a powerful tool to keep other men from competing with him for the services of his servant.

2. *Father-Male Rival-Daughter: Seduction*

Like the master-servant relation, the father-daughter relation was also protected against interference. By the nineteenth century, seduction, which allowed a father to bring suit against anyone who sexually interacted with his daughter without his consent, was a popular cause of action.[66] Seduction's underlying framework was heavily reliant on the law of master-servant relations. Indeed, at that time, the employment relation between a master and a female servant was similar to the familial relation between a father and daughter: a master/father stood *in loco parentis* to both.[67] Sexual interference with a female servant was treated as analogous to physical interference

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[60] Not every man shares in the patriarchal dividend equally. Some men are also subordinated in the system of male privilege. *See* NANCY DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 5 (2010).

[61] Statute of Labourers, 1351, 25 Edw. 3, St. 1, c. 1. *See* Jones, *supra* note 56, at 39–40 (providing a brief discussion of the background and passage of the Statute of Labourers).

[62] Wexler, *supra* note 1, at 285.

[63] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §129, at 980 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

[64] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 759 (Erle, J.).

[65] *Id.* at 759 (Erle, J.), 768 (Coleridge, J., dissenting).

[66] Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 773 (2001).

[67] Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 89 (1982).

with a male servant, since, like a beating, sexual interference and a resulting pregnancy could disable the female servant and cause her to leave the service.[68] Seduction of a father's daughter fell within this same "loss of services" rubric, and initially focused on the loss of the daughter's contribution to the household income.[69] The cause of action later focused on the particular injury to the father: he suffered a loss of status corresponding to his daughter's perceived loss of virtue.[70]

Seduction was rooted in the idea that fathers owned their daughters, and were entitled to sole custodial rights.[71] Part of this ownership included a property right in a daughter's body and sexuality.[72] This property right rendered a daughter's consent or lack thereof to the sexual interaction a nonissue; she could not legally agree to engage in behavior that conflicted with the property right of her father.[73] Sexual access to her was his right to give.

Courts sometimes justified the tort of seduction partly on the basis that it prevented the patriarchal violence and retribution that occurred when fathers took the law into their own hands.[74] Early common law sources show that nonmarital sex was understood as a battle between the men, and a heated one at that.[75] Seduction of young women could incite men to violent retaliation, and lead to enduring blood feuds.[76] As self-help retaliation moved to the "the more regularized public order of a lawsuit," the tort of seduction provided a legal substitute for that feud, and in lieu of blood vengeance, provided that fathers would receive damages.[77]

3. *Husband-Male Rival-Wife: Criminal Conversation*

While enticement offered compensation if one man "stole" another's servant, and seduction offered compensation if one man "stole" another's daughter, criminal conversation offered compensation if one man "stole" another's wife through sexual intercourse.[78] As with seduction, criminal conversation evolved from the master-servant rule.[79] In the early seventeenth century, when the master-servant rule expanded to apply to an interference with the husband-wife relationship, the injury was framed in terms of a loss

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[68] VanderVelde, *Legal Ways of Seduction*, *supra* note 43, at 821.
[69] *Id.* at 821.
[70] Moran, *supra* note 66, at 773.
[71] *See* MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850–1895, at 25 (1989).
[72] Larson, *supra* note 13, at 382.
[73] *Id.* at 386.
[74] *See* VanderVelde, *Legal Ways of Seduction*, *supra* note 43, at 837.
[75] *Id.* at 831.
[76] *Id.*
[77] *Id.* at 837.
[78] *See* Greenstein, *supra* note 29, at 734–35. Criminal sanctions were available to remedy this type of "taking." For a time during the mid-1600s, adultery was a capital offense in England, and in some areas of colonial America. *Id.* at 725.
[79] *Id.* at 733–34.

of services: loss of consortium allowed a cuckolded husband to bring an action against his wife's lover for damages on the basis that the lover had deprived him of his wife's services.[80] Later in the century, loss of consortium gave rise to a separate tort of criminal conversation, and criminal conversation dropped the requirement that the injury be framed in this way. The tort treated the adultery as a trespass and injury in itself.[81]

The doctrine of coverture was an important founding principle for both loss of consortium and criminal conversation. Under coverture, the legal existence of the wife was subsumed upon marriage into that of her husband. Marriage essentially "confer[red] upon one of the parties to the contract, legal power & control over the person, property, and freedom of action of the other party, independent of her own wishes and will . . . ."[82] A wife lacked the benefits of full legal personality: she could not make contracts, own property, nor lay claim to the proceeds of her own labor.[83] Consistent with the framework of coverture, a wife's consent to the alleged adultery was legally irrelevant. Since she did not own the exclusive rights to her body, she could not be the one to exercise those rights. The only possible defense to criminal conversation, which was basically a strict liability tort, was the consent of the husband.[84]

The criminal conversation action was initially only available to husbands, and wives had no corresponding ability to make a claim if their husbands were unfaithful.[85] Legally and culturally, the injury done to a wife when her husband was unfaithful was framed as mere hurt feelings.[86] Conversely, the husband's emotional injury, inflicted upon him by another man through the medium of his wife, was treated as a serious issue.[87] Even when framed as a property matter in the early form of the tort, the parties involved

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[80] LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 51–52 (1998).

[81] *Id.* at 52. Even though criminal conversation did not require an allegation that there had been a loss of services, plaintiffs continued to allege that throughout the nineteenth century. *Id.* at 53.

[82] F.A. HAYEK, JOHN STUART MILL AND HARRIET TAYLOR: THEIR CORRESPONDENCE AND SUBSEQUENT MARRIAGE 168 (1951) (reprinting letter from John Stuart Mill (Mar. 6, 1851)).

[83] Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 477 (1988).

[84] Moran, *supra* note 66, at 775.

[85] Nor could they simply quit the marital relationship; divorce was "virtually unattainable until the Matrimonial Causes Act of 1857." KOROBKIN, *supra* note 80, at 22.

[86] *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 817–18 (1990).

[87] The law also recognized the magnitude of the injury by providing a defense for husbands who killed their wives' lovers.

> Adultery in the nineteenth century was also a legitimate basis for husbands to kill seducers. Legally, this was explained as an extension of a man's right to self-defense, not only of himself but also of his property as was the case with trespassers or burglars. The right was restricted, however, to killing a seducer "on the spot," thus justifying the killing as one that took place in the heat of passion rather than as a premeditated act that would be harmful to public peace.

in loss of consortium and criminal conversation actions recognized that the true harm being recompensed was actually an injury to masculinity.[88] The harm was understood as a kind of emasculation or castration, "a figurative rape of man by man."[89] Trivial losses of service triggered large damage awards for cuckolded husbands, to compensate this sense of dishonor.[90]

The criminal conversation cause of action did two important things: it commercialized the sexual dispute and removed women from the legal discourse.[91] The tort converted the sexual dispute from a type of perceived challenge to masculinity that would once have resulted in violence into a private, commercial one, between men.[92] The lawsuit became a contest in which husbands and lovers competed for patriarchal supremacy through a regulated economic fight in the courtroom, from which only one would emerge dominant.[93] Within this contest, the interests of women were irrelevant. As a "classically homosocial structure," the tort is

> between the two men; the wife's function in the case is as its contested object, her sexuality something that links the men and to which a money value is to be attached. Though her behavior is thus central to the litigative story, her "consent" to the adultery—her willingness, aggression, emotional involvement, in short, her subjectivity—is legally irrelevant, and therefore outside the story's narrative boundaries.[94]

In the criminal conversation action (as in the enticement and seduction actions), the woman's role is subordinate: she acts as object to the male subjects. The legal story converts a sexual rivalry into "an economic relationship between two men, husband and lover" concerning "financially assessable damage to property."[95] In this story, the wife "fades from view."[96] The relationship of wife to lover and wife to husband is minimized or eliminated, and "the litigative conversation that ensues is entirely male-voiced."[97]

Nehal A. Patel, *The State's Perpetual Protection of Adultery: Examining* Koestler v. Pollard *and Wisconsin's Faded Adultery Torts*, 2003 Wis. L. Rev. 1013, 1021 n.81 (2003) (citations omitted).

[88] Korobkin, *supra* note 80, at 52 ("[T]he linguistic [and legal] fiction[s] substituted for what was understood to be the true harm: the unmentionable adultery and its effect on masculine honor.").

[89] *Id.* at 48.

[90] *Id.* at 52.

[91] *Id.* at 47–48.

[92] *Id.*

[93] *See id.*

[94] *Id.* at 93.

[95] *Id.* at 47–48.

[96] *Id.* at 48.

[97] *Id.*

II. Male Employer-Male Rival-Female Employee: Contractual Interference

Prior to *Lumley v. Gye*, no court had held that procuring a breach of contract could constitute a tort.[98] The only procurement cases were the ones described above, involving servants, daughters or wives—"enticing away dependent members of another's household."[99] Why, then, did this particular case lead the court to expand tortious liability?[100] The answer, I suggest, must include a recognition of the particular gendered scenario that came before the court. As a woman, Johanna Wagner was more easily conflated with a dependent member of another's household, and the scenario therefore appeared more similar to those grounding the actions of enticement, seduction, or criminal conversation. Had Johanna Wagner been a man of equal social standing with Lumley and Gye, this association likely would not have manifested in the same way. In order for there to be a cause of action, the decision in *Lumley v. Gye* required one of two questions to be answered in the affirmative: either Johanna Wagner was a servant and thus naturally caught within the enticement action, or the enticement principle was broad enough to include her as a non-servant.[101] Her status as a woman caught between two competing men made the affirmative answers to both questions more likely. The factual matrix of *Lumley v. Gye* appeared as an erotic triangle, and the court therefore applied its cultural and legal knowledge of the regulation of erotic triangles to extend its principles to this new scenario.

As cognitive psychology has taught us, "culturally embedded stories or scripts," which are themselves usually inflected with gender, deeply affect our thoughts and decisions.[102] Stories about the way the world is, and the way people are, frame our beliefs and actions.[103] They influence our reasoning, including our legal reasoning. While cultural beliefs and norms inflect all areas of law, they are particularly potent in tort law.[104] Tort law, perhaps even more than other areas of law, is profoundly impacted by culture.[105] In many ways, tort law is less formalistic and more flexible than other legal fields.[106] Its "open-textured qualities allow great latitude for meaning mak-

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[98] Sayre, *supra* note 48, at 667.

[99] *Id.*

[100] Waddams, *supra* note 2, at 449.

[101] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 761 (Coleridge, J., dissenting). The majority of the judges categorized Wagner as a servant. *Id.* (Crompton, J., Erle, J. & Wightman, J.)

[102] Peggy Cooper Davis, *The Proverbial Woman*, 48 Rec. Ass'n B. City N.Y. 7, 11 (1993).

[103] *Id.*

[104] *See* David M. Engel & Michael McCann, *Introduction: Tort Law as Cultural Practice, in* Fault Lines: Tort Law as Cultural Practice 1, 2 (David M. Engel & Michael McCann eds., 2009) [hereinafter Fault Lines].

[105] *Id.* at 3.

[106] Valerie P. Hans, *Juries as Conduits for Culture? in* Fault Lines, *supra* note 104 at 80, 80–81 (quoting Professor Peter Schuck: "Tort liability, more than most areas of

ing by all the actors in the tort law system and make tort law a particularly important site of the articulation and dissemination of cultural norms and images."[107]

Because of its susceptibility to the importation of cultural beliefs and norms, tort law has an important role in gender ordering. If the culturally salient stories are ones of patriarchy and gender hierarchy, as erotic triangles are, tort law will reflect those values and can become "complicit in the control of women."[108] Each party to a tort action comes with a gender (and a race, sexual orientation, and economic or social class), and these characteristics come with their own stories.[109] These characteristics and their corresponding stories shape the way that the law is constructed and applied: the interpretations and understandings of legal claims, and the legal responses to harms, are often shaped by these factors.[110] Legal actors, including judges, draw upon cultural ideas and "deeply embedded notions" of gender that exist beyond the formal confines of the specific cases before them,[111] and these cultural understandings are then taken up and reified in the law.[112] This effect is not limited to cases that are explicitly *about* women, as cases concerning domestic or family matters are sometimes viewed. Instead, "restricted conceptualizations of women influence jurists' interpretations of legal norms governing the economic sphere" and can inform the "jurist's sense of the scope or weight of a liberty interest" as well.[113]

A. The Gendered Bonds

When the *Lumley v. Gye* tripartite male-male-female dispute came before the court, the court interpreted it in a way that conformed with the legal precedents that featured these gendered scenarios. The application of gendered triangulation had two important consequences for the three members of the *Lumley v. Gye* dispute: it influenced the creation of the male-

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law, mirrors the economic, technological, ideological, and moral conditions that prevail in society at any given time . . . . The master ideas that drive tort doctrine—reasonableness, duty of care, and proximate cause—are as loose-jointed, context-sensitive, and openly relativistic as any principles to be found in law." PETER SCHUCK, TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND THE PUBLIC WELFARE 18 (1991)).

[107] Engel & McCann, *supra* note 104, at 7.

[108] Ann Scales, *"Nobody Broke It, It Just Broke": Causation as an Instrument of Obfuscation and Oppression, in* FAULT LINES, *supra* note 104, at 269, 278.

[109] *See* Leslie Bender, *Teaching Torts As If Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 116 (1994).

[110] *See id.*

[111] Carolyn Strange, *Masculinities, Intimate Femicide and the Death of Penalty in Australia*, 1890–1920, 43 BRIT. J. CRIMINOLOGY 310, 313 (2003).

[112] *See generally* Hans, *supra* note 106 (discussing the capacity of the jury to influence tort law through their cultural understandings and background during the decision-making process).

[113] Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895, 902–03 (2001).

male tort bond, and it contributed to the court's understanding of the female-male contract as establishing an unequal relationship status, rather than as establishing a regime of private ordering between two subjects.

1. *The Male-Male Tort Bond*

Before the court decided *Lumley v. Gye*, there was no legal link between a promisee to a contract and a third party who persuaded a promisor to breach that contract.[114] The doctrine of privity of contract dictated that the only parties that could be held liable in relation to the contract were the parties to it. Quite properly, then, Gye, in his defense, circumscribed the case as "a wrong between the plaintiff and Johanna Wagner alone," for which the proper cause of action was only in contract, not tort.[115] The court rejected this defense, and created a legal link between the two men. The judges gave a legal dimension to the social and competitive bond that already existed between Lumley and Gye, and bound them in tort. Building on the actions of enticement, seduction, and criminal conversation, where courts gave the man with the prior relationship to the woman property rights over her, the court found that what Frederick Gye did was essentially a wrongful act, committed against Benjamin Lumley.[116] In keeping with the tradition established in these prior causes of action, the court interpreted Gye's actions in relation to Lumley, and saw his persuasion of Wagner as an attempt to insult and injure Lumley.

The wrongful act that the new *Lumley v. Gye* tort targeted was a type of impermissible competition, one that constituted a potentially dangerous challenge to another man's masculinity. Typically, "[n]ineteenth century courts defined competition as a privilege to struggle against other persons who sought the same product within the same market; to compete was to fight with equals for the same end."[117] This idea echoes some of the honor traditions seen in dueling; men generally would duel only with others of similar social status.[118] However, as is clear from the torts of seduction and criminal conversation, once a man had acquired property rights to a woman, other

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[114] *See* Sayre, *supra* note 48, at 667.

[115] Lumley v. Gye, (1853) 22 L.J.Q.B. 463 (Eng.) 466 (argument by Willes on behalf of Gye) (full argument by Willes not included in the English Reports).

[116] *See* Waddams, *supra* note 2, at 447. As Justice Erle stated: "The only distinction in principle between this case [concerning criminal conversation] and other cases of contracts is, that the wife is not liable to be sued: but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong." Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 756 (Erle, J.).

[117] Note, *Tortious Interference With Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1532 (1980).

[118] VanderVelde, *Legal Ways of Seduction*, *supra* note 43, at 836.

men were prohibited from competing with him, and any exchange had to be voluntary.

By the time of *Lumley v. Gye*, the marketplace had emerged as an important locus of masculine competition. "Marketplace Masculinity," a way of relating marked by "aggression, competition, [and] anxiety—and the arena in which those characteristics are deployed—the public sphere, the marketplace," had become increasingly important since the 1830s.[119] Competition and interaction with other men in the context of the marketplace became a major source of masculine identity, and the marketplace became the most significant area for testing and proving manhood.[120]

The allegation that Gye somehow "took" Wagner from Lumley thus could easily have been read by the court as an allegation that Gye had behaved in a way that transgressed the normal bounds of competition and threatened another man's masculinity, just as criminal conversation or seduction would have done.[121] The court used the concept of malice as shorthand for this. Malice was an important issue circulating in the case, one that led subsequent courts to assume that it was in fact the gist of the action.[122] According to the custom of the time, malice meant actual malevolence.[123] Although malice was used "loosely" and with an "evident contrariety of meanings," the concept was used as a justification for legally binding the two men together.[124] The court used malice to indicate that where one man targeted another and intended to insult him by, in some sense, "taking" a woman from him, such an act could be legally wrongful.

2. *The Male-Female Contract Bond*

With regard to the male-male bond, the court took a relational bond and made it more powerful by giving it a legal dimension. It created a legal bond where none existed before, because it understood the wrong to be between the two men.[125] For the male-female contract bond, however, the court did the opposite. It took a contractual bond, and focused not on the *legal* significance of that bond, but on its *relational* significance. At least initially, Johanna Wagner was legally bound to Benjamin Lumley through their contract, and that contract should have been the sole basis for liability

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[119] Kimmel, *supra* note 37, at 83.

[120] *Id.* at 82.

[121] In discussing the principle behind this case, Justice Erle states that "the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed . . . ." Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 756 (Erle, J.).

[122] Sayre, *supra* note 48, at 672.

[123] *Id.*

[124] *Id.* at 673.

[125] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 757 ("He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract.").

for any issues with her performance. However, because the law typically configured legal actions involving women as triangulated between two men, the contractual bond, which should have established a binary between two subjects, was sublimated to the gendered structure of the erotic triangle and the higher power of the relational bonds that tie women to men. These bonds were based not in contract, but in status relations, and under these status relations, women were subordinate to a more powerful male. Since the bond between Lumley and Wagner was viewed as unequal because of the gender of the parties, the court more easily equated that unequal bond with another: that of master and servant.

In the mid-nineteenth century, when *Lumley v. Gye* occurred, the old status-based regime was evolving into a new contract-based one.[126] In the early nineteenth century, a status-based regime reigned.[127] This regime was based on ascription, under which social positions are determined by ascribed characteristics, like sex, race, or ethnicity.[128] A status-based society perpetuates a "natural order of subjection," in which the law uses status as an ordering principle.[129] The more modern contract regime, on the other hand, supposes that people are not born into specific social stations, but rather can, as free and rational beings, make agreements that can shift their social positions.[130] They can define their own roles, and choose to enter or not enter into legally significant relationships with others.[131] A contract regime purports to represent "a civil order of freedom," and political modernity.[132]

Johanna Wagner had entered into a contract with Benjamin Lumley, an act that should have meant that they had agreed to a private ordering between them. As such, their private agreement should have governed the performance and breach of those obligations, subject to the applicable law. In a world of private contractual ordering, privity of contract should have limited the dispute to one between her and Lumley, and her breach should have rendered her solely liable for damages. *Lumley v. Gye*, however, represented a moment in which contract was unable to overcome status. Instead of being seen as a person with the freedom to make and break contracts, subject to the usual contractual liabilities, Johanna Wagner was viewed as a woman, whose very ability to enter those contracts was somewhat anomalous. The Lumley-Wagner-Gye erotic triangle was similar enough to the already established situations of enticement, seduction, and criminal conversation that Wagner

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[126] R. H. Graveson, *The Movement from Status to Contract*, 4 MOD. L. R. 261, 265 (1940).

[127] *Id.*

[128] *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 10 (1988).

[129] Emily Zakin, *Beyond the Sexual Contract: Traversing the Fantasy of Fraternal Alliance*, *in* BETWEEN THE PSYCHE AND THE SOCIAL: PSYCHOANALYTIC SOCIAL THEORY 159, 160 (Kelly Oliver & Steve Edwin eds., 2002) (quoting PATEMAN, *supra* note 128, at 10).

[130] Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 636 (2007).

[131] *Id.*

[132] Zakin, *supra* note 129, at 160 (citing PATEMAN, *supra* note 128, at 9).

and Lumley's relationship could more easily be analogized to that of servant and master. The court noted that "where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule."[133] Because the court classified Wagner as a servant, her contractual relations were adjudicated under a separate set of standards from those applicable to the usual male-male contractual relations between equals. Shifting the blame to Gye implied that Wagner lacked legal subjectivity and "the capacity to decide to breach,"[134] despite the fact that she was technically able to enter into a contractual arrangement.[135]

Indeed, only a small subsection of women at the time had the power to enter into legally binding contracts at all. Married women were subject to the law of coverture, under which they did not have the independent legal personhood required for contracting by themselves.[136] Only an unmarried woman like Johanna Wagner could contract on her own behalf, and thus even the fact that she could become a party to an employment contract was relatively rare.[137]

Instead of being viewed as people with all the accoutrements of legal personhood, in the nineteenth century, there was a "culturally constructed barrier to conceiving of women as autonomous parties."[138] Women were understood as relationally bound to men: their identities and spheres of acceptable behavior were determined through their relationship to a more powerful male. Servants were bound to their masters, daughters were bound to their fathers, and wives were bound to their husbands. In *Lumley v. Gye*, a female performer was understood to be similarly bound, but this time to her male employer. She was not seen as an independent actor in a marketplace, able to control her own labor and act for her own economic gain, but instead as subordinate to the man she contracted with.[139]

In many contract cases involving female performers that occurred after *Lumley v. Gye*, the contractual/relational bond between female performers and their theatre-manager employers seemed to be conflated with a marriage

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[133] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 755 (Erle, J.).

[134] Elisa Masterson White, *Arkansas Tortious Interference Law: A Proposal for Change*, 19 U. ARK. LITTLE ROCK L.J. 81, 103–04 (1996).

[135] "It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant." Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 755 (Erle, J.).

[136] SHANLEY, *supra* note 71, at 8.

[137] VanderVelde, *Gendered Origins*, *supra* note 3, at 777.

[138] *Id.* at 830.

[139] *Cf. id.* at 787 (discussing how artisans "occupied a niche between the higher status of partners and the lower status of indentured servants, apprentices, and slaves"). Wagner's status as a foreigner also likely affected how the court viewed her status. As VanderVelde notes, Lord Chancellor Lord St. Leonards seemed to target Wagner's status as a foreigner when he referred to "the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other." *Id.* at 792 n.81 (quoting Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.) 693).

bond.[140] Theatre managers likely viewed their contractual relationships with their female employees not as merely commercial arrangements, but as marital ones.[141] Their confusion is not surprising given that the same word, "master," referred both to husbands and to employers.[142] The legal construction of the marital and employment relationships were closely related as well: they shared the same root, and "[s]tandard nineteenth-century legal treatises on domestic relations contained chapters on husband and wife next to chapters on master and servants."[143] The line between husband and employer was linguistically, culturally, and legally blurred, and female performers were seen as quasi-wives, subject to the will of their employers.[144]

As a quasi-wife, a female performer's contractual breach was more easily linked with adultery and infidelity.[145] Both breaches are marked by disobedience and activeness: contract performance, regardless of whether it is found in the commercial or marital context, is passive and obedient, whereas breach or nonperformance is active and disobedient.[146] Disobedience was a subversion of woman's gender role and a threat to the power of the master or husband; "[w]omen were expected to be obedient and subordinate."[147] Moreover, disobedience suggested a betrayal and the infliction of psychic injury upon the master or husband, an injury that was worsened if the disobedience was the result of a connection to a rival male.[148]

Through the close parallels between the Lumley-Gye-Wagner commercial triangle and the husband-rival-wife domestic triangle, elements of criminal conversation were able to seep into the construction of the tort. The common legal-cultural narrative of adultery colored the story of Johanna Wagner and the man to whom she was contractually bound. In fact, in *Lumley v. Gye*, one of the cases explicitly relied on to extend the application of the enticement action was *Winsmore v. Greenbank*, an action brought by a husband against a rival alleged to have disrupted his wife's services to him.[149]

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[140] *See id.* at 831.

[141] *See id.* VanderVelde notes that the negative injunction cases she studied did not have corresponding actions in interference with contractual relations. *Id.* at 844 n.368. This may be due to the fact that although Lumley was successful in the demurrer action, he ultimately lost the case at trial on the grounds that Gye genuinely believed that the Lumley-Wagner contract was terminated. *See* note 16, *supra*.

[142] *Id.* at 832.

[143] *Id.* at 831.

[144] Davis, *supra* note 102, at 14 (summarizing VanderVelde's argument in VanderVelde, *Gendered Origins*, *supra* note 3).

[145] VanderVelde, *Gendered Origins*, *supra* note 3, at 831.

[146] *See* Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5, 13 (1988).

[147] VanderVelde, *Gendered Origins*, *supra* note 3, at 846.

[148] *See id.*

[149] (1745) 125 Eng. Rep. 1330 (C.P.).

> [I]t was prima facie an unlawful act of the wife to live apart from her husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act . . . . This case appears to me to be an exceedingly strong authority in the present case.

Early cross-citations between cases involving criminal conversation erotic triangles and cases involving the *Lumley v. Gye* type of erotic triangle provide further evidence that the marital and commercial triangles were connected and conflated.[150] There was a commingling of the law regulating the intimate realm with the law regulating the economic realm in cases like *Duffies v. Duffies* (where the plaintiff's lawyer used *Lumley v. Gye* to argue that the action for enticing a spouse should not be restricted to husbands, but should also be available to wives as well);[151] *Burdick v. Freeman* (where the respondent's attorney cited *Lumley v. Gye* in the context of a criminal conversation action);[152] *Tasker v. Stanley* (where *Lumley v. Gye* was cited in an alienation of affections case);[153] and *Nolin v. Pearson* (where *Lumley v. Gye* was cited in support of the proposition that a wife should be able to bring a loss of consortium action against her husband's mistress).[154]

These cultural overlays on this male-female contractual bond prevented it from holding the power that a male-male contractual bond would have had—because one of the parties was a woman, the relation was more easily conflated with the marital one, and thus the rules that applied to that type of relationship were thought to appropriately apply to this one as well. Because gender affected "the character of the relationship," what should have been a contract between equals was interpreted more like a master-servant relationship.[155] Moreover, the male-male tort bond was given prominence in the dispute, and seen as more significant than the contractual connection. This is the basis for the tension between contract and tort visible in interference with contractual relations, and the reason why the doctrine of privity of contract was broken.

B. Causation and the Female Intermediary

The gendered nature of the bonds in *Lumley v. Gye* connects to another enduring problem of interference with contractual relations: the problem of *novus actus interveniens*. Normally, a human intermediary standing be-

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Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 758 (Wightman, J.).

[150] They also are an interesting example of how, despite the idea of separate spheres or hostile worlds that was developing at the time, the economic and the intimate realms were deeply entwined.

[151] 45 N.W. 522, 523 (Wis. 1890).

[152] 120 N.Y. 420, 423 (1890) (attorneys' arguments not printed in North Eastern Reporter).

[153] 26 N.E. 417, 418 (Mass. 1891).

[154] 77 N.E. 890, 891 (Mass. 1906). *See also* Plant v. Woods, 57 N.E. 1011 (Mass. 1900). The court noted that "procuring a wife to leave her husband" was based on the same general principle as inducement in a labor dispute context. *Id.* at 1014.

[155] John Danforth, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1496 (1981). He states: "two of the majority judges took care to note the details of Lumley's relationship with Wagner," and the "holding strongly suggested that the character of the relationship disrupted would determine whether one could be liable for interfering with another's contract."

tween a plaintiff and defendant will break the chain of causation, since the intermediary possesses free will and is responsible for making her own decisions.[156]

However, causation, like most other legal concepts, is a matter of cultural habit.[157] Rather than having independent logical content, causation is a flexible concept, and "[c]ause and effect can be defined and connected in a wide variety of ways, and attributions of such linkages are shaped (collectively and individually) by where one wants blame to end up."[158] It acts as a glue that allows us to "stick a defendant to a plaintiff" according to where one feels that fault lies.[159]

The precedents to *Lumley v. Gye* illustrate that our concept of causation is a malleable concept, one that is influenced by gender. Through actions in enticement, seduction, and criminal conversation, courts created the legal fiction that servants, children, and wives had no "free will independent of the master's."[160] Accordingly, causation was a non-issue in these cases: courts felt that the male rival was a wrongdoer, and they modeled the causation doctrine to comply with this belief.

In *Lumley v. Gye*, the majority of the court implicitly included this same idea. Johanna Wagner occupied a category—woman—that was closely adjacent to the categories of wife and servant, and so it was not difficult for the court to gloss over the problem of her intervening will. In fact, Judge Coleridge's dissent specifically pointed to the problematic nature of such a conflation. He noted that the law for causation in regard to wives was not applicable to the unmarried Johanna Wagner, and argued that while, in a criminal conversation action, "effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing," this legal fiction should not have applied in the instance before the court.[161]

The court's focus on the rivalry between Lumley and Gye allowed the issue of causation to fade into the background. For if one concentrates "solely on the pursuers and their rights and privileges against each other, one avoids the questions of causation and indemnity that result from viewing those rights and privileges as channeled through the obligor or potential obli-

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[156] *See* DOUGLAS HODGSON, THE LAW OF INTERVENING CAUSATION 12–13 (2008); Benjamin L. Fine, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1123 (1983).

[157] Scales, *supra* note 108, at 271–72 (explaining how questions of causation "depend upon an analysis of habits of inference" that are specific to each culture).

[158] David Nelken, *Law, Liability and Culture*, *in* FAULT LINES, *supra* note 104, at 21, 21.

[159] Scales, *supra* note 108, at 272.

[160] Note, *supra* note 117, at 1526.

[161] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 762 (Coleridge, J., dissenting).

gor."[162] The problem, though, is that rights and privileges *are* channeled through the obligor, and by "ignoring the fact that the decision to breach or not breach lies in the hands of the breaching party, we treat the breacher as being without will."[163] Holding someone liable for someone else's decision implies that the latter is not an autonomous being. It is incompatible with the understanding of a person as a "human being in charge of his or her own life."[164]

Today, we no longer accept legal fictions that deny the independent wills of servants and wives, yet no acceptable alternative rationale for this aspect of the tort has been offered. The intervening will issue remains an unsolved problem. Usually the issue is simply ignored; causation is rarely considered in its own right. Ultimately, one scholar advises, "a search for a well-defined causation analysis" for the tort will only end in frustration.[165] The oft-referenced Restatement (Second) of Torts gives only the briefest of guidance on this issue.[166] Case law typically provides a superficial application of the "but for" test and ignores issues which should be of great significance in determining liability, like the promisor's state of mind, and the evidentiary elements required to establish that state of mind.[167] Indeed, it is questionable whether the "but for" test is even an appropriate one.[168]

When the courts do provide a truncated analysis of causation, they often rely on proximate cause to establish the causation link.[169] The "but for" test is cursorily used first to establish cause in fact,[170] and then to establish proximate cause, which "concerns whether the law should impose liability after the evidence establishes cause in fact."[171] Prosser offers his opinion on the role of proximate cause in the tort:

> Some of the earlier decisions denying liability argued that the defendant's conduct can never be a proximate cause of the breach, since there is an intervening voluntary act of the third party promissor; but where that act is intentionally brought about by the defendant's inducement, or is even a part of the foreseeable risk

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[162] Benjamin L. Fine, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1125 (1983).

[163] Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 664 (1999).

[164] Dobbs, *supra* note 8, at 358.

[165] Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of This Commercial Tort*, 35 CUMB. L. REV. 317, 344 (2005).

[166] *Id.* (noting that causation is not listed as an independent element in the RESTATEMENT (SECOND) OF TORTS § 766 (1965)).

[167] *Id.* at 344–45.

[168] Wexler, *supra* note 1, at 299.

[169] Ames, *supra* note 165, at 344.

[170] *See id.* at 344.

[171] Steven W. Feldman, *Tortious Interference with Contract in Tennessee: A Practitioner's Guide*, 31 U. MEM. L. REV. 281, 310 (2001).

> which he has created, it seems clear that the result is well within the limits of the "proximate."[172]

This view, that proximate cause should entail that "a man might be held liable for any 'natural and probable' consequences of his actions even if there were human intermediaries," is problematic.[173] The legal gymnastics required to reconcile normal understandings of causation with the tort are best explained by simply realizing that the case continued the tradition of using the legal fiction that servants, daughters, and wives had no independent will that could break the chain of causation.

C. The Property Problem

In addition to the construction of causation, the legal predecessors to interference with contractual relations imported another problematic concept into the new tort—the way in which legal erotic triangles configured women as property. Proprietary interests underpinned the creation of interference with contractual relations.[174] Put bluntly, "[t]he tort grew out of a desire to protect the property interests people supposedly had in other people."[175] More specifically, it grew out of the desire to protect the property interests that men had in women. From a master's property interest in his female or male servant, and a father's property interest in his daughter, and a husband's property interest in his wife, came a man's property interest in a contractual relationship formed with a woman. In these predecessor torts, the property rationales were initially explicitly acknowledged, and so, too, in the case of interference with contractual relations. Gye's counsel "vigorously argued"[176] that, in order to succeed on the claim, Lumley "must have a property in the thing taken away,"[177] and the judges endorsed this view. By the early 1900s, courts often expressed their understanding that the basis of the tort was in protecting a property right.[178]

In 1853, giving a man a property right in a woman who was contractually bound to him was a relatively unremarkable proposition.[179] However, as cultural milieus changed and the idea that one person could hold property

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[172] PROSSER & KEETON ON TORTS, *supra* note 63, at 990–91 (footnotes omitted).

[173] Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1207 (1996).

[174] Waddams, *supra* note 2, at 449.

[175] Wexler, *supra* note 1, at 284.

[176] Waddams, *supra* note 2, at 447.

[177] Lumley v. Gye, (1853) 22 L.J.Q.B. 463 (Eng.) 466 (argument by Willes on behalf of Gye) (full argument by Willes not included in the English Reports).

[178] *See* Fred McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 141 n.38 (1992) (collecting cases).

[179] As discussed *supra* in Part II.C.2–3, it was standard that a male head of a household would have proprietary rights in his wife, offspring, and servants. It was not a far stretch to extend this to contracted female employees.

rights in another became abhorrent, a new rationale was needed to justify the tort of interference with contractual relations. Many of these new justifications were rooted in notions of property, but highlighted proprietary rights in contractual performance, rather than a contracting party. In modern cases, courts frequently express the idea that promisees have proprietary rights in the performance of contracts; however, they do not explain how, or why, the performance of the contract should have this quality.[180]

The High Court of Australia deftly illustrates the circularity of the reasoning often employed:

> [the theory that contractual rights are quasi-proprietary] seeks to answer the question: "Why is a plaintiff's right to performance of a contract protected against third party interference?" It gives the answer: "Because it is quasi-proprietary." But that raises the question: "Why is it quasi-proprietary?" The answer is: "Because it is protected against third party interference."[181]

Many scholars have posed justifications for the tort that are rooted in property, but no argument has convincingly articulated why a contractual right that is normally only effective against other parties should suddenly become a property right against anyone who induces another to breach.[182] In their defense, that is no easy task. Property conceptions are not the finest of analytical tools:

> Once it is recognized that property is a social construct rather than a transcendental phenomenon, it must become apparent that the concept is limited both in its content as well as analytic value. Ultimately, the decision to confer proprietary protection on a particular resource or interest calls for a thorough and explicit examination of the *nature* of the interest as well as the relevant *policy* considerations. By itself, property talk is neither a sufficient nor a useful substitute.[183]

Recognizing the bias built into the tort of interfering with contractual relations reveals why it cannot be explained in a way that reconciles current conceptions of property with the autonomy of all the individuals involved.

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[180] *See, e.g.*, Duggin v. Adams, 360 S.E.2d 832, 835 (Va. 1987) ("A party to a contract has property rights in the performance . . . .").

[181] *Zhu v Treasurer of NSW* (2004) 218 CLR. 530, 573.

[182] *See, e.g.*, Richard Epstein, *Inducement of Breach of Contract as a Form of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987) (arguing that the inducement tort is "best understood as an unsuspected manifestation of the problem of ostensible ownership"); Lilian BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877 (1990) (explaining some shortcomings of Epstein's property-based approach); and Fred McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131 (1999) (connecting the tort to assignability rights in contract).

[183] Pey-Woan Lee, *Inducing Breach of Contract, Conversion and Contract as Property*, 29 O.J.LS. 511, 518 (2009).

Indeed, the property-based theory with the most explanatory power is that of Benjamin Fine, which proposes that the most important relationship in the tort is that between the promisee and the interferor, or the two rivaling men in the *Lumley v. Gye* scenario.[184] Fine suggests that a pursuer of an economic good has a right of pursuit that runs against the world, and that scholarship on the tort "has incorrectly emphasized the relationship between the obligee and the obligor, or prospective obligee or obligor."[185] Instead, he argues, the focus should be on "the obligee and the interferor as competing pursuers of the same economic good, the performance of the obligor."[186] He analogizes the obligee and the interferor to hunters of wild animals, and finds parallels between the moment a hunter acquires property rights over an animal, and the moment one acquires contractual rights.[187] Property rights begin to vest as soon as the hunter can demonstrate some control over the animal. Once the hunter can do this, other hunters may not also pursue the animal. While Johanna Wagner is obviously not an animal, the analogy is a good one. Focusing on the promisee and the interferor reveals much about the problematic property assumptions inherent in the tort. "At least symbolically," the structure of the tort continues to configure the promisor as the property of the promisee.[188]

III. Problematic Applications of the Tort

Interference with contractual relations treats the original promisee and the new promisee as competitors for the same economic good, but in so doing, it ignores the fact that the "economic good" in question is often someone else's labor. Through its structure, the tort commodifies the original promisor and her labor, and this commodification eclipses the personhood of the original promisor such that the tort can be used in ways that conflict with her autonomy and freedom of contract, as well as her ability to control her own labor. Contract and tort law "define the weapons that parties may deploy in competition or bargaining . . . [and] shape the relative bargaining power of social actors."[189] In America, the tort traditionally empowered employers; it became an important part of "a formidable body of legal principles that systematically favored employers in litigation with employees."[190] As the tort developed and evolved, it was applied in many problematic contexts for nefarious purposes. It was used to oppress

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[184] *See generally* Fine, *supra* note 162.
[185] *Id.* at 1125.
[186] *Id.*
[187] *Id.*
[188] Dobbs, *supra* note 8, at 359.
[189] John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 Law & Hist. Rev. 627, 628 (2000).
[190] *Id.* at 635.

marginalized groups by restricting labor mobility and prevent workers from advancing their economic interests or gaining any upward mobility.

A. Racial Oppression

In America, some of the early cases rejected the *Lumley v. Gye* tort.[191] Soon, though, legal actors recognized that the tort was a useful tool for oppressing recently freed slaves in the American South.[192] There, the tort was enlisted to perform tasks similar to those performed by the enticement action in the Statutes of Labourers.[193] Specifically, it was used to prevent labor mobility, and the attending social and economic mobility that would accompany free labor movement.[194]

The Civil War and its attendant abolition of slavery in the 1860s was an "economic disaster" for Southern white plantation owners.[195] The former slaves had a newfound market power: the plantation owners desperately needed agricultural labor, and, accordingly, the former slaves began to command real market wages, as opposed to the "implicit subsistence wage of slavery."[196] In order to prevent worker mobility and push down wages, white landowners formed cartels, and when those were unsuccessful, the landowners enlisted the aid of interference with contract to prevent workers from finding better opportunities.[197]

Indeed, shortly after the Thirteenth Amendment was ratified in 1865, North Carolina passed a statute called "An Act to Prevent Enticing Servants from Fulfilling Their Contracts or Harboring Them."[198] The Act provided that servants and the persons who either enticed them away or harbored them could be sued jointly and singly, and, if liable, would be responsible for "the actual double value of the damages assessed."[199] In Georgia, eight days after the Thirteenth Amendment was ratified, one plantation owner had

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[191] Danforth, *supra* note 155, at 1496 (citing Kline v. Eubanks, 33 So. 211 (La. 1902) (holding that there is no liability for inducing breach of contract); Boyson v. Thorn, 33 P. 492 (Cal. 1893) (endorsing Coleridge's dissenting opinion in Lumley v. Gye); Boulier v. Macauley, 15 S.W. 60 (Ky. 1891) (refusing to apply legislation it interpreted as restricted to farm laborers to a female performer).

[192] David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 784–85 (1992) (comparing the labor shortage caused by the emancipation of slaves after the Civil War to that of the labor shortage in England during the Plague).

[193] Statute of Labourers, 1351, 25 Edw. 2, St. 1, c. 1; Partlett, *supra* note 192, at 784–85.

[194] Partlett, *supra* note 192, at 784–85 n.50.

[195] DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 8 (2001).

[196] *Id.*

[197] *Id.* at 9.

[198] 1866 N.C. Sess. Laws 122.

[199] *Id.* at 123.

already hired his former slaves on as employee/servants.[200] When a neighbor persuaded the former slaves to work for him instead, the plantation owner successfully brought an action against his neighbor.[201] In some states, enticement laws took the tort action one step further and criminalized the hiring of a worker who was already under contract.[202]

Even the former slaves who chose to stay on the same plantation under the new regime of sharecropping were restricted by the tort. Egalitarian and cooperative sounding, the sharecropping system allowed former slaves to perform agricultural labor on the same land they once did, though this time they were compensated with some of the crop.[203] Theoretically, they also should have been free to move between lands, to seek out better returns for their labor. Soon, however, the potential of *Lumley v. Gye* to keep these workers in their place, both literally and figuratively, became apparent. Southern states quickly took advantage of the doctrine by classifying the former slave sharecroppers into the same category as contract service providers.[204] Once so defined, the *Lumley v. Gye* tort ensured that at-will contracts could effectively stifle the mobility of these workers.[205] Other landowners would face tortious liability if they encouraged workers to leave their former master's employ, leaving the former slaves with few options. Essentially, the contract and tort combination became "a means of perpetuating slavery under a different name."[206]

Courts were careful to distinguish the tort from the institution of slavery, and specifically denied that the tort was rooted in the idea that people could have property rights in others. Instead, they claimed that the tort was "not derived from any idea of property by the one party in the other, but [was] an inference from the obligation of a contract freely made by competent persons."[207] Despite these denials, however, "many of the early American decisions involving interference with contracts concerned newly freed black sharecroppers" and the contract/tort regime became an effective means of coercion.[208] The "ability to work and to sell one's labor in the

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[200] Remington, *supra* note 163, at 657 n.30 (describing Salter v. Howard, 43 Ga. 601 (1871)).

[201] *Id.*

[202] *See* BERNSTEIN, *supra* note 195, at 10.

[203] Partlett, *supra* note 192, at 784 n.50.

[204] *See, e.g.*, Haskins v. Royster, 70 N.C. 601, 611 (1874) ("By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop . . . . He is as much a servant as if his wages were fixed and payable in money.").

[205] *Id.*

[206] *Id.* at 784–85 (quoting Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 556 (1989)).

[207] *Haskins*, 70 N.C. at 605.

[208] Note, *supra* note 117, at 1525 n.72. The Note further explains how *Haskins* exemplified the way the contract/tort regime coerced sharecroppers:

> For example, the black "servant" in *Haskins* stipulated in his contract against his and his family's "insolence" towards the white landowner. For disrespectful behavior towards him, the plaintiff retained the power at any time to eject the share-

market is, for most individuals in American society, the most significant resource that they own and control," and the tort fundamentally impacted that ability.[209] As was stated by Lord Lindley in *Quinn v. Leathem*, "a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."[210] By deterring alternative employers, the tort decreased the possibility of more lucrative alternative employment for former slaves.[211] Also by decreasing the potential for alternative employment, the tort impacted the right to quit.[212] "The right to quit is the antithesis of slavery. Being able to quit is the minimal means of guarding against unduly oppressive labor conditions and is fundamental to controlling one's person and one's labor."[213] When the possibilities of alternative employment are taken away, there is little freedom to quit, and little opportunity to raise one's economic lot.

B. Suppression of Labor Movements

Former slaves were not the only workers who were subjected to the tort's coercive effects.[214] "The German sociological tradition has long taught us to see in the legal protection of property rights a source of coercive power over the working classes," and this form of protection of property rights was no exception.[215] Marx, in particular, raised questions of power and equality in connection with contract, and suggested that "power struggles between

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cropper and his family from "their houses, and to take to himself the whole of their labor and crop." 70 N.C. at 616–17 (Reade, J., dissenting). And, as the dissent pointed out, even a slave had a right to be fed and clothed, whereas the cropper was responsible for meeting his own material needs. *Id.* at 618.

[209] VanderVelde, *Gendered Origins*, *supra* note 3, at 783 n.34.

[210] Quinn v. Leathem [1901] A.C. 495 (H.L.) 534 (appeal taken from Ir.) (Lindley, L.J.).

[211] Law and economic scholars also provide a theoretical basis for understanding how incentives and deterrents work in the tort. Harvey Perlman explains that the tort deters the breach of contracts to the extent that a third person may be less likely to make a better offer to a promisor, since the possibility of tort damages being imposed upon him will mitigate his potential gain from the agreement. Perlman, *supra* note 8, at 83–84. The possibility of punitive damages, too, will weigh heavily against the production of a better offer. BeVier, *supra* note 182, at 917.

[212] VanderVelde, *Gendered Origins*, *supra* note 3, at 794.

[213] *Id.*

[214] In the United Kingdom,

> strikes feature in about 40 per cent of all the reported cases in which *Lumley* has provided the basis of a cause of action. Another 20 per cent of the reported cases concern other issues arising out of employment or personal services contracts. Typically they concern employers who lure away employees who have special skills or confidential information. The remaining 40 per cent cover a variety of commercial contexts, including trade boycotts and rent strikes . . . .

David Howarth, *Against* Lumley v. Gye, 68 MODERN L. REV. 195, 197 (2005) (footnotes omitted).

[215] Witt, *supra* note 189, at 628.

capitalists, the bourgeoisie, and workers resulted in more freedom for some contracting parties than others."[216] The tort initially ensured that the contracting employers retained more freedom than the contracting employees: it was used as a tool against many members of the working class to "enforce compulsory labor" and suppress labor unions.[217]

The tort's role in suppressing organized labor is significant, and was "[o]ne of the factors that propelled the development of the interference tort . . . ."[218] Employers often used interference with contractual relations to thwart union organization.[219] Union organizers, on the other hand, were usually unable to successfully rely on the action: "[w]hile combinations of businessmen that destroyed the livelihood of nonmembers were tolerated, unions that inflicted similar harm as a means to increase bargaining power rather than as an end were found to have engaged in intimidation and duress."[220] So-called yellow-dog contracts, were also closely connected to this cause of action. These contracts, in which an employer provided employment on the basis that the employee agreed not to join a union, were called yellow-dog contracts in order to express "connotations of animal servitude as opposed to human dignity."[221] In *Hitchman Coal and Coke v. Mitchell*, a 1917 decision of the United States Supreme Court, the Court upheld an injunction prohibiting a union from interfering with the yellow-dog contracts at two coal mines.[222] This precedent encouraged other employers to avoid unions by entering into similar contractual arrangements with their employees.[223]

C. Restriction on Employee Mobility

Non-unionized employees have also been negatively affected by the tort. In fact, in 2000, a California court refused to allow an employer's action in contractual interference specifically because of the conflict between the tort and labor mobility.[224] The court noted that California had a "strong public policy in favor of employee mobility," and there was "something

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[216] Ertman & Williams, *supra* note 47, at 3.

[217] PROSSER & KEETON ON TORTS, *supra* note 63, at 979.

[218] Remington, *supra* note 58, at 705.

[219] Indeed, efforts to subvert union activity prompted the expansion of interference with contractual relations into interference with non-employment related agreements and prospective agreements in the late nineteenth century. *See* Note, *supra* note 117, at 1511.

[220] *Id.* at 1533 (footnotes omitted).

[221] DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW: TEXTS AND CASES 8 (14th ed. 2010).

[222] *Id.*

[223] *Id.*

[224] GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs. Inc., 99 Cal. Rept. 2d 665 (2000), *overruled by* Reeves v. Hanlon, 95 P.3d 513 (2004). *See* Jeffrey Kramer, *Practice Tips: The Risks of Recruiting At-Will Employees*, 27 LOS ANGELES LAW. 19 (2005) (discussing California cases, including *GAB Bus. Servs* and *Reeves*, and their evaluation of the tort with respect to at-will employee contracts).

inherently suspect about a tort that, at bottom, concerns an employee's voluntary departure from employment."[225] While this case was eventually overruled by the California Supreme Court, the Appellate Court's initial declaration of a public policy against such a claim demonstrates some of the discomfort surrounding the tort. By imposing damages on the next employer to hire a departing employee, the "practical effect of this tort is to decrease the value to prospective employers of an employee under contract, rendering the employee more likely to remain with her current employer."[226] Further, the tort stifles an employee's ability to voice dissatisfaction and raise grievances, since there are fewer "substitute employment opportunities" as a result of the tort's deterrent properties.[227]

While many states have circumscribed the application of interference with contractual relations in the employment context, a new employer can still be liable for inducement if the new employee was contracted for a specific term.[228] Cases like *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.,*[229] *Tata Consultancy Services v. Systems International, Inc.*,[230] and *CompuSpa, Inc. v. International Business Machines Corp.*,[231] serve as examples of situations where employers brought actions against the new employers of their former employees, alleging interference with contract. These cases highlight the tort's continuing problematic applications.

IV. Restructuring the Triangle

The old torts of enticement, seduction, and criminal conversation were explicitly based on the idea that men had property rights to their servants, daughters, and wives. When it became culturally unacceptable to speak of one person holding property rights in another, however, the arguments regarding the rationales for these torts shifted. Legal figures turned to other justifications for the torts of seduction, criminal conversation, and the similar American tort, alienation of affections.[232] For instance, by the early twentieth century, courts no longer explained the tort of seduction using a property rationale. Instead, they cited the " 'moral and emotional investment in sexual chastity . . . as a legally protected interest' compensable with hard

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[225] *Id.* at 667.

[226] Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 Stan. L. Rev. 87, 96 (1993).

[227] VanderVelde, *Gendered Origins*, *supra* note 3, at 851.

[228] *See* Rudolf Callman, Callmann on Unfair Competition, Trademarks and Monopolies, § 9.22 (4th ed. 2009); Wonnell, *supra* note 229, at 96.

[229] 479 F.3d 1099 (9th Cir. 2007) (holding that, in a claim for intentional interference with the contract of non-at-will employees, the former employer does not have to allege wrongful act beyond solicitation of employees and knowledge that the contract existed).

[230] 31 F.3d 416 (6th Cir. 1994) (noting that Michigan state law requires allegation of malice and/or wrongful act for liability to attach in an interference with contract action).

[231] 228 F. Supp. 2d 613 (D. Md. 2002) (discussing the differences in the state laws of New York and Texas with respect to the tort of interference with contract).

[232] Greenstein, *supra* note 29, at 735–36 & n.72.

currency."[233] Criminal conversation underwent a similar conversion, and the rationale espoused morphed into "the protection of the marriage relationship and the larger marital institution from outsiders . . . ."[234] Alienation of affections, an American tort that allows a jilted spouse to sue someone alleged to have caused the loss of affection, also lost its property rationale in favor of a justification based on the plaintiff's interest in marital exclusivity and consortium, rather than the plaintiff's property interest in his spouse.[235]

Once the property rationales were abandoned, though, few of the new rationales were compelling enough to justify the continuations of these torts, and they have disappeared from most jurisdictions.[236] Because these legal erotic triangles were based upon regulating the exchange of women as the property of men, the torts simply could not overcome their deeply offensive genesis. As one scholar phrased it, "to retain a tort that originated from a husband's exclusive right to his wife's sexuality arguably promotes disrespect for the law."[237]

Through its gendered beginning, interference with contractual relations participated in this legacy of regulating homosocial relationships between men in a way that ensured women and other members of subordinated status would remain in that subordinated status. The particular status of Johanna Wagner as an unmarried woman was viewed through a cultural lens as enough like a wife or servant to be easily associated with the legal structures that applied to them. Once she had served as the first step down the path of expansion, the door was open to apply the tort to other people, including men in traditionally subordinated groups. Now, of course, the tort is available to all. But its offensive past as a highly effective tool of oppression gives us reason to ask, "[have] the old malevolent purposes . . . been replaced with modern rectitude . . . [o]r, does some of the evil remain, albeit more disguised?"[238]

Even without considering how gender has structured interference with contractual relations, many scholars have suggested that the problems inherent in it warrant at least a major renovation.[239] When these arguments are combined with an understanding of its gendered genesis and subsequent development as a tool of subordination, there is a compelling basis to argue that this tort should travel the same path as torts like criminal conversation.

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[233] *Id.* at 731 (quoting Larson, *supra* note 13, at 385).

[234] *Id.* at 735.

[235] *Id.* at 731–32.

[236] *See* Patel, *supra* note 87, at 1014 n.13, for a list of states that abolished the heartbalm torts.

[237] Caroline L. Batchelor, *Falling Out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. Rev. 1910, 1931 n.157 (2009).

[238] Wexler, *supra* note 1, at 328.

[239] *See, e.g.*, Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 Minn. L. Rev. 1097, 1100 (1993) ("[T]he law of [tortious interference] gives excessive protection to tenuous contractual relationships at the expense of competition and efficiency.").

However, given that judicial and legislative bodies have not responded to the already persuasive academic call for abolition or abandonment, it seems unlikely that this tort will soon fade away.[240]

In the meantime, it is possible to reshape the tort in a way that erases its gendered components and resolves its most problematic aspects. The tort should be reconceived as one of "mixed joint liability."[241] Under this view, which was championed by the House of Lords in one of their final cases, the tort relies on the general principle that one "who procures another to commit a wrong" shares liability for that wrong.[242] The inducer is liable because he has participated in the underlying breach, not because he has done some independent wrong vis-à-vis the plaintiff. Instead of the original promisor serving as a conduit between the relationship of the plaintiff and defendant, the promisor is elevated to the status of an active subject in the dispute. The causation problem, the property problem, and the relationship between the tortious and contractual aspects of the tort are clarified in this new conception of the tort as a form of mixed joint liability. Further, this view advocates limiting damages to those available in contract in order to reflect a non-gendered understanding of the nature of the injury.

A. Mixed Joint Liability

Joint liability holds persons liable for wrongful acts in which they actively participate, encourage, or help to bring about. Prosser outlines the basis of liability:

> [a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for the benefit, are equally liable.[243]

While the concept of sharing in liability through participation or knowing involvement in an underlying tort is well-known to tort law, normally joint tortfeasance means that two parties are jointly responsible for the same

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[240] Kyle Graham has an interesting take on why interference with contractual relations has endured and will continue to do so. Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 389 (2008) (noting, among other things, that "[t]he tort singles out no one industry or cohesive group for liability, while all can envision how the theory could be useful to them in the proper situation").

[241] The term and concept of "mixed joint liability" comes from GLANVILLE L. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 1 (1951), *noted in* HAZEL CARTY, AN ANALYSIS OF THE ECONOMIC TORTS 72 (2001). In *O.B.G. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) 19 (appeal taken from Eng.), the House of Lords (which was then still serving a judicial function) endorsed a similar justification for the tort, referring to it as accessory liability.

[242] O.B.G. v. Allan, [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) 19 (appeal taken from Eng.).

[243] PROSSER & KEETON ON TORTS, *supra* note 63, at 323 (footnotes omitted).

tort.[244] In the case of interference with contractual relations, the participation is not in another's tort. Instead, the underlying wrong is a breach of contract. Technically, then, an inducer and a promisor cannot be joint tortfeasors, because "breach of contract is not a tort," and therefore the promisor is not a tortfeasor at all.[245] Further, joint liability usually results in shared liability for the same tort, not liability for a separate tort of inducing or procuring.

If the underlying wrong is a breach of contract, how can the inducer, who is not a party to the contract nor under any duty of performance in regards to it, nevertheless be liable for breach? Liability attaches because the inducer's intentional and knowing participation in the breach makes it appropriate for the inducer to share in the responsibility for it as a type of mixed joint liability. Importantly, a rights-based view of the tort supports the imposition of liability in this way: "[t]he induced contracting party has violated a right of the plaintiff and the defendant comes to be responsible for that violation since he or she has participated in a meaningful way in the violation by procuring it."[246]

Adopting this new conception of the tort requires only a relatively small doctrinal shift. The tort's elements would be the same as those already required by the restrictive view of the tort applied in many jurisdictions. Generally, there must be an enforceable contract, the promisor must breach that contract, the interferor must have knowingly induced or participated in that breach, and the promisee must have suffered damage as a result.[247]

The first element limits this tort to breaches of enforceable contracts. This is because unless a right of the plaintiff has been violated, it does not make sense to speak of the defendant's participation in that violation. Many jurisdictions, including New York, Maryland, Idaho, and Georgia already contain such a requirement.[248] Also, there must be an actual breach of that contract, not a mere disruption.[249] This will limit the scope of the tort and achieve the goal of restricted applicability that many scholars have sug-

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[244] Lee, *supra* note 183, at 521.

[245] William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 553 (1980).

[246] Neyers, *supra* note 9, at 170.

[247] *See*, *e.g.*, NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 664 N.E.2d 492, 496–98 (1996).

[248] Remington, *supra* note 58, at 651 n.11. The jurisdictions that allow at-will or voidable contracts to form the basis for these claims have sometimes been criticized. *See* Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test,* 40 U. MIAMI L. REV. 487, 502–03 (1986).

[249] *See* Wexler, *supra* note 1, at 300 (discussing how California accepts a mere disruption, whereas New York requires a breach for damages to be awarded).

gested.[250] Again, there is a precedent for this restriction: New York and Connecticut already require a breach as an element of the tort.[251]

The requirement that the interferor must knowingly have induced or participated in the breach includes an element of intentionality: the defendant must know both that the contract exists and that she is participating in a breach of it. The level of participation required should be the same as the level generally required in cases of joint tortfeasance or aiding and abetting. In particular, inducement, and active encouragement or help will suffice, as will active participation, or ratification or adoption of the acts for the defendant's benefit.[252] Of further note, malice or a bad motive is not a relevant consideration in this inquiry.

Impropriety, other than participating in another's breach of duty, is not required under this version of the tort. This avoids the problems associated with the remarkably vague "improper" standard set out in the Restatement (Second) of Torts.[253] The troublesome nature of the current "improper" element is perhaps best illustrated in the following aptly articulated complaint against the tort: it is "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way."[254] The standard of impropriety established in the purportedly unworkable seven-factor analysis set out in the Restatement (Second) of Torts has proven to be impossible to apply consistently.[255] In contrast, a requirement of participation that does not depend on the propriety or impropriety of the involvement will give the tort more certainty in application.

Case law indicates that there is already some movement towards thinking of the tort in terms of joint tortfeasance, for courts sometimes use the language of joint tortfeasance when discussing it. For example, in *TABFG,*

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[250] *See* William J. Woodward Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1118 nn.53–54 (1996) (citing Perlman, *supra* note 8, at 97–129; Epstein, *supra* note 182, at 21–26) (noting that many scholars have argued in favor of "drastically scaling back the tort").

[251] *See* Wexler, *supra* note 1, at 297–98 (citing Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445 (N.Y. 1979); Solomon v. Aberman, 493 A.2d 193 (Conn. 1985)) (discussing how both jurisdictions require a breach of a valid contract as a necessary element of the tort).

[252] PROSSER & KEETON ON TORTS, *supra* note 63, at 323.

[253] RESTATEMENT (SECOND) OF TORTS § 766 (1979). As Gary Myers notes, the seven-factor "improper" standard "permits liability based on a vague and subjective standard." Myers, *supra* note 239, at 1111.

[254] PROSSER & KEETON ON TORTS, *supra* note 63, at 979.

[255] *See* Wexler, *supra* note 1, at 295 ("Every case turns out to be essentially an ad hoc determination, since '[t]he decision . . . depends upon a judgment and choice of values in each situation.'") (citing RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1979)); BeVier, *supra* note 182, at 884 ("Nor, apparently, are the factors themselves susceptible to coherent analysis . . . . [T]he dispositive question of whether any particular inference is 'improper' is to be decided by reference to seven factors of uncertain content and unspecified relevant importance.").

LLC v. Pfeil, the court referred to the defendant's argument that one of the alleged breaching promisors should have been included in the action as essentially an argument that "all joint tortfeasors must be named in the action,"[256] and in *Skelly v. Richman*, too, the court noted that the promisor and the inducer were "somewhat in the status of joint tortfeasors."[257] Also, a Georgia statute makes a party who has maliciously procured a breach of contract jointly liable for the breach.[258]

This new view of the tort clarifies what the interferor must do to attract liability, simplifies the relationship between contract and tort principles, avoids the causation problem associated with the current conception of the tort, and does not treat the promisor as the property of the promisee. It acknowledges the promisor's role in the breach by treating both the promisor and the interferor as liable together. Rather than replicating a triangular structure, this vision of the tort would create a two-party structure, with both the inducer and the promisor as autonomous actors. Each party is responsible for her own actions and held to account for her own decisions.

The new view also avoids the significant difficulties associated with viewing the tort as rooted in property. Whereas a conception of the tort as involving property rights "places burdens on strangers" to respect other people's contracts, the joint liability view simply says that liability will attach to active participation in the breaches of others.[259] The participation in the breach is more consistent with the "basic private law principle that the only person on whom liability is to be foisted is the person who it can be said has infringed the plaintiff's right,"[260] since the promisor and the interferor have together infringed the plaintiff's right.

This view also accords well with the treatment of breaches in contract law. "[T]he law attaches no stigma or special sanction to a contracting party who for economic reasons chooses to breach. If breaching a contract is not itself blameworthy, then '[t]o hold an inducer liable, his behavior must be at least as culpable as that of the breaching promisor; to impose a liability rule more onerous than that imposed on the promisor, the inducer must be more culpable.'"[261] This form of joint liability holds an inducer liable to the same extent the breaching party is held liable, because the inducer has participated in the breach in a way which makes him as culpable as the breaching party.

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[256] No. 08 C 6979, 2009 U.S. Dist. WL 1209019, at *1–3 (N.D. Ill. May 1, 2009).

[257] 89 Cal. Rptr. 556, 565 (1970).

[258] GA. CODE ANN. 51-12-30 (2001) ("In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.").

[259] Neyers, *supra* note 9, at 164.

[260] *Id.*

[261] Dowling, *supra* note 248, at 512 (citing Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461–64 (1897); quoting Perlman, *supra* note 8, at 93).

B. Damages in Contract

Gender issues heavily influence how injuries are understood and valued. The gender of the plaintiff, in particular, impacts how the law will conceptualize the harm.[262] As we saw in *Lumley v. Gye*, the idea that interference with contractual relations should attract tort damages grew out of the court's understanding of the injury as more than just a mere breach of contract. The injury was arguably understood as a psychic injury to masculine identity similar to the kind of injury a cuckolded husband or father of a seduced daughter might experience. Just as the damage awards for the cuckolded husband and the father of a seduced daughter may have been very high to compensate for the perceived severity of the emotional and moral injury inflicted upon the plaintiff by another man, the suggestion in *Lumley v. Gye* was that this similar injury could attract a similarly high damage award.[263]

Since Justice Erle's bare pronouncement in *Lumley v. Gye* that contractual remedies may be inadequate and that the inducer "might justly be made responsible beyond the liability of the contractor,"[264] the question of the appropriate measure of damages for interference with contractual relations has received little attention.[265] Courts typically analogize the situation to those of other intentional torts, and reason that like those torts, a plaintiff's damages should not be restricted.[266] Interference with contractual relations can result in the usual spectrum of tort damages: damage awards can compensate emotional and reputational harms to the plaintiff, the pecuniary loss of the benefits of the bargain, and the consequential losses legally caused by the interference.[267] Damages for loss of profits are frequently awarded.[268] Also, because the damages are in tort, punitive damages are possible.

In contrast, the promisor's liability is limited to the damages regularly available under contract law. This is because the cause of action against the promisor is framed as a contractual, rather than tortious harm. The action in contract against the promisor does not limit a plaintiff's ability to bring an action for tortious interference, but any actual payments made by the promisor in settlement of the contractual claim must be deducted from any tort award against the interferor.[269] Since the damages for breach are common to

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[262] *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464–65 (1997); Chamallas & Kerber, *supra* note 86, at 814; Viviana A. Zelizer, *The Purchase of Intimacy*, 25 LAW & SOC. INQUIRY 817, 828 (2000).

[263] Larson, *supra* note 13, at 384 n.35.

[264] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.), 757 (Erle, J.).

[265] *See* PROSSER & KEETON ON TORTS, *supra* note 63, at 1002.

[266] *See* Myers, *supra* note 239, at 1118.

[267] RESTATEMENT (SECOND) OF TORTS § 774A (1979).

[268] *Id.* at cmt. b.

[269] The plaintiff's available action for breach of contract against the third person does not prevent an action in interference against a third party. The two are considered wrongdoers, and each may be liable to for the harm caused to him by the loss of the benefits of the contract. RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (1979). However, "since

both actions, there is a possibility of double recovery without such a rule. Even with this rule of deduction, however, the possibility of overcompensation is alive. In essence, the promisee is able to receive tort damages, even though the underlying harm is a breach of contract. This result "throws off the delicate contract damage system" and makes it possible for a promisee to end up better off than he would have been if the promised performance had occurred.[270]

The discrepancy between the promisor's liability and the inducer's liability is troubling. Holding an inducer liable for more damages than the person who actually owed the duty under the contract is anomalous, to say the least.[271] Once the gendered injury is removed from the equation, it is difficult to argue that the inducer has done something "more wrong" than the breaching promisor; indeed, all the inducer has done is helped to bring about the breach. The issue of proportionality, or "making the punishment fit the crime" is askew: "the question is what is the relative culpability of actors who have different roles under the *same* set of facts. While views on 'fairness' may differ, it is difficult to conclude that an 'accessory' (the inducer) should be treated far more harshly than the 'principal' (the breaching promisor)."[272]

The better position is that damages for the tort of interfering with contractual relations should be limited to contractual damages. Although at first blush it seems odd to award anything other than tort damages for a tortious wrong, when it is remembered the actual wrong of this tort is a breach of the underlying contract, the limitation makes sense. Moreover, limiting damages to those recoverable in contract has many advantages. Holding both the promisor and the inducer to the same level of damages is fair. It honors the autonomy of the breaching party, accounts for her participation in the loss, and reflects the equivalent responsibility of both parties. It is consistent with the view that the inducer is liable as a form of mixed joint liability for the loss caused by the breach, as well as with general principles of contract law. Since the real wrong of this tort is the breach, the remedy available should be that which is generally applicable for breach of contract, according to the rules of contract law.

Already, case law shows some movement towards adopting this view. A minority of courts has long suggested that the appropriate measure of damages should be limited to those available when the contract was made.[273]

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the damages recoverable for breach of the contract are common to the actions against both, any payments made by the one who breaks the contract . . . must be credited in favor of the defendant who has caused the breach." RESTATEMENT (SECOND) OF TORTS § 774A cmt. e (1979).

[270] Dowling, *supra* note 248, at 509.

[271] PROSSER & KEETON ON TORTS, *supra* note 63, at 1004.

[272] Wexler, *supra* note 1, at 326.

[273] *See* PROSSER & KEETON, *supra* note 63, at 1003 & n.65 (citing McNutt Oil & Refining Co. v. D'Ascoli, 281 P.2d 966 (Ariz. 1955) (allowing punitive damages but limiting contractual damages to actual damages)); *see also, e.g.*, R & W Hat Shop, Inc. v.

Also, courts have applied the contract doctrine regarding liquidated damages to interference cases.[274] Often, if there is a liquidated damages clause in the contract, courts will hold that the amount set in the clause is the maximum recovery available, and no award can be made over that amount. Taken together, the application of liquidated damages rules and the case law already limiting damages to those available in contract indicate that there is a fluidity to the division between contract and tort damages in interference cases, a fluidity which could easily shift to a purely contractual damages system.[275]

There is much scholarly debate regarding whether expectancy damages offer full compensation for contractual breaches.[276] But if expectancy damages are viewed as fully compensatory in a two-party situation, "so that the promisee is indifferent between receiving performance or the value of performance, this should also remain true in the three-party inducement context."[277] And the same should still hold true even if expectancy damages are viewed as undercompensatory; it is difficult to find a persuasive argument that a promisee whose promisor breached without conferring with any other party first should be restricted to undercompensatory damages, whereas a promisee whose promisor breached after consultation with another party deserves a greater amount of compensation.

If expectancy damages are undercompensatory, it is still difficult to see why the interferor, who has done nothing more than participate in the underlying breach, should be solely responsible for paying more. Surely the interferor cannot be saddled with the failings of the contract law system. Chancellor Perlman states it well: "[t]o the extent that undercompensation interferes with the objectives of contract doctrine, a reform applicable to all breaches seems a more appropriate response."[278]

Sculley, 118 A. 55 (Conn. 1922) (limiting damages to actual damages); Swaney v. Crawley, 157 N.W. 910 (Minn. 1916) (damages limited to those for breach of contract); Mahoney v. Roberts, 110 S.W. 225 (Ark. 1908) (limiting damages to those available in contract); Armendariz v. Mora, 553 S.W.2d 400 (Tex. Civ. App. 1977) (damage awards for tortious interference same as those for breach of contract, but exemplary damages allowable when actual malice proven); Kerr v. Du Pree, 132 S.E. 393 (Ga. Ct. App. 1926) (stating damages are limited to amount that would have been earned under contract). Pennsylvania restricts damages available for interference to those available for breach of contract. *See, e.g.*, Fishkin v. Susquehanna Partners, 563 F. Supp. 2d 547 (E.D. Pa. 2007) (federal case interpreting Pennsylvania state law).

[274] Deepa Varadarajan, Note, *Tortious Interference and the Law of Contract: The Case for Specific Performance Revisited*, 111 YALE L.J. 735, 757 (2001).

[275] *Id.* at 757–59 (citing Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 45 F. Supp. 2d 1164 (D. Kan. 1999); Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc., 690 P.2d 207 (Colo. 1984); McEnroe v. Morga, 678 P.2d 595 (Idaho Ct. App. 1984)).

[276] *See* Perlman, *supra* note 8, at 88–89.

[277] Note, *supra* note 274, at 747 (paraphrasing Perlman, *supra* note 8, at 93).

[278] Perlman, *supra* note 8, at 89.

Conclusion

The problematic nature of the tort of interference with contractual relations is widely acknowledged. However, previous attempts at explaining its anomalous nature have ignored the crucial role that gender played in the formation of the tort. The tort's structure mimics that of the erotic triangle, a cultural archetype in which two rivaling males compete for one woman. Its previous legal manifestations, consisting of enticement, seduction, and criminal conversation, provided the precedents for interference with contractual relations, and the particular factual matrix which came before the court in *Lumley v. Gye* ensured that the new tort appeared to be a natural extension.

In *Lumley v. Gye*, "gender was a catalyst" that transformed legal doctrine.[279] Because the tort was created under a particularly gendered circumstance involving male rivalry over the services of a woman, the tort privileged the two men as subjects, and denied the full autonomy of Johanna Wagner. It ignored her role in causing the breach, and placed responsibility for her actions not on her, but on the man who influenced her decision. The tort treated her as the property of the man with whom she had contracted and failed to recognize her right to control her own labor. It impeded her ability to seek out new, economically beneficial relationships for herself by imposing a risk on potential contractual partners that was meant to deter them. It configured her as a commodity in a marketplace of men.

The way in which the tort commodifies the contract breacher facilitated the use of the tort as a means of oppression during its subsequent development. The tort was used against former slaves in the southern United States, workers attempting to form labor unions, and employees seeking mobility. These examples demonstrate how the tort's structure is irreconcilable with modern social and legal values and should be reconfigured. The conception of the tort as a form of mixed joint liability, in which the interferor is responsible for his participation in the underlying breach as opposed to an independent wrong, and damages are limited to those available in contract, provides a viable alternative. This reconfiguration removes the property and causation problems inherent in the tort, and provides an assignment of blame that is not based on gendered assumptions about how men relate to each other.

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[279] VanderVelde, *Gendered Origins*, *supra* note 3, at 782.