

IDAHO'S LAW OF SEDUCTION

MICHAEL L. SMITH*

ABSTRACT

Seduction is a historical cause of action that permitted women's fathers to bring suit on their daughters' behalf in sexual assault and rape cases. This tort emerged long ago when the law's refusal to recognize women's agency left this as the only means of recovering damages in these cases. As time went on, the tort evolved, and women were eventually permitted to bring lawsuits for seduction on their own behalf. Today, most states have abolished seduction, along with other torts permitting recovery for damages arising from intimate conduct. One could be easily forgiven for thinking that such an archaic tort still exists in the laws of Idaho.

But one would be wrong. This article argues that despite the Idaho Supreme Court's abolition of the "heartbalm" torts of alienation of affections (a plaintiff suing a person who enticed their spouse to end a marriage) and criminal conversation (a plaintiff suing someone who had sex with their spouse), the tort of seduction lives on. Unlike the common law actions of alienation of affections and criminal conversation, seduction is based in statutes dating back to before Idaho became a state. As much as Idaho's Supreme Court has critiqued heartbalm torts for being outdated and prone to abuse, these reasons are insufficient to abolish the statute-based tort of seduction.

While seduction is still good law in Idaho, it doesn't follow that it ought to remain law. The gendered language of Idaho's seduction statutes renders them vulnerable to an equal protection challenge. And the existence of alternate causes of action to seek recovery for sexual harassment, sexual assault, and rape now perform the damage-recovery function that seduction used to address. While this Article makes the case for the factual existence of Idaho's law of seduction the many shortcomings and vulnerabilities the law faces suggest that Idaho's law of seduction shouldn't be long for this world.

*Temporary Faculty, University of Idaho College of Law

TABLE OF CONTENTS

I.	INTRODUCTION	292
II.	THE TORT OF SEDUCTION: IN IDAHO AND ELSEWHERE.....	295
A.	A BRIEF HISTORY OF THE SEDUCTION TORT.....	296
B.	SEDUCTION LAW IN IDAHO	301
i.	<i>Idaho's Seduction Statutes</i>	302
ii.	<i>Idaho's Seduction Case Law</i>	302
C.	SEDUCTION IN THE NEWS	306
D.	THE ABOLISHMENT OF SOME HEARTBALM ACTIONS IN IDAHO	310
i.	<i>O'Neil v. Schuckardt: The Abolishment of Alienation of Affections</i> ..	310
ii.	<i>Neal v. Neal: The Abolishment of Criminal Conversation</i>	311
III.	THE TORT OF SEDUCTION STILL EXISTS IN IDAHO.....	313
i.	<i>The Statutory Basis of Idaho's Seduction Tort</i>	313
ii.	<i>The Scope of O'Neil and Neal</i>	314
iii.	<i>Distinguishing Seduction from Alienation of Affections and Criminal Conversation</i>	315
IV.	SHOULD THE TORT OF SEDUCTION EXIST IN IDAHO?	316
A.	CONSTITUTIONAL CONCERNS OVER IDAHO'S SEDUCTION LAW	316
i.	<i>Does Idaho's Seduction Law Violate the Equal Protection Clause?</i> ..	316
ii.	<i>Equal Protection Challenges to Other States' Seduction Statutes</i>	320
iii.	<i>Does Idaho's Seduction Law Violate Substantive Due Process?</i>	325
B.	SHOULD IDAHO PERMIT SEDUCTION TORTS?	327
i.	<i>Doubts Over the Standard Critique</i>	327
ii.	<i>Alternate Arguments Against the Tort of Seduction</i>	329
V.	CONCLUSION.....	331

I. INTRODUCTION

If you ask a group of lawyers or law students to identify what they believe to be the quintessential tort, you'll probably hear a lot about negligent conduct. You might also get some answers identifying classic intentional torts like assault and battery. Some sophisticated respondents may answer in Latin.¹ There is always that odd guy who will bring up strict liability actions for unusually dangerous animals that have escaped their owner's land.²

You probably won't hear much about seduction. Indeed, many attorneys who've graduated law school and passed the bar may not even be aware that a tort of seduction exists or has existed. Mentioning seduction in a legal context may be

1. See *Res Ipsa Loquitur*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/res_ipsa_loquitur (last visited Feb. 15, 2023).

2. Maybe it's because that respondent has a relative who once kept a bear as a pet on a farm. And maybe one fateful day while that respondent was still a child, that bear escaped.

more likely to prompt thoughts of illicit sexual conduct³ or behavior preceding a divorce.⁴

But seduction is a tort as well. In Idaho, a plaintiff may bring a seduction tort where she⁵ is induced away from a chaste or respectful state through “solicitation, persuasion, or any artifice,” and has sexual intercourse with the defendant.⁶ This tort is grounded in the historical cause of action for seduction, in which only the woman’s or girl’s father (or, in some cases, employer) could sue for the loss of her services.⁷

Seduction is one of several “heartbalm” actions, which provide for causes of action by jilted lovers and spouses.⁸ It is often grouped with three other heartbalm torts: alienation of affections, criminal conversation, and breach of promise to marry.⁹ In an alienation of affections lawsuit, a spouse may sue a third party who enticed the plaintiff’s spouse away from the marriage through some wrongful conduct.¹⁰ The defendant’s conduct did not need to be sexual—instead it was “enough that the defendant’s conduct was ‘inherently wrong and tend[ed] to, and [did], have that effect.’”¹¹

Criminal conversation is a strict liability tort which arises when a defendant has sex with someone who is married to the plaintiff.¹² Because it is a strict liability tort, a plaintiff suing for criminal conversation need not prove that the defendant was aware that the plaintiff’s spouse was married.¹³

A cause of action for breach of promise to marry arises when two parties mutually agree to marry one another, but one party backs out of the agreement.¹⁴

3. See *State v. Coleman*, 152 Idaho 872, 877, 276 P.3d 744, 749 (Ct. App. 2012) (describing “grooming” in the child sexual abuse context, as “a pattern of seduction and preparation, resulting in the child being willing and compliant to the defendant’s sexual abuse”).

4. See IDAHO CODE § 32-603(1) (2022) (listing “Adultery” as a cause for divorce).

5. More on this gendered language later. See *infra* Section IV.A.1.

6. See *Seamons v. Spackman*, 81 Idaho 361, 366, 341 P.2d 442, 445 (1959) (quoting *Opitz v. Hayden*, 135 P.2d 819 (Wash. 1943)); see also IDAHO CODE § 5-308 (2022) (“An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.”).

7. See Lea Vandervelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 828 (1996).

8. See Rebecca Tushnet, *Rules of Engagement*, 107 YALE L.J. 2583, 2586 & n.12 (1998); Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COLUM. L. REV. 242, 242 (1952).

9. See Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COLUM. L. REV. 242, 242 (1952).

10. Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 732 (2004); see also *O’Neil v. Schuckardt*, 112 Idaho 472, 475, 733 P.2d 693, 696 (1986).

11. Greenstein, *supra* note 10, at 732 (quoting *Veeder v. Kennedy*, 589 N.W. 2d 610, 619 (S.D. 1999)).

12. *Id.* at 734; see also *Neal v. Neal*, 125 Idaho 617, 620, 873 P.2d 871, 874 (1994).

13. Greenstein, *supra* note 10, at 734.

14. *Id.* at 729.

The other party may then sue.¹⁵ The plaintiff may recover emotional damages resulting from the breach, along with “indemnity for financial loss and compensation for loss of the advantages that would have resulted from marriage to the defendant.”¹⁶

Even if one is aware of these heartbalm torts, there’s no shame in thinking that this cause of action no longer exists. Many states have passed laws abrogating the tort.¹⁷ Several of these states have accompanied these laws with statements condemning the seduction tort and related causes of action. Minnesota, for example, decries seduction and other causes of action arising out of intimate relationships as having “been subject to grave abuses, have caused intimidation and harassment, to innocent persons and have resulted in the perpetration of frauds.”¹⁸ Colorado, similarly, critiques actions for “alienation of affections, criminal conversation, seduction, and breach of contract to marry” as having:

[B]een subjected to grave abuses, caused extreme annoyance, embarrassment, humiliation, and pecuniary damage to many persons wholly innocent and free of any wrongdoing who were merely the victims of circumstances, and have been exercised by unscrupulous persons for their unjust enrichment, and have furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds.¹⁹

This widespread condemnation and removal of seduction and other heartbalm torts seems unsurprising in light of changing social mores and shifts in what behavior is worthy of legal stigma.²⁰ Today, the idea of suing someone for seduction or sleeping with someone’s spouse seems antiquated.

Idaho, at first glance, seems to have followed the anti-heartbalm trend. In the 1980s, the Idaho Supreme Court took aim at the tort of alienation of affections.²¹ The court discussed “the many ill effects of the suit,” claimed that these “outweigh[ed] any benefit it may have” and abolished alienation of affections in Idaho.²² Less than a decade later, the court did the same to criminal conversation.²³ Describing criminal conversation’s rationale as “medieval,” noting that it was often

15. *Id.*

16. 11 C.J.S. *Breach of Marriage Promise* § 23 (2023).

17. See, e.g., COLO. REV. STAT. § 13-20-202 (2022) (“All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction are hereby abolished.”); MINN. STAT. § 553.02 (2022) (“All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction are abolished.”); N.J. STAT. ANN. § 2A:23-1 (West 2023) (“The rights of action formerly existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are abolished from and after June 27, 1935.”).

18. MINN. STAT. § 553.01 (2022).

19. COLO. REV. STAT. § 13-20-201 (2022).

20. See Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1356 (2017).

21. See O’Neil v. Schuckardt, 112 Idaho 472, 475, 733 P.2d 693, 696 (1986).

22. *Id.* at 477, 733 P.2d at 698.

23. Neal v. Neal, 125 Idaho 617, 620, 873 P.2d 871, 874 (1994).

invoked out of revenge, and arguing that calculating damages for the injured party was a task “not governed by any true standards;” Idaho’s Supreme Court abolished the tort.²⁴

With nationwide and local condemnation of alienation of affections and criminal conversation, one may be tempted to conclude that causes of action for seduction are no longer permitted in Idaho. But this isn’t the case. After discussing the history of the seduction tort in Idaho and elsewhere in Part II, I argue in Part III that despite broad language in Idaho Supreme Court opinions abolishing causes of action for alienation of affections and criminal conversation, the tort of seduction is still permitted under Idaho law. The cases abolishing criminal conversation and alienation of affections are specific to those torts, and do not directly address seduction. Moreover, the court is unable to abolish seduction because, unlike the common law torts of alienation of affections and criminal conversation, the seduction tort is based in statute.²⁵ Accordingly, Idaho’s legislature must act if Idaho is to abolish seduction.

While I make the case for why the seduction tort exists in Idaho, that case is descriptive rather than normative. Questions remain as to whether the tort of seduction ought to remain on the books in Idaho, and whether it would be a good thing if plaintiffs began bringing seduction lawsuits more often. In Part IV, I argue that there are several reasons why it may be worth consigning the tort of seduction to the dustbin of history along with other heartbalm statutes. To start, seduction has outlived much of its usefulness. Long ago, the seduction tort was necessary to provide at least some avenue for victims of sexual assault and harassment to recover damages. But now, other legal avenues exist to assert these claims. Additionally, the gendered language of Idaho’s seduction statutes raises serious constitutional concerns. While Idaho’s Supreme Court may not be able to abrogate a statutory cause of action in the same manner it may with a common law cause of action, the possibility of a constitutional challenge to Idaho’s seduction law should not be dismissed.

II. THE TORT OF SEDUCTION: IN IDAHO AND ELSEWHERE

To fully understand Idaho’s law of seduction and its origins, some historical context is necessary. In this section, I provide a quick sketch of the history of the tort of seduction, and its adoption and development in the United States. I then address Idaho’s tort of seduction, including the history of Idaho’s seduction statutes and the details of the few reported cases on the tort. I also discuss seduction’s place in the public mind by surveying media coverage of the tort—noting frequent Idaho media coverage of seduction suits brought locally and in other states. I also address the decline of seduction and other heartbalm statutes in Idaho and elsewhere, through the efforts of legislatures and courts.

24. *Id.* at 620–21, 873 P.2d at 874–75.

25. This doesn’t mean that a constitutional challenge to the seduction tort isn’t an option. See *infra* Section IV.A.

A. A Brief History of the Seduction Tort

The tort of seduction was adopted from the common law action *per quod servitium amisit*, “a writ of feudal origin, which allowed a master to bring an action and recover money damages for interference with his servant’s services.”²⁶ M.B.W. Sinclair writes that the first recorded instance of this action being used to prosecute the seduction of a woman was employed in the 1653 case of *Norton v. Jason*,²⁷ and that the court “left open the possibility of the woman herself bringing suit for the seduction.”²⁸

Despite this, women were historically barred from taking action themselves, and relied instead on their fathers to bring suit for his loss of their daughters’ services.²⁹ This resulted from the more general lack of rights and legal capacity that women³⁰ were afforded under the legal system.³¹ Lea Vandervelde points out that early seduction causes of action that required fathers to bring suit on behalf of their daughters disadvantaged women because it left the question of whether to bring suit up to their fathers.³² This regime also effectively punished women who sought emancipation by removing their ability to bring seduction lawsuits.³³

In the early days of the tort, a plaintiff in a seduction case needed to show that he had lost out on the benefits of services his daughter would have provided were it not for the defendant’s seduction.³⁴ Work around the plaintiff’s house, business, or farm, cooking, cleaning, and doing laundry, are all examples of such services.³⁵ Because proving damages required proving a failure to provide these services, “usually only seductions resulting in pregnancy were actionable,” although there “was at least one exception” in which a plaintiff’s long-lasting state of a “great agitation” required her to be monitored “lest she should do herself some

26. See M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 L. & INEQ. 33, 35 (1987); Vandervelde, *supra* note 7, at 821 & n.10; see also 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *141–42 (1768); Bobette Sanders, *Per Quod Servitium Amisit-An Anomaly*, 42 MO. L. REV. 491, 492 (1977) (describing the action).

27. Sinclair, *supra* note 26, at 35 (citing *Norton v. Jason*, 1 Sty. 398, 82 Eng. Rep. 809 (K.B. 1653)).

28. Sinclair, *supra* note 26, at 35.

29. CAROLINE H. DALL, WOMAN’S RIGHTS UNDER THE LAW: IN THREE LECTURES, DELIVERED IN BOSTON, JANUARY, 1861 43 (Boston, Walker, Wise & Co. 1861); Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 382–83 (1993).

30. Throughout this Article, I will tend to use the term “women,” even where laws applied to those under the age of majority. Where laws are specific to minor females, I will specify that this is the case. But, as a matter of preference, I will avoid the clinical and potentially disrespectful term “female” throughout much of the discussion. See Kara Brown, *The Problem With Calling Women ‘Females’*, JEZEBEL (Feb. 5, 2015), <https://jezebel.com/the-problem-with-calling-women-females-1683808274>.

31. See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 45–49 (1985) (describing the unmarried woman as “a legal nonentity in any household in which she lived”).

32. Vandervelde, *supra* note 7, at 873.

33. *Id.*

34. Sinclair, *supra* note 26, at 36.

35. *Id.*

injury.”³⁶ Even in these historic seduction cases, where damages were supposed to be based on the value of the lost services, damage amounts did not always track the value of services. Courts would sometimes uphold “[j]ury awards of damages for dishonor and distress rather than for the mere loss of services.”³⁷

The law of seduction in the United States developed in a similar manner, with fathers initially acting as “standard plaintiffs” and with plaintiffs needing to at least show “that the woman be subject to the plaintiff’s control so that he could, if he wished, call upon her services.”³⁸ But there were differences between the law of seduction in the United States and the law in England. One notable development in U.S. courts involved the courts’ use of evidence regarding the moral character of the seduced woman. Sinclair notes that “[i]f the evidence was intended as a defense it was inadmissible as irrelevant, but if it was introduced for the purpose of reducing damages for loss of honor or mental and familial distress, then it was relevant and admissible.”³⁹ Sinclair suggests that this rule proceeds from the assumption that “damages ultra services are for actual suffering and are not exemplary or punitive.”⁴⁰ Additionally, it seems that this rule represents a partial acceptance of the tactic of seeking damages beyond services, albeit at the risk of potential introduction of adverse evidence of a woman’s sexual character.

Courts in England and the United States took efforts to distinguish the tort of seduction from the related tort of breach of promise to marry. As noted above, breach of promise to marry is “a unique hybrid of contract theory and tort theory” that allows a woman to “sue a suiter who promised to marry her but subsequently backed out of that promise.”⁴¹ Breach of promise to marry was “a woman’s cause of action,” and courts were concerned that introduction of evidence of promise to marry could influence the jury’s damage determination in a seduction case “when the woman herself could still bring an independent action.”⁴² The U.S. courts were particularly strict about excluding evidence of promises of marriage in seduction actions.⁴³ Still, the torts remained intertwined, and proof of seduction—sexual conduct—eventually became a means of proving aggravated damages in breach of promise to marry cases.⁴⁴

As time went on, the tort of seduction grew more common and seduction lawsuits tended to focus more on “the moral and honorific aspects of seduction”

36. *Id.* at 37 (quoting *Manwell v. Thomson*, 2 Car. & P. 303, 172 Eng. Rep. 137, 137 (N.P. 1826) (Abbott, C.J.)).

37. *Id.* at 38–39.

38. *Id.* at 41–42.

39. *Id.* at 45.

40. Sinclair, *supra* note 26, at 46.

41. Greenstein, *supra* note 10, at 729.

42. Sinclair, *supra* note 26, at 34, 40.

43. *See id.* at 46.

44. *Id.* at 55; *see also* GROSSBERG, *supra* note 31, at 45–49; JILL ELAINE HASDAY, *INTIMATE LIES AND THE LAW* 102 (2019).

rather than the loss of services.⁴⁵ Jane Larson notes that “[i]n the late nineteenth century, the tort of seduction was among the most common civil actions.”⁴⁶ The mid-1800s to late in the century saw changes in the tort of seduction across the country, with many states recognizing the “moral and emotional investment in sexual chastity” as the primary interest at issue in seduction torts and permitting the “seduced woman to sue in her own name, replacing her father as the plaintiff and real party in interest.”⁴⁷ This shift brought with it a renewed focus on the seduced woman’s consent to sexual intercourse as well as “her prior lack of chastity.”⁴⁸ Jill Elaine Hasday notes that during this transitional period, actions for seduction often served “to secure legal remedies against men who had been both deceitful and violent in pursuing sex.”⁴⁹ This shift also drew attention to the issue of exemplary or punitive damages in seduction cases—occasionally resulting in high damage verdicts.⁵⁰ Despite this overall trend, seduction law in some states lagged behind, with Missouri keeping its “traditional rule banning suit by the seduced woman” until 1977.⁵¹

While permitting women to bring suit on their own behalf gave them more leeway than historical, restrictive laws that required their fathers to sue on their behalf, this development was not without its drawbacks to seduction plaintiffs. Jane Larson emphasizes some complications that resulted from changes to the law that permitted women to pursue seduction suits on their own behalf:

Once a seduced woman was allowed to sue on her own behalf, the circumstances of her sexual consent became the most contested factual issue in the dispute. She was required to prove that her apparently willing consent to sexual relations had been compromised by the defendant’s wrongdoing. Reformulated as a moral injury to the seduced woman herself, the paradigmatic seduction case evolved into a claim of fraud: By means of an intentional deception, the seduced woman had yielded a valuable interest—her consent—only in reliance on “deception, enticement, or other artifice.” Pregnancy—a critical element of the tort when economic loss of services had been the gravamen of the cause of action—now brought only an additional measure of damages.⁵²

The moral environment of the late 1800s may have contributed to an emphasis on the issue of consent and the need to prove some sort of deception, fraud, or enticement. Lawrence Friedman notes that while public prosecution of crimes relating to intimate conduct such as adultery and fornication declined in the

45. Sinclair, *supra* note 26, at 48.

46. Larson, *supra* note 29, at 383.

47. *Id.* at 385–86.

48. Sinclair, *supra* note 26, at 49.

49. HASDAY, *supra* note 44, at 102–03.

50. *Id.* at 56–57.

51. *Id.* at 55–56.

52. Larson, *supra* note 29, at 387.

1800s, American society retained its focus on traditional sexual morals, condemning sex outside of marriage, excessive sexual behavior, and unusual sexual conduct.⁵³ In practice, some level of sexual misconduct was tolerated—at least in contrast to the even more restrictive practices of the colonial era—but actions crossed a line when they became a matter of public knowledge.⁵⁴

While Friedman's focus is on the criminal law of sexual behavior, this aversion to publicized sexual activity was likely an obstacle to many would-be seduction claims, potentially deterring plaintiffs from bringing suit out of the concern that filing a lawsuit would transform private, out-of-wedlock sexual activity into a public matter. This is not to say that women were without options in seduction cases. In addition to the civil cause of action for seduction, several states criminalized seduction, meaning that seducers faced potential litigation and prison.⁵⁵ While some men were prosecuted and imprisoned for seduction, these laws often exempted those who ended up marrying their victims, leading to several instances where a seduction prosecution ended with a marriage.⁵⁶ Sometimes these marriages were successful, others did not last, and still others ended in tragedy.⁵⁷

Marrying one's accuser also seems to have been a defense in civil seduction cases as well. One particularly tragic example of a seduction-induced marriage gone wrong is the case of Henry Guenther, "a prosperous gardner [sic]," who married Sophia Weigler after she had sued him for seduction and breach of promise to marry.⁵⁸ Weigler had been "taken into the Guenther home" when she was a child, but when she was twenty years old, Guenther's wife died and Guenther "poured false words of affection into her ears" and promised to marry her.⁵⁹ The two began a sexual relationship and Weigler had one child, who died soon after birth, and then a second child.⁶⁰ When Guenther refused to marry Weigler, she sued him for seduction.⁶¹ After losing in the civil case and facing an award of \$5,000, Guenther married Weigler to avoid paying damages.⁶² The following summer, Guenther was arrested for the murder of his new wife after she died "under suspicious circumstances" and an autopsy revealed "strong traces of arsenic" in the contents

53. Lawrence M. Friedman, *Crime and Punishment in American History* 128–29 (1993).

54. *Id.* at 130–31.

55. *Id.* at 218–19.

56. *Id.*; see also Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 21–22 (2012); Walter Wadlington, *Shotgun Marriage by Operation of Law*, 1 GA. L. REV. 183, 198 (1967) (noting that, of the forty-one states that criminalize seduction, thirty-five of those states "provide that marriage, or sometimes a renewed offer to marry, will serve as a defense").

57. FRIEDMAN, *supra* note 53, at 219–20.

58. *Married Her and Murdered Her*, IDAHO DAILY STATESMAN, Aug. 6, 1891, at 1.

59. *Shadows of the Gallows*, DAYTON EVENING HERALD, Aug. 5, 1891, at 7.

60. *Id.*

61. *Id.*

62. *Married Her and Murdered Her*, *supra* note 58, at 1.

of her stomach.⁶³ Mr. Guenther was convicted of manslaughter after a jury trial the following year.⁶⁴

Beginning in the 1930s, states began to push back against the existence of heartbalm statutes. Roberta West Nicholson, Indiana's "only woman legislator" introduced the first bill to eliminate heartbalm statutes.⁶⁵ This began a trend of numerous states eliminating various heart balm statutes in various manners. For example, Colorado, Florida, New Jersey, and New York abolished alienation of affections, criminal conversation, breach of promise to marry, and seduction causes of action.⁶⁶ Other states eliminated several of these statutes—with Alabama, California, Indiana, and Michigan eliminating all actions other than seduction, although abolishing the tort for "women above a specified age."⁶⁷ Those who urged the elimination of heartbalm actions argued that these torts were used to blackmail innocent defendants.⁶⁸ They also argued that money could not sufficiently address the damages alleged, and that "the public airing of an illicit sexual relationship was itself evidence of the complaining woman's lack of modesty and morality, exposing her as an unworthy plaintiff."⁶⁹ These concerns were accompanied and amplified by a shift in social mores toward "greater sexual openness," which further propelled reform of heartbalm statutes and other laws related to intimate sexual conduct.⁷⁰

Today, laws permitting seduction suits in at least some cases remain on the books in several states, including Alabama,⁷¹ Guam,⁷² Idaho,⁷³ Mississippi,⁷⁴ Montana,⁷⁵ (possibly) South Dakota,⁷⁶ the Virgin Islands,⁷⁷ and West Virginia.⁷⁸ Several states still appear to have common law causes of action for seduction that

63. *Id.*; *Charged with Murder*, LIMA DAILY TIMES, Aug. 5, 1891, at 1.

64. *Verdict of Manslaughter*, HAMILTON EVENING JOURNAL, Mar. 21, 1892, at 1.

65. Sinclair, *supra* at note 26, at 66.

66. *Id.*

67. *Id.*

68. Larson, *supra* 29, at 395.

69. *Id.*

70. *Id.* at 394–95; see also DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 39 (2016) (describing the "rapid social change . . . toward individual fulfillment and social tolerance and away from repression" and resulting changes to abortion and fornication prohibitions).

71. ALA. CODE § 6-5-350 (2022); but see ALA. CODE § 6-5-331 (2022) (restricting the tort of seduction to females under the age of 19).

72. 20 GUAM CODE ANN. § 2231 (2005); 7 GUAM CODE ANN. §§ 12106, 12107 (2022).

73. IDAHO CODE §§ 5-308, 5-309 (2022).

74. MISS. CODE ANN. §§ 11-7-9, 11-7-11 (2022).

75. MONT. CODE ANN. §§ 27-1-514, 27-1-322 (2022) (stating that the "rights of personal relations forbid the seduction of a spouse, child, orphan, or servant," permitting parents and the seduced plaintiff to prosecute a cause of action for seduction, and providing that "[t]he damages for seduction rest in the sound discretion of the jury").

76. S.D. CODIFIED LAWS § 20-9-7 (2023) (stating that the "rights of personal relation forbid . . . the seduction of a wife, daughter, or orphan sister" as well as "a husband, son, or orphan brother").

77. V.I. CODE ANN. tit. 5, § 74 (2022).

78. W. VA. CODE § 55-7-1 (2022).

are established by case law rather than through statute. These states include Arkansas,⁷⁹ Missouri,⁸⁰ Pennsylvania,⁸¹ and Wisconsin.⁸²

Mississippi, Pennsylvania, South Carolina, and the Virgin Islands have laws that criminalize what they deem “seduction,” but which appear to be more in line with breaches of promise to marry.⁸³ Under Mississippi law, “any person” who “obtain[s] carnal knowledge of any woman, or female child, over the eighteen years, of previous chaste character, by virtue of any feigned or pretended marriage or any false or feigned promise of marriage” is guilty of a felony and may be imprisoned for up to five years.⁸⁴ In Pennsylvania, the person seduced must be “any female of good repute, under eighteen years of age.”⁸⁵ In South Carolina, there is no age limit on the woman seduced, the defendant must be over the age of sixteen, and a prosecution may be stayed if the defendant “contracts marriage with the woman.”⁸⁶ In the Virgin Islands, the seduction and sexual intercourse with “an unmarried female of previous chaste character” is a felony punishable by up to three years in prison.⁸⁷ As in South Carolina, the Virgin Islands’ law provides that marriage of the defendant and the seduced woman “is a bar to prosecution.”⁸⁸ No conviction under the Virgin Islands’ laws can be sustained by the seduced woman’s testimony alone.⁸⁹

Michigan law criminalizing seduction is notably harsh and, unlike these other states, is not limited to instances involving a false promise to marry. Under Michigan law, “[a]ny man who shall seduce and debauch any unmarried woman” is guilty of a felony and may be punished by up to five years’ imprisonment.⁹⁰

B. Seduction Law in Idaho

Idaho’s law provides for a cause of action for seduction, grounded in statute and supplemented by case law. While Idaho does not have many published appellate cases that involve seduction claims, the statutory basis for bringing these suits dates back to before Idaho’s statehood and remains on the books.

79. *Darnell v. Lea*, 258 S.W. 363, 364 (Ark. 1924).

80. *Breece v. Jett*, 556 S.W.2d 696, 705 (Mo. App. 1977).

81. *Whiteman v. Sarmiento*, 22 Pa. D. & C. 2d 384, 387 (C.P. 1960) (A suit for seduction brought by a father of the seduced woman requires proof of the woman’s services. These services are assumed when the woman is under the age of 21. If she is over 21, some evidence of services is required, although the bar for such proof is not high.).

82. *Slawek v. Stroh*, 215 N.W.2d 9, 18 (Wis. 1974).

83. See MISS. CODE ANN. § 97-29-55 (2022); 18 PA. CONS. STAT. § 4510 (2022); S.C. CODE ANN. § 16-15-50 (2022); V.I. CODE ANN. tit. 14, § 1981 (2022).

84. MISS. CODE ANN. § 97-29-55.

85. *Id.*

86. S.C. CODE ANN. § 16-15-50.

87. VI CODE ANN. tit. 14, § 1981.

88. VI CODE ANN. tit. 14, § 1982 (2022).

89. *Id.* at § 1983.

90. MICH. COMP. LAWS § 750.532 (2023).

i. Idaho's Seduction Statutes

Prior to Idaho's statehood, its laws consisted of territorial laws, followed by the enactment of the 1881 Code of Civil Procedure.⁹¹ This 1881 Code of Civil Procedure contained Idaho's first statute providing for a cause of action for seduction.⁹² Section 189 of the Idaho Code of Civil Procedure provides that:

An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.⁹³

Section 190 of the same code provides that:

A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward [be] not living with or in the service of the plaintiff at the [time] of the seduction or afterwards, and there be no loss [of] service.⁹⁴

These statutes have remained in force since 1881. The former section 189 is presently codified at Idaho Code section 5-308, with identical wording as the 1881 law.⁹⁵ Idaho Code section 5-309 changes section 190 by permitting "the parents" to bring an action for seduction of their daughter, and adds the requirement that such suits are for when the daughter is "under the age of majority at the time of the seduction."⁹⁶ Both parents are to act as plaintiffs in a seduction suit on behalf of their minor daughter, but "if either the father or mother be dead or has abandoned his or her family, the other is entitled to sue alone."⁹⁷

Idaho's late-1800's development as a territory and a state place it relatively late in the life of the law of seduction. From the beginning, Idaho women themselves were permitted to bring the tort of seduction, rather than relying on their parents or employer to do so. This tracks the trend in the mid- to late-1800s of states permitting women to bring seduction suits on their own behalf rather than relying on their fathers to do so.⁹⁸

ii. Idaho's Seduction Case Law

91. See *David Steed & Associates, Inc. v. Young*, 115 Idaho 247, 251–52, 766 P.2d 717, 721–22 (1988) (Johnson, J., specially concurring) (noting Idaho's code of civil procedure "adopted by the Idaho territorial legislature in 1881" which was in place until 1975).

92. See IDAHO CODE CIV. PROC. §§ 189, 190, (1881).

93. *Id.* § 189.

94. *Id.* § 190.

95. IDAHO CODE § 5-308 (2022).

96. Compare *id.* at § 5-309, with IDAHO CODE CIV. PROC. § 190.

97. IDAHO CODE § 5-309.

98. See *Larson, supra* note 29, at 385–86.

A search of Idaho's case law reveals four reported appellate cases that discuss the seduction tort, ranging from 1930 to 1959.⁹⁹ *Hei v. Holzer*,¹⁰⁰ a fifth reported case from 2003 notes that the complaint filed in the trial court included a cause of action for seduction by a plaintiff student against her teacher who had begun a sexual relationship with her.¹⁰¹ Seduction is only mentioned in passing, however, as the court states that "[b]ecause the defendants did not raise the issue of the constitutionality of the cause of action for seduction, we do not express any opinion on that issue."¹⁰²

In Idaho's earliest reported seduction case, *Kralick v. Shuttleworth*,¹⁰³ the plaintiff alleged that the defendant had "with force and by flattery, false promises, artifice, and urgent importunity based upon professions of attachment" had "seduced, debauched, and carnally knew her," and that she suffered humiliation, distress, and "great bodily and mental pain and anguish."¹⁰⁴ The plaintiff had previously brought another action for seduction against the same defendant in 1925, which resulted in a settlement and dismissal.¹⁰⁵ The case went to trial, which resulted in a verdict of \$3,000 in the plaintiff's favor.¹⁰⁶

On appeal, the Idaho Supreme Court approved a jury instruction that detailed the requirement that the plaintiff prove her chastity in order to prove her case.¹⁰⁷ That instruction stated that while there was evidence of sexual intercourse between the plaintiff and defendant in 1925, the plaintiff could demonstrate actual seduction arising from sexual intercourse that occurred in 1927 if she could prove that in the intervening two years "the plaintiff had reformed, and thereafter had led a virtuous life, and that during the absence of the defendant no one had had an act or acts of sexual intercourse with her."¹⁰⁸ The court elaborated:

A woman of previous unchaste character may reform, and afterwards be seduced, and recover such damages as she may have sustained. All presumptions are in favor of a woman's chastity. Although a woman has once been unchaste she has a right to reform, and, if there has in fact been a reformation, she may again be the subject of seduction. So, if you find by the greater weight or preponderance of the evidence that prior to the time of the alleged seduction, the plaintiff had at one time lapsed from physical chastity, if it also appears affirmatively that she

99. See *Kralick v. Shuttleworth*, 49 Idaho 424, 289 P. 74 (1930); *Landholm v. Webb*, 69 Idaho 204, 205 P.2d 507 (1949); *Fulgham v. Gatfield*, 72 Idaho 367, 241 P.2d 824 (1952); *Seamons v. Spackman*, 81 Idaho 361, 341 P.2d 442 (1959).

100. *Hei v. Holzer*, 139 Idaho 81, 85 73 P.3d 94, 98 (2003).

101. *Id.* at 84, 73 P.3d at 97.

102. *Id.* at 85 n.2, 73 P.3d at 98 n.2.

103. *Kralick*, 49 Idaho 424, 289 P. 74 (1930).

104. *Id.* at 429, 289 P. at 76.

105. *Id.* at 431, 289 P. at 76–77.

106. *Id.* at 430, 289 P. at 76.

107. *Id.* at 442, 289 P. at 81.

108. *Id.* at 439, 289 P. at 79.

has reformed, and at the time of the alleged seduction maintained a habit of sexual virtue, she may be deemed chaste within the meaning of the law, so that an invasion of that virtue under false promises, artifice, professions of attachment, or urgent importunity would entitle her to an award of such damages, if any, as are shown by a preponderance of the evidence.¹⁰⁹

In approving the order, the Idaho Supreme Court confirmed that “the chastity of the woman is presumed until the contrary is shown” in civil actions.¹¹⁰ It was the defendant’s burden to show the plaintiff’s “unchastity” and no such evidence was introduced.¹¹¹

The court also noted that the plaintiff’s age and experience were relevant to whether the defendant’s conduct constituted wrongful seduction:

The defendant in 1927 was about sixty-one years of age, a successful business man, divorced from his wife, and the father of five children. The evidence shows him to be fairly prosperous, with a keen, alert, mind, presumably well versed in the ways of the world, and socially more or less prominent. On the other hand, the plaintiff was about twenty-one years of age, born in Sweden, and emigrating with her parents to this country when she was three years old. When she was thirteen her mother died, and she resided with her father, three brothers, and one sister on a farm. She never went beyond the fourth grade in school. From the testimony she appears rather ignorant of the ways of the world, credulous, not capable of combatting the artifices made use of by defendant. . . . What might be seduction in one case might, with an older woman, more mature mentally, of greater intelligence, education, and experience, and under different circumstances, not constitute seduction. The disparity of the ages of the parties is always proper to be considered.¹¹²

In *Seamons v. Spackman* the Idaho Supreme Court elaborated on the elements of the seduction tort.¹¹³ There, the plaintiff alleged that two months before, while the plaintiff was 19 years old, the defendant had “wilfully [sic] and maliciously enticed and persuaded her to have illicit intercourse with him, and then and there seduced and carnally knew her.”¹¹⁴ The plaintiff alleged that she became pregnant as a result, and “continues to suffer ill health and injury, humiliation,

109. *Kralick*, 49 Idaho at 439, 289 P. at 79–80.

110. *Id.* at 440, 289 P. at 80.

111. *Id.*

112. *Id.* at 442–43, 289 P. at 81 (internal citations omitted).

113. *Seamons v. Spackman*, 81 Idaho 361, 364–65, 341 P.2d 442, 443–44 (1959).

114. *Id.* at 363, 341 P.2d at 443.

shame and mental distress” and that her reputation was injured and “her prospects ruined.”¹¹⁵ Following, a jury ruled in the plaintiff’s favor.¹¹⁶

The *Seamons* case elaborates on the sufficiency of evidence needed to prove seduction.¹¹⁷ At trial, the plaintiff testified that the defendant had told her that he loved her and then taken her for a ride in his vehicle.¹¹⁸ The defendant parked the car and “embraced plaintiff with increasing ardor and passion, making sexual advances, and ultimately accomplishing the sexual act.”¹¹⁹ The plaintiff testified that these advances were unwelcome and that she resisted, stating that “the intercourse was ‘against my will. . . . I did try to push Mr. Spackman away . . . he was stronger than I was, . . . I tried to prevent it. . . . I know I was scared and I was hurt and I was trying to keep him away from me.’”¹²⁰

Rather than focus on the plaintiff’s refusal and physical resistance to the defendant’s actions, the court focused its attention on the defendant’s attempts to break down the plaintiff’s resistance to his advances:

[I]n addition to the disparity of the ages of the parties, the evidence shows defendant’s representations of love for plaintiff; the jury must have believed that defendant made those representations deceitfully, as an artifice of deceptive enticement, and as an element of persuasion to overcome plaintiff’s resistance, in addition to the force which defendant exerted.¹²¹

The court rejected the defendant’s assertion that “enticement or persuasion [are] not enough” to prove seduction.¹²² In doing so, the court relied on its opinion in *Fulgham v. Gatfield*, in which the court stated that enticement and persuasion were enough, and that no evidence of false promises or deception was needed to prove seduction.¹²³ Unlike the evidence in *Seamons*, which amounted to a claim of sexual assault and rape, the *Fulgham* case involved allegations of repeated professions of love, promises by the defendant to marry the plaintiff, and a demand that the plaintiff have sex with him with the promise that he would marry her shortly thereafter.¹²⁴ The plaintiff agreed, and shortly thereafter the defendant deserted her.¹²⁵ In *Fulgham*, as in *Seamons*, the plaintiff became pregnant and she alleged that her career suffered and that she suffered physical and mental injuries

115. *Id.*

116. *Id.* at 369, 341 P.2d at 447.

117. *Id.* at 364, 341 P.2d at 444.

118. *Id.* at 367, 341 P.2d at 446.

119. *Seamons*, 81 Idaho at 368, 341 P.2d at 446.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (citing *Fulgham v. Gatfield*, 72 Idaho 367, 372, 241 P.2d 824, 826 (1952)).

124. *Fulgham*, 72 Idaho at 369–70, 241 P.2d at 824–25.

125. *Id.* at 370, 241 P.2d at 825.

and distress as a result of the seduction.¹²⁶ There, as well, the court affirmed the jury's verdict in favor of the plaintiff and damage award of \$6,000.¹²⁷

C. Seduction in the News

While there are relatively few published appellate cases arising from seduction lawsuits in Idaho, the use of appellate cases to determine the prominence and frequency of seduction litigation is an imperfect measure. Published cases include only those in which a party sought to appeal the outcome of a seduction lawsuit—a lawsuit that, by its nature, involves recounting sensitive facts and events that both parties would likely wish to put behind them. The case also needs to be published in the first place—a likely outcome if the case reaches the Idaho Supreme Court, but less likely should the case only make it to the Idaho Court of Appeals.¹²⁸

A look to news reports in the 1800s and 1900s supplements what one may learn from the limited opinions Idaho's appellate courts have published. While by no means an exhaustive or systematic survey of media coverage, searches of newspaper articles containing the word "seduction" yields hundreds of results ranging from the 1800s into the 1900s.¹²⁹ Other research suggests that media coverage of heartbalm lawsuits increased in the 1930s—potentially drowning out "modest reform proposals."¹³⁰

This examination of stories on seduction in Idaho's newspapers adds nuance and context to a present understanding of how Idaho's public perceived the tort. Stories of seduction suits appeared frequently in Idaho newspapers, detailing lawsuits against politicians, actors, businessmen, and everyday citizens in Idaho and beyond.

No doubt due to the titillating nature of seduction cases, stories of seduction suits against high profile individuals appear commonly in historic Idaho newspaper

126. *Id.*

127. *Id.* at 370, 241 P.2d at 825.

128. See Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS, 349, 365 (2004) (noting Idaho's Court of Appeals Internal Rule for Publication of Opinions states that an opinion "will only be published if it establishes a new rule of law or alters or modifies an existing rule; involves an issue of continuing public interest; criticizes or explains existing law; applies an established rule to a significantly different fact situation; resolves an apparent conflict; or makes a significant contribution to legal literature by an historical review or a legislative history"); Internal R. Idaho S.Ct. 15(f) (the Idaho Supreme Court may, by unanimous consent of all justices, determine not to publish the Court's final opinion).

129. NEWSPAPERS.COM, <https://www.newspapers.com> (a search of Newspapers.com, which includes archived information for several Idaho papers, for the term "seduction" ranging from 1690 to 1970 yielded approximately 989 matches. I used this time range because searches of more modern years yielded numerous unresponsive results relating to television schedules that include films or shows with "seduction" in the title. Even so, I present this number with the caveat that it includes irrelevant stories in which the word "seduction" is used in a non-legal context. Additionally, this range included several incorrect hits in which the word "reduction" was scanned as "seduction").

130. See Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 412–14 (2008).

articles. Idaho papers reported on seduction lawsuits against movie producers and actors—often detailing high verdicts sought by the plaintiffs in those actions. A 1928 article in the Idaho Sunday Statesman detailed a seduction suit by actress Alys Murrell against Charles H. Christie, “motion picture producer,” in which Murrell demanded \$750,000 for seduction, \$1 million for breach of promise to marry, and \$397,500 for “breach of promise to employ.”¹³¹ A 1938 Idaho Statesman Article reported on a lawsuit by Gaye Melton, “a showgirl,” against “William Koenig, former Hollywood film studio manager” in which Melton sought \$100,000 in damages for seduction, and \$100,000 in damages for breach of promise to marry.¹³² Criminal seduction cases in other states also found their way into Idaho’s papers. A 1943 article in the Idaho Daily Statesman provided a detailed breakdown of the charges and testimony in the trial of actor Errol Flynn—including testimony by “[d]ark-haired Peggy La Rue Satterlee,” a “16-year-old night club entertainer” that Flynn engaged in multiple “act[s] of intimacy” with her on his “palatial yacht.”¹³³

Reports on seduction suits against social and political elites across the country were also frequent occurrences in Idaho newspapers. Stories ranged from suits against those in the oil and energy industry,¹³⁴ an heir to a wealthy rubber merchant,¹³⁵ and to wealthy individuals involved in politics.¹³⁶ Seduction suits against politicians were also frequent topics in the news. Idaho papers reported on

131. *Film Actress Asks Million Heart Balm*, IDAHO SUNDAY STATESMAN, July 29, 1928, at 1.

132. *Show Girl Seeks \$200,000 Damages in Seduction Suit*, IDAHO STATESMAN, May 8, 1938, at 2.

133. *Girl Tells Jury of Yacht Party*, IDAHO DAILY STATESMAN, Jan. 20, 1943, at 3.

134. *See Sensational Charge Heard During Trial of Love Theft Suit*, IDAHO DAILY STATESMAN, July 3, 1936, at 6 (reporting on a “\$300,000 love theft suit against Lewis Mallory, 3rd, wealthy Pennsylvania oil man,” by James Edgar, Jr., who claimed to have witnessed his wife in bed, nude, with Mallory); *Chief Witness in Fuel Case Indicted*, IDAHO DAILY STATESMAN, Dec. 17, 1913, at 1 (reporting on the indictment of David G. Powers for the seduction Lena Caduff while Powers was due to testify as “the government’s chief witness” in a criminal conspiracy trial involving fraud committed by the Western Fuel Company).

135. *See Scalding Bath for Girl Lands Wealthy Scion in Courtroom*, IDAHO EVENING TIMES, Jan. 16, 1935, at 1 (reporting on Vera Read’s lawsuit against George Eastman Dryden, “son of a millionaire rubber merchant and grand-nephew of the late George Eastman of camera fame,” alleging causes of action for “breach of promise, seduction and assault” arising from Dryden’s allegedly holding Read in a bathtub “while he ran hot water over her and ducked her head”).

136. *See Captured the Wife’s Affections*, WEISER SIGNAL, Aug. 29, 1895, at 4 (reporting on a lawsuit by John Albert Barnes, “superintendent of the Eastern Rubber Company” against “Frank A. Magoun, until recently rated as a millionaire, and frequently mentioned in connection with the republican gubernatorial nomination this year” for the seduction of Barnes’s wife); *see also Sage Sued for Seduction*, IDAHO DAILY STATESMAN, July 19, 1893, at 1 (reporting on a “seduction for promise of marriage” lawsuit seeking \$100,000 brought by Delia Keegan against Russell Sage). Sage was United States Representative for New York from 1853 to 1857, and, after that, was the “president and director of several railroad companies and financial institutions.” *Sage, Russell*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <https://bioguide.congress.gov/search/bio/S000013> (last visited Feb. 5, 2023).

a seduction lawsuit against Kentucky Congressman W.C.P. Breckinridge¹³⁷ and wrote repeated reports and updates on a seduction suit against Lee Russell, the governor of Mississippi.¹³⁸

In 1934, John Edward Brownlee, the premier of Alberta, went to trial as the defendant in a seduction lawsuit brought by Vivian MacMillan, a “former government employee.”¹³⁹ Idaho papers reported on MacMillan’s allegations that Brownlee “persuad[ed] her to accept a position in the government service, live at his home, and then threaten[ed] to discharge her if she refused his advances.”¹⁴⁰ The Idaho Statesman reported on MacMillan’s tearful testimony in which she stated that Brownlee had “promised to be her guardian and open his home to her,” that while she “resisted his advances for six months,” she ultimately gave in.¹⁴¹ While Brownlee testified and denied MacMillan’s account,¹⁴² the jury ultimately found in favor of MacMillan.¹⁴³

Idaho’s papers also followed a high-profile seduction suit against Elias Jackson Baldwin, aka “Lucky” Baldwin. Baldwin was a millionaire “who made his money in real estate, hotels, the stock market, and even selling brandy and tobacco to Mormons.”¹⁴⁴ By 1880, Baldwin “became the wealthiest landowner in Southern

137. See *Opening of the Breckinridge Case*, IDAHO DAILY STATESMAN, Mar. 9, 1894, at 1 (reporting on the beginning of trial in the “sensational suit of Madeline V. Pollard against Congressman W.C.P. Breckinridge, of Kentucky, for seduction and breach of promise of marriage” in which the plaintiff sought \$50,000 in damages); see also *The Local Mirror*, CALDWELL TRIBUNE, Aug. 19, 1893, at 1 (reporting on Pollard’s initiation of the lawsuit and that “[o]wing to the prominence of all parties, the affair is almost national”).

138. *Southern Girl Sues Governor for Seduction*, IDAHO DAILY STATESMAN, Feb. 7, 1922, at 1 (reporting on a “one hundred thousand dollar damage suit for allege seduction, filed by Miss Francis G. Birkhead, against Lee N. Russell, governor of Mississippi”); *Seduction Charge Probed*, IDAHO DAILY STATESMAN, Mar. 10, 1922, at 1 (describing the beginning of an investigation prompted by Governor Russell’s “charge that fire insurance interests maintained a pernicious lobby at the legislature and were responsible for the \$100,000 damage suit alleging seduction against him”); *Charges Filed Again*, TWIN FALLS DAILY NEWS, May 24, 1922, at 8 (reporting on a \$100,000 suit for “breach of promise and seduction” filed by Frances Birkhead against Governor Russell); *Former Governor of Mississippi Wanted for Seduction of Girl*, TWIN FALLS DAILY TIMES, Dec. 8, 1922, at 1 (reporting on a \$100,000 charge of contempt against Theodore G. Bilbo, the former governor of Mississippi, arising from a subpoena in a seduction suit brought by Francis Birkhead against Governor Russell—not against Mr. Bilbo as the article’s title suggests); *Jury Exonerates Russell*, IDAHO DAILY STATESMAN, Dec. 12, 1922, at 1 (reporting the jury’s verdict in favor of Governor Russell in the seduction suit brought by Francis Birkhead).

139. *Alberta Premier Goes on Trial in Seduction Case*, IDAHO EVENING TIMES, June 25, 1934, at 1.

140. *Id.*

141. *Girl Weeps During Testimony Against Canadian Premier*, IDAHO STATESMAN, June 27, 1934, at 2.

142. *Premier Denies Girl’s Charges*, IDAHO EVENING TIMES, June 29, 1934, at 1.

143. *In Canadian Seduction Case*, IDAHO STATESMAN, July 7, 1934, at 12.

144. Robert Peterson, *Lucky Baldwin’s Arcadia: A “Gambling Hell and Booze Pleasure Park”*, OFF RAMP, Dec. 15, 2016, <https://archive.kpcc.org/programs/offramp/2016/12/15/53755/hidden-history-lucky-baldwin-s-arcadia-a-gambling/>.

California, laying claim to more than 40,000 acres of Los Angeles County.”¹⁴⁵ Idaho newspapers recount a sensational seduction lawsuit by Lillian Ashley against Baldwin in 1894.¹⁴⁶ Ashley sought damages of \$75,000 after she had lived with Baldwin and “became the mother of his child.”¹⁴⁷ In response, Baldwin argued on demurrer that he was “a gay deceiver” and “that his reputation is so well-known that no woman of experience would trust him.”¹⁴⁸ In other words, Baldwin himself argued that he was so sleazy that Ashley could not have reasonably relied on “such evidently insincere protestations of love.”¹⁴⁹ The case proceeded to trial, during which the plaintiff’s sister, Emma Ashley, “walked up close behind the aged horseman, and, holding a revolver two inches from his head, pulled the trigger.”¹⁵⁰ At first, the gun did not fire, and when Emma Ashley managed to shoot, the bullet “grazed the top of Baldwin’s head, inflicting a slight scalp wound.”¹⁵¹ Baldwin ultimately won at trial after introducing “testimony showing that Miss Ashley had been intimate with other men and was an adventuress.”¹⁵² Emma Ashley, meanwhile, was “acquitted of the charge of attempted murder on the ground of insanity.”¹⁵³

While these high-profile trials demonstrate an ongoing interest in sensational seduction cases, it’s also worth noting that Idaho’s papers reported on seduction claims by non-famous individuals as well. Idaho papers reported on lawsuits involving everyday parties, including lawsuits brought within the state,¹⁵⁴ and

145. Alvaro Parra, *Elias “Lucky” Baldwin: Land Baron of Southern California*, KCET, Sept. 5, 2013, <https://www.kcet.org/shows/departures/elias-lucky-baldwin-land-baron-of-southern-california>.

146. *Lucky Baldwin Sued*, IDAHO DAILY STATESMAN, May 9, 1894, at 3.

147. *Id.*

148. *He Is a Gay Deceiver*, KOOTENAI HERALD, Apr. 27, 1895, at 2.

149. *Id.*

150. *Lucky Baldwin’s Luck*, IDAHO DAILY STATESMAN, July 3, 1896, at 1.

151. *Id.*

152. *Baldwin is “Lucky” Once Again*, IDAHO COUNTY FREE PRESS, Jan. 29, 1897, at 3.

153. *Id.*

154. *See \$10,000 Asked for Damages*, DAILY STAR-MIRROR (Moscow), Mar. 15, 1917, at 1 (reporting on a “damage suit to obtain \$10,000 for alleged seduction under a promise to marry and ‘pretense of great affection’” filed by Edna Humiston against Ivan Bull); *Wronged Girl Gets \$10,000*, CLEARWATER REPUBLICAN (Orofino), Feb. 4, 1921, at 7 (reporting on an award of \$10,000 for plaintiff Lillian High in a lawsuit against Fay Anderson for seduction); *Attorney Claims Seduction Evidence Was Insufficient*, IDAHO STATE J., Apr. 6, 1959, at 3 (reporting on Supreme Court proceedings in *Seamons v. Spackman*, 81 Idaho 361, 341 P.2d 442 (1959)).

lower-profile seduction lawsuits and criminal cases in California,¹⁵⁵ Georgia,¹⁵⁶ Indiana,¹⁵⁷ Iowa,¹⁵⁸ New York,¹⁵⁹ Utah,¹⁶⁰ and Washington.¹⁶¹ While Idaho's papers devoted a fair amount of space to lawsuits involving famous parties, coverage of these other seduction suits demonstrates the perceived newsworthiness of seduction lawsuits more generally.

D. The Abolishment of Some Heartbalm Actions in Idaho

As noted above, the 1930s saw the beginning of a trend against the heartbalm actions of alienation of affections, criminal conversation, breach of promise to marry, and seduction. Various states and state courts took measures to limit or eliminate these torts.¹⁶² Idaho was no exception, although it took a bit longer than other states to eliminate some of its heartbalm torts.

i. *O'Neil v. Shuckardt*: The Abolishment of Alienation of Affections

In *O'Neil v. Shuckardt*, the Idaho Supreme Court took up the plaintiff's appeal from an order granting the defendants' motion for judgment notwithstanding the

155. *Seduction Suit*, IDAHO WORLD, July 1, 1869, at 3 (reporting on a "seduction suit" in San Francisco, which is more likely an alienation of affections action, as it involves a plaintiff, Neal Gergenson, suing a defendant, Peter Lane, for \$40,000 arising from Lane's alleged seduction of Gergenson's wife); *Girl Names Kin in Seduction Suit*, IDAHO FALLS POST-REGISTER, June 18, 1942, at 17 (reporting on a \$100,000 seduction lawsuit filed by Cornelia Van Ree against her sister and her sister's husband, Gerald Turner).

156. *Seduction and Subsequent Marriage*, IDAHO DAILY STATESMAN, July 6, 1914, at 6–7 (reporting on the Court of Appeals of Georgia's ruling in *Morris v. State*, 81 S.E. 257 (Ga. Ct. App. 1914), concerning a criminal charge of seduction).

157. *Miscellaneous*, IDAHO WORLD, Feb. 9, 1867, at 1 ("A black girl at Shelbyville, Indiana, has commenced a suit against a white man for breach of promise of marriage and seduction.").

158. *Got Off Cheaply*, IDAHO WORLD, June 10, 1869, at 1 (reporting on a verdict in an Iowa lawsuit by B. McArthur against J.T. Bishop for adultery and other causes of action, in which the jury found Bishop "guilty of seduction, adultery, and foeticide, on their first vote, and mulcted him to the extent of \$1,800 and costs.").

159. *Claims Seduction*, IDAHO FALLS POST-REGISTER, July 3, 1934, at 2 (reporting on a lawsuit by Nettie Seeley on behalf of her daughter, Betty Seeley, against F. Walter Rowe, Jr., seeking \$100,000 in damages for seduction).

160. *General News*, KETCHUM KEYSTONE, Jan. 15, 1898, at 3 (reporting on a verdict of \$10,000 to the plaintiff, Ida Wright, in her lawsuit against J.A. Hyde, Jr., in which Wright alleged "seduction under promise of marriage"); *General News*, KETCHUM KEYSTONE, May 8, 1897, at 3 (reporting on a lawsuit by Eula Wray against Thomas Kearnes, "the well-known Park City mining man" alleging seduction and seeking \$10,000 in damages).

161. *Man for Whom Ruth Garrison Slew Convicted of Seduction*, IDAHO STATESMAN, June 9, 1919, at 2 (reporting on a guilty verdict against Douglas Storrs, who was charged "with the seduction of Miss Ruth Garrison, 18 years old, who poisoned Storrs' wife, Ms. Grace Storrs, in Seattle last spring," noting that Garrison had been "recently acquitted of a charge of murder on the ground of mental irresponsibility").

162. See Sinclair, *supra* note 26, at 66.

verdict following a \$1 million jury verdict in favor of the plaintiff.¹⁶³ The plaintiff had sued his wife's mother and Bishop Francis K. Schuckardt, the leader of "a fundamentalist sect of the Catholic Church" that believed that "marriages between Catholics and non-Catholics are not valid in the eyes of God unless the non-Catholic has taken instruction in the faith and has agreed that any children of the marriage be raised as Catholics."¹⁶⁴ The defendants convinced the plaintiff's wife that her marriage to him, a non-Catholic, was invalid "in the eyes of God," leading to the couple's divorce.¹⁶⁵

The Idaho Supreme Court began its analysis by noting the elements of an alienation of affections action and acknowledging several defenses to the action, including a defense available to parents acting "in good faith to protect their child's welfare" so long as they act reasonably and without ill will.¹⁶⁶ But the court quickly moved on to a discussion of the desirability of the tort itself, noting that multiple states had abolished or never recognized a cause of action for alienation of affections.¹⁶⁷

The court concluded that the tort of alienation of affections should be abolished.¹⁶⁸ It noted that alienation of affection suits are often brought "for the plaintiff to vindicate himself and gain revenge on the other spouse and the defendant."¹⁶⁹ The court also argued that injuries in these lawsuits "are intangible" and that "damage awards have few standards, making it easier for verdicts to be tainted by passion and prejudice."¹⁷⁰ Additionally, the court stated that defendants are often "expose[d] . . . to the extortionate schemes of the plaintiff," and that the cause of action is often employed as a weapon in divorce proceedings—leading to evidence and testimony of "one of the parent's extramarital activities."¹⁷¹ All of this led the court to conclude that because "the many ill effects of the suit for alienation of affections outweigh any benefit it may have, we both affirm the ruling of the trial court and abolish the cause of action in Idaho."¹⁷²

ii. *Neal v. Neal*: The Abolishment of Criminal Conversation

In *Neal v. Neal*, the defendant, Thomas Neal, "filed for divorce after his wife became aware that he was having an extramarital affair."¹⁷³ His wife, Mary Neal, counterclaimed for divorce, suing Thomas Neal as well as Jill LaGasse, whom she

163. *O'Neil v. Schuckardt*, 112 Idaho 472, 473, 733 P.2d 693, 694 (1986).

164. *Id.* at 474, 733 P.2d at 695.

165. *Id.*

166. *Id.* at 475, 733 P.2d at 696.

167. *Id.* at 476, 733 P.2d at 697.

168. *Id.* at 477, 733 P.2d at 698.

169. *O'Neil*, 112 Idaho at 477, 733 P.2d at 698.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Neal v. Neal*, 125 Idaho 617, 619, 873 P.2d 871, 873 (1994).

claimed was having an adulterous relationship with Mr. Neal.¹⁷⁴ Ms. Neal sought damages from Mr. Neal and Ms. LaGasse through a criminal conversation cause of action, arguing that it “remain[ed] a viable cause of action under Idaho law.”¹⁷⁵

On appeal, the Court of Appeals of Idaho noted that criminal conversation “has been abolished, either legislatively or judicially, in a majority of jurisdictions in this country.”¹⁷⁶ The court of appeals cited authority indicating that thirty-five states had “abolished or severely limited the torts of marital interference—alienation of affections, criminal conversation and seduction.”¹⁷⁷ Citing the Idaho Supreme Court’s ruling in *O’Neil*, the court of appeals concluded that the “national and rational extension” of that ruling was “the abolition of the tort of criminal conversation.”¹⁷⁸

The Idaho Supreme Court then took up the case, and noted that criminal conversation was a common law tort, with origins in “the proposition that a husband has a property right in his wife and her services” and that this interest is “stolen” as a result of adultery.¹⁷⁹ The court also stated that there had been no reported cases involving criminal conversation in Idaho since 1918, and that “the change in societal views toward women which has occurred since then may have much to do with this total absence of case law.”¹⁸⁰ In light of the “medieval rationale” for criminal conversation, the court ruled that the tort was abolished as a cause of action in Idaho.¹⁸¹

Ms. Neal also sought to recover damages under theories of intentional and negligent infliction of emotional distress—arguing that she suffered emotional distress due to “fear that she may have contracted a sexually transmitted disease.”¹⁸² The Idaho Supreme Court held that the district court had properly dismissed this claim, as there was no allegation of actual exposure to any such disease.¹⁸³ Because there was no allegation of actual exposure, the court held that Ms. Neal failed to establish a reasonable fear—a necessary element of a claim seeking emotional distress damages—and absent this allegation, the court did not address whether Ms. Neal had proved whether her fear was sufficiently genuine to support a claim for emotional distress damages.¹⁸⁴

174. *Id.*

175. *Id.* at 620, 873 P.2d at 874.

176. *Neal v. Neal*, 125 Idaho 627, 631, 873 P.2d 881, 885 (Ct. App. 1993), *aff’d in part, rev’d in part*, 125 Idaho 617, 873 P.2d 871 (1994).

177. *Id.*

178. *Id.* at 631–32, 873 P.2d at 885–86.

179. *Neal*, 125 Idaho 617, 620, 873 P.2d 871, 874 (1994).

180. *Id.*

181. *Id.*

182. *Id.* at 622, 873 P.2d at 876.

183. *Id.*

184. *Id.*

In the wake of *O'Neil* and *Neal*, it seems reasonable to conclude that Idaho's heartbalm torts no longer exist. The court of appeals' reasoning in *Neal*, in particular, is expansive, as it addresses not only criminal conversation but also seduction, and reasons that the Idaho Supreme Court's *O'Neil* ruling extends to other heartbalm statutes.¹⁸⁵ While the Court of Appeals of Idaho or the Idaho Supreme Court have not yet directly confronted a seduction appeal, it seems that under the logic in *O'Neil*, any such appeal will cause seduction to go the way of alienation of affections and criminal conversation. Seduction, therefore, is effectively dead in Idaho.

Or is it? The next section makes the case that the tort of seduction still exists under Idaho law. And because of its statutory basis, the tort of seduction cannot be abolished as easily as alienation of affections or criminal conversation.

III. THE TORT OF SEDUCTION STILL EXISTS IN IDAHO

The case for the continued existence of the seduction tort in Idaho is straightforward. First, and most importantly, the tort of seduction is grounded in statute, as well as in case law. Seduction's statutory basis means that Idaho's courts cannot simply abolish the cause of action in the same way they have done so with the common law torts of alienation of affection and criminal conversation. Second, *O'Neil* and *Neal* do not explicitly address seduction—with the only language regarding seduction included in the non-controlling Court of Appeals opinion in *Neal*. Third, even if one were to apply the logic of *O'Neil* and *Neal* to the seduction tort, the analogy between those cases and seduction is not as clear because seduction is not a tort arising from the marriage relationship.

To be clear, this section's argument is a descriptive one. I argue that, as a matter of law, the tort of seduction continues to exist in Idaho. I do not argue that this is a good thing, or that there are no obstacles to its continued existence in the face of possible constitutional challenges. I take up these issues in section IV.

i. The Statutory Basis of Idaho's Seduction Tort

Idaho's tort of seduction is a creature of statute. Idaho Code section 5-308 permits women to bring seduction lawsuits on their own behalf.¹⁸⁶ And Idaho Code section 5-309 allows parents to bring seduction suits on behalf of their daughter if their daughter is under the age of majority when the seduction occurs.¹⁸⁷ These statutes have been in place in largely the same form since before Idaho became a state.¹⁸⁸

The Idaho Supreme Court recognizes that there are limits in place on its ability to review statutes. In *Liefeld v. Johnson*, the court stated:

185. *Neal v. Neal*, 125 Idaho 627, 631, 873 P.2d 881, 885 (Ct. App. 1993), *aff'd in part, rev'd in part*, 125 Idaho 617, 873 P.2d 871 (1993).

186. IDAHO CODE § 5-308 (2022).

187. IDAHO CODE § 5-309 (2022).

188. *See* IDAHO CODE CIV. PROC. §§ 189–190 (1881).

So long as the statute is constitutional, we have no intrinsic ability to review its inherent wisdom or, if it seems unwise, the power to change it. Whenever lines are drawn by legislation, some may seem unwise, but the responsibility for drawing these lines rests with the legislature and judicial review is limited. We agree with the sentiments expressed by other courts which have urged their legislatures to periodically review their statutory provisions which limit tort recoveries.¹⁸⁹

The court has subsequently cited *Leliefeld* to reiterate the limits of its ability to review cases—finding that if a statute is constitutional, the court’s review of the statute is limited.¹⁹⁰

In *Neal*, the Idaho Supreme Court made sure to note that criminal conversation was a common law tort before ruling that the tort was abolished.¹⁹¹ While the court in *O’Neil* did not explicitly state that alienation of affections was a common law tort, its reasoning, and the authorities it cited all boiled down to case law.¹⁹²

Because seduction, unlike the common law torts at issue in *O’Neil* and *Neal*, is based in statute rather than only the common law, Idaho’s courts cannot abolish it in the same manner as alienation of affections and criminal conversation. Additionally, the bar against overturning statutes on grounds other than their constitutionality prevents the reasoning from *O’Neil* and *Neal* from extending to seduction suits, as the court did not decide those cases on constitutional grounds.

ii. The Scope of *O’Neil* and *Neal*

The second argument in favor of the continued existence of seduction in Idaho is simple: the legislature and courts have not taken action to limit or eliminate the tort. Idaho’s legislature isn’t a passive actor when it comes to outdated laws regarding sexual conduct. In 2022, Idaho’s governor signed Senate Bill 1325 (S.B. 1325), a bill that eliminated Idaho’s crimes of adultery, fornication, and sodomy—which, until June 2022, was referred to as “the infamous crime against nature.”¹⁹³ The elimination of the crime of adultery brought Idaho’s criminal law more in line with the Idaho Supreme Court’s criticism of the archaic tort of criminal conversation in *Neal v. Neal*.¹⁹⁴ Despite the array of changes to Idaho’s criminal law governing intimate behavior, S.B. 1325 had nothing to say about seduction.

189. *Leliefeld v. Johnson*, 104 Idaho 357, 375, 659 P.2d 111, 129 (1983) (internal citations omitted).

190. *See Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 719, 791 P.2d 1285, 1298 (1990).

191. *See Neal v. Neal*, 125 Idaho 617, 620, 873 P.2d 871, 874 (1994).

192. *See O’Neil v. Schuckardt*, 112 Idaho 472, 475–76, 733 P.2d 693, 696–97 (1986).

193. *See* S.B. 1325, 66th Leg., 2d Sess. (Idaho 2022); *see also* IDAHO CODE § 18-6605 (2021) (prior version of Idaho’s statute criminalizing “the infamous crime against nature, committed with mankind or with any animal”). S.B. 1325 renumbered Idaho Code § 18-6609 to replace § 18-6605—so § 18-6605 now outlaws video voyeurism. *See* IDAHO CODE § 18-6605 (2022).

194. *See Neal*, at 620, 873 P.2d at 874.

And, as previously noted, neither *O'Neil* nor *Neal* addressed seduction. Those cases were specific to the causes of action before them. *O'Neil* addressed alienation of affection only.¹⁹⁵ Indeed, it took nearly a decade for the Court to abolish the closely related tort of criminal conversation, which was the sole tort at issue in *Neal*.¹⁹⁶ Because the tort of seduction was not addressed by the court in either case, there has been no ruling abolishing it. The Idaho Supreme Court recognized this, albeit in passing, in *Hei v. Holzer* where it noted that it was not ruling on the constitutionality of the seduction tort.¹⁹⁷ This acknowledged the continued existence of the seduction tort—as the tort must still be on the books if it is to be challenged on constitutional grounds.

iii. Distinguishing Seduction from Alienation of Affections and Criminal Conversation

Even if the Idaho Supreme Court has not directly ruled on whether to abolish seduction, one might argue, like the Court of Appeals in *Neal*, that the “rational extension” of the court’s abolishment of alienation of affections and criminal conversation in *O'Neil* requires the abolishment of seduction.¹⁹⁸ The Court of Appeals cited the Tennessee case of *Lentz v. Baker* in support of a claim that “the tort of criminal conversation has been abolished, either legislatively or judicially, in a majority of jurisdictions in this country,” claiming that the *Lentz* case counted “thirty-five jurisdictions that had abolished or severely limited the torts of marital interference—alienation of affections, criminal conversation, and seduction.”¹⁹⁹ In light of the call for the abolition of the torts of marital interference, both in *O'Neil* and in thirty-five other states, there seems to be a strong argument that seduction is effectively dead law.

This argument breaks down in several ways. To start, the Court of Appeals characterization of *Lentz* is incorrect. While *Lentz* did list thirty-five states, it did so only in the context of counting states that had eliminated the tort of alienation of affections and did not mention the torts of criminal conversation or seduction.²⁰⁰ This is an important distinction. While several states abolished all the heartbalm statutes, others did not—focusing only on alienation of affections and criminal conversation.²⁰¹ The Court of Appeals of Idaho’s characterization states that *Lentz* listed thirty-five states limiting “alienation of affections, criminal conversation and seduction,” which misrepresents what the *Lentz* court said.²⁰²

195. See *O'Neil*, 112 Idaho at 475–76, 733 P.2d at 696–97.

196. See *Neal*, at 620, 873 P.2d at 874.

197. See *Hei v. Holzer*, 139 Idaho 81, 85 n.2, 73 P.3d 94, 98 n.2 (2002).

198. See *Neal v. Neal*, 125 Idaho 627, 631–32, 873 P.2d 881, 885–86 (Ct. App. 1993), *aff'd in part and rev'd in part*, 125 Idaho 617, 873 P.2d 871 (1993).

199. *Id.* at 631, 873 P.2d at 885 (citing *Lentz v. Baker*, 792 S.W.2d 71, 75 (Tenn. Ct. App. 1989)).

200. *Lentz*, 792 S.W.2d at 75 n.2.

201. See *Sinclair*, *supra* note 26, at 66–67.

202. *Neal*, 125 Idaho at 631, 873 P.2d at 885; see *Lentz*, 792 S.W.2d at 75 n.2.

And even if *Lentz* had listed thirty-five states that had abolished torts of “marital interference,” (as the Court of Appeals in *Neal* characterized the list) this would not encompass the tort of seduction. Modern and historic seduction lawsuits were brought by, or on behalf of, unmarried women—indeed, it is a requirement that the seduced woman be unmarried in order for a tort of seduction to exist.²⁰³ To the extent that seduction may impact marital relationships, this is a part of alienation of affections or criminal conversation suits—not seduction claims.²⁰⁴ Accordingly, the Court of Appeals of Idaho’s grouping of seduction in with “torts of marital interference” betrays a misunderstanding of the nature of the tort and further demonstrates how the case before the *Neal* court was different from the tort of seduction. This is a significant mistake, as one of the primary reasons behind the abolition of alienation of affections and criminal conversation is the concern that these torts may be weaponized in divorce proceedings to gain unfair leverage.²⁰⁵ This is not a problem with seduction, however, as the tort involves unmarried plaintiffs.

IV. SHOULD THE TORT OF SEDUCTION EXIST IN IDAHO?

While the tort of seduction still exists in Idaho, this does not mean that it *ought* to remain in place. Many of the arguments raised by the *O’Neil* and *Neal* courts may be adapted against the tort of seduction. While Idaho’s courts may be unable to abolish the tort of seduction in the same manner they may abolish a common law action, Idaho’s legislature can take action against seduction as it recently did with outdated laws criminalizing private sexual conduct.²⁰⁶ This section addresses whether Idaho’s law of seduction should remain, whether it should be revised or reconceptualized, and potential constitutional objections to the tort as it currently exists.

A. Constitutional Concerns Over Idaho’s Seduction Law

Idaho’s law of seduction raises at least two constitutional concerns. First, the gendered language of Idaho’s seduction statutes means that they may be vulnerable to challenge on equal protection grounds. Second, the law concerns intimate sexual conduct and therefore may implicate the Fourteenth Amendment’s Due Process Clause.

i. Does Idaho’s Seduction Law Violate the Equal Protection Clause?

203. See IDAHO CODE § 5-308 (2022) (stating that “[a]n unmarried female may prosecute . . . an action for her own seduction”); see also Sinclair, *supra* note 26, at 60.

204. See Greenstein, *supra* note 10, at 734; see also *O’Neil v. Schuckardt*, 112 Idaho 472, 475, 733 P.2d 693, 696 (1986); *Neal v. Neal*, 125 Idaho 617, 620, 873 P.2d 871, 874 (1994).

205. See *O’Neil*, at 477, 733 P.2d at 698.

206. See S.B. 1325, 66th Leg., 2nd Sess. (Idaho 2022).

Idaho's seduction statutes are not gender neutral. Only "unmarried female[s]" may pursue an action for their own seduction.²⁰⁷ Parents may only sue on behalf of their daughters for seduction.²⁰⁸ Interestingly, guardians may sue for the seduction "of a ward under the age of majority at the time of seduction."²⁰⁹ The statute does not limit seduction actions on behalf of wards to female wards.²¹⁰ Neither of Idaho's seduction statutes specify the sex of who may be sued for seduction.²¹¹

The United States Supreme Court has interpreted the Fourteenth Amendment's Equal Protection clause to prohibit laws that discriminate based on sex if those laws fail to serve an important or exceedingly persuasive government interest, or are not substantially related to the achievement of such an interest.²¹² Laws that fail to meet this standard, and instead serve to "ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women" violate the Equal Protection Clause.²¹³ Laws or government actions that explicitly limit the rights or opportunities of one sex more than the other may implicate equal protection concerns.²¹⁴ The same is true of laws that, on their face, punish or penalize only one sex for certain conduct.²¹⁵

Equal protection is also implicated where the government provides privileges or benefits to only one sex. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."²¹⁶ But it is not enough for a government to generally claim that a law serves a compensatory purpose—it must demonstrate that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification."²¹⁷ In *Mississippi University for Women v. Hogan*, the United States Supreme Court ruled that a public school of nursing in which only women were admitted, failed to meet these requirements, as it "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job."²¹⁸

207. IDAHO CODE § 5-308 (2022).

208. *Id.* § 5-309.

209. *Id.*

210. *Id.*

211. IDAHO CODE §§ 5-308, 5-309 (2022).

212. *See* *United States v. Virginia*, 518 U.S. 515, 524, 531 (1996).

213. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994); *see Virginia*, 518 U.S. at 541–42.

214. *See Virginia*, 518 U.S. 515 (1996) (involving a challenge arising from women being prohibited from attending a public school); *Reed v. Reed*, 404 U.S. 71, 73, 76–77 (1971) (holding that an Idaho law that required that "males must be preferred to females" violated the Fourteenth Amendment's Equal Protection Clause).

215. *See Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that an Oklahoma statute that prohibited the selling of 3.2 percent beer to men, aged 18-20, but not to women of the same age, violated the Equal Protection Clause).

216. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

217. *Id.*

218. *Id.* at 729.

The Idaho Supreme Court has also overturned laws that discriminate based on sex. In *Harrigfeld v. District Court*, the Idaho Supreme Court ruled that a statute that set the age of majority at 21 for males and 18 for females was unconstitutional.²¹⁹ The court reasoned that the distinction was arbitrary and lacked rational justification.²²⁰

Despite these constitutional prohibitions against sex discrimination, Idaho's Supreme Court has previously upheld laws that facially discriminate based on sex. In *State v. LaMere*, the court upheld Idaho's law against statutory rape, which (at the time) only applied to male perpetrators.²²¹ The court relied on *Michael M. v. Superior Court of Sonoma County*, in which the United States Supreme Court had rejected an equal protection challenge to California's similar statutory rape law that punished only men for the offense.²²² The *LaMere* court concluded that "one of the main objectives" behind Idaho's statutory rape law was "the prevention of teenage pregnancies," and that this was an "important governmental objective."²²³ The court rejected the argument that the law was instead based on "'out-moded' thinking of men about the chastity of women and their status as chattel," stating that laws were not to be struck down based on "'alleged illicit legislative motive[s].'"²²⁴ The court concluded that the statutory rape law was sufficiently related to this interest because only men could physically cause the teen pregnancy, and that punishment of men alone "could certainly help deter this conduct."²²⁵ The Idaho Supreme Court reaffirmed its ruling in *LaMere* over two decades later in *State v. Joslin*, rejecting arguments that "societal changes since *LaMere* . . . undermine any assumption that males are always the aggressors when minor females engage in sexual intercourse."²²⁶

The Idaho Supreme Court also rejected equal protection challenges to the state's strict abortion restrictions in *Planned Parenthood Great Northwest v. State*.²²⁷ There, the court stated that invidious discrimination "occurs when a statute treats similarly situated individuals differently based on their sex alone."²²⁸ The court reasoned that Idaho's abortion restrictions were not sex-based

219. *Harrigfeld v. Dist. Ct. of Seventh Jud. Dist. ex rel Freemont Cnty.*, 95 Idaho 540, 544–45, 511 P.2d 822, 826–27 (1973).

220. *Id.* at 545, 511 P.2d at 827.

221. *State v. LaMere*, 103 Idaho 839, 843, 655 P.2d 46, 50 (1982). The statute at issue was amended in 2016 to remove a reference to "the perpetrator's penis" and to change references to "female victim" to "victim." See Act of March 25, 2016, ch. 296, 2016 Idaho Sess. Laws 828 (amending Idaho Code § 18-6101).

222. *LaMere*, at 843, 655 P.2d at 50 (citing *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981)).

223. *Id.*

224. *Id.* (quoting *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472 n.7 (1981)).

225. *Id.*

226. *State v. Joslin*, 145 Idaho 75, 85, 175 P.3d 764, 774 (2007).

227. *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 439–40, 522 P.3d 1132, 1197–98 (2023).

228. *Id.* at 1198.

discrimination because “[o]nly women are capable of pregnancy; thus, only women can have an abortion,” meaning that men and women were not similarly situated.²²⁹

Idaho’s seduction statutes implicate equal protection scrutiny because they are facially discriminatory. With the exception of suits by guardians brought on behalf of wards, Idaho’s statutes permit claims by women only.²³⁰

Drawing on cases like *LaMere* and *Joslin*, the state may argue that Idaho’s seduction statutes serve a government interest in avoiding underage pregnancies and that limiting the class of potential plaintiffs to women is sufficiently related to accomplishing this interest.²³¹ This is likely one of the few interests that Idaho may raise in defense of its statutes, as arguments about the need to preserve chastity and women’s sexual vulnerability would perpetuate invidious and archaic gender stereotypes.²³²

Arguments from *LaMere* and *Joslin* run into difficulties. First, Idaho Code section 5-308, which permits women to bring seduction suits on their own behalf, is not limited by age—distinguishing it from *LaMere* and *Joslin* which involved sexual intercourse with minors.²³³ The state might respond by replacing an interest in preventing underage pregnancies with the interest of preventing pregnancies out of wedlock. While this may be a legitimate government interest, it is an open question as to whether this interest is as strong as the interest in preventing underage pregnancies—which involve unique concerns of whether children will receive proper care, and which may be more disruptive to the mother who is bearing and giving birth to a child in her formative years.²³⁴ This argument also falters if the seduction cause of action is evaluated in a manner consistent with Idaho’s earlier case law—in which proof of the plaintiff’s chastity was also required to maintain a seduction action.²³⁵ Such a requirement would likely run afoul of equal protection, as an unchaste woman may become pregnant just as easily as a chaste woman.

Second, neither section 5-308 nor 5-309 require that the plaintiff become pregnant as a result of the seduction.²³⁶ The Idaho Supreme Court has confirmed this, ruling that the “gravamen of the action for seduction, contemplated [by

229. *Id.*

230. IDAHO CODE §§ 5-308, 5-309 (2022).

231. See *State v. LaMere*, 103 Idaho 839, 843, 655 P.2d 46, 50 (1982); see also *Joslin*, 145 Idaho at 85, 175 P.3d at 774.

232. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994); *United States v. Virginia*, 518 U.S. 515, 541–42 (1996).

233. See IDAHO CODE § 5-308 (2022).

234. For more on why the prevention of out-of-wedlock pregnancies may not be a sufficiently important government interest in constitutional cases, see Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1669 (1991).

235. See *Kralick v. Shuttleworth*, 49 Idaho 424, ___, 289 P. 74, 79–80 (1930).

236. IDAHO CODE §§ 5-308, 5-309 (2022).

section 5-308], is not ‘pregnancy.’”²³⁷ This second argument is weaker than the first, as the gendered statutory rape laws that the Idaho Supreme Court previously upheld did not include a requirement that the victim become pregnant.²³⁸ The absence of a pregnancy element in a seduction case may weaken the connection between the interest in preventing underage pregnancies, but that connection is likely strong enough to meet equal protection scrutiny—at least in light of the court’s prior rulings in *LaMere* and *Joslin*.

This analysis suggests that section 5-308, which permits women to bring seduction suits on their own behalf, faces a serious equal protection challenge. Section 5-309, which is limited to suits brought on behalf of female minors or wards may fare better, in light of its closer connection to the government interest in preventing underage pregnancies. The fit is not perfect, but neither was the fit of Idaho’s former statutory rape provision, which the Idaho Supreme Court upheld.

ii. Equal Protection Challenges to Other States’ Seduction Statutes

A discussion of equal protection challenges to Idaho’s seduction law would be incomplete without reference to how other state courts have addressed similar challenges. As it happens, several states have ruled seduction statutes to violate equal protection requirements.

a. *Franklin v. Hill: Dubious Reasoning, But Still Worth Noting*

In *Franklin v. Hill*, the Supreme Court of Georgia took up an equal protection challenge to Georgia’s seduction statute.²³⁹ The statute at issue provided that:

The seduction of a daughter, unmarried and living with her parent, whether followed by pregnancy or not, shall give a right of action to the father or to the mother if the father is dead, or absent permanently, or refuses to bring an action. No loss of services need be alleged or proved. The seduction is the gist of the action, and in well-defined cases exemplary damages shall be granted.²⁴⁰

The case involved a lawsuit by Nancy Franklin against her daughter’s former high school teacher, Andrew Hill, in which Franklin alleged that Hill had seduced her daughter.²⁴¹ Hill identified three ways the seduction statute “establish[ed] a gender classification”: (1) “only unmarried daughters, not sons, are protected from seduction;” (2) “mothers are permitted to bring a seduction action only if the father is unable or unwilling to sue;” and (3) “only men are liable for seduction.”²⁴² Hill limited his challenge to the third argument alone.

237. *Seamons v. Spackman*, 81 Idaho 361, 364, 341 P.2d 442, 443 (1959).

238. *State v. LaMere*, 103 Idaho 839, 843, 655 P.2d 46, 50 (1982).

239. *Franklin v. Hill*, 444 S.E.2d 778, 779 (Ga. 1994).

240. GA. CODE ANN. § 51-1-16 (2020).

241. *Franklin*, 444 S.E.2d at 779.

242. *Id.* at 780.

Even though Georgia's seduction statute did not specify the sex of the defendant, the court agreed with Hill's framing. It did so by relying on a definition of "seduction" from a 1979 edition of Black's Law Dictionary, which defined the term to mean "the '[a]ct of man enticing woman to have unlawful intercourse with him by means of persuasion, solicitation, promises, bribes, or other means without employment of force.'"²⁴³ The court also relied upon one of its own prior rulings dating back to 1931, in which it had defined seduction as applied "to the conduct of a man towards a woman."²⁴⁴ From these external sources, the court made the leap that "by definition the statute makes a gender classification in that only men may be liable for the seduction of unwed daughters."²⁴⁵ The court reached this conclusion despite the statute itself containing no such definition or specification of the seduction defendant's gender—relying only on the fact that the statute identified the plaintiff as a female. Lesbians, it seems, are inconceivable—at least in the eyes of the Georgia Supreme Court.²⁴⁶

Having accepted the dubious framing of the seduction law as applying only to male defendants, the *Franklin* court then analyzed whether the law stood up to equal protection scrutiny.²⁴⁷ While the court recognized that "preventing unwanted pregnancies, particularly of minors, is a legitimate government interest, the seduction statute is not substantially related to that goal."²⁴⁸ The court noted that the law did not have an age limitation, as it was not restricted to claims brought by parent of minor children only.²⁴⁹ It argued that the statute gave the right of action to the parent, rather than the child who "has the unwanted pregnancy and endured the 'scars'" of such a pregnancy.²⁵⁰ The court also pointed out that pregnancy was not a required element of a seduction claim.²⁵¹ Finally, the court noted that the statute was "aimed at compensating a father or mother for personal injuries suffered by the daughter's seduction" rather than "detering behavior that offends the public morals."²⁵²

Instead, the Georgia Supreme Court reasoned, the seduction statute was aimed at a different interest:

Rather than seeking to prevent the pregnancy of unwed daughters, the statute was passed to hold men civilly liable for corrupting the morals and compromising the chastity of unmarried women. Passed in 1863 at

243. *Id.* (quoting BLACK'S LAW DICTIONARY (5th ed. 1979)).

244. *Id.*; *Mosley v. Lynn*, 157 S.E. 450, 454 (Ga. 1931).

245. *Franklin*, 444 S.E.2d at 781.

246. *Cf.* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 110 (1989) ("Lesbians can so violate the sexuality implicit in female gender stereotypes as not to be considered women at all, or lesbian existence must be suppressed to reaffirm the stereotypes.").

247. *Franklin*, 444 S.E.2d at 781.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

a time when women and children were the legal property of their husbands or fathers, the statute vindicates the outraged feelings of the father whose daughter's virtue has been ruined.²⁵³

From this, the court concluded that Georgia's seduction statute violated the equal protection of laws and was unconstitutional.²⁵⁴

Some of the steps the Georgia court took are too dubious to warrant consideration in the context of Idaho's seduction law. For example, reading a seduction statute that does not specify the sex of the defendant to apply only to men ignores the text and dismisses the fact that women may seduce women. It is therefore misleading to frame Idaho's (or Georgia's) seduction law as targeting only male defendants.

As tenuous as some of its reasoning may be, other aspects of the *Franklin* court's analysis support the conclusion that Idaho Code section 5-308 violates equal protection. The *Franklin* court provides persuasive authority for the point that a seduction law that does not include an age limit has, at best, a tenuous relationship to the interest of preventing teenage pregnancies.²⁵⁵ The *Franklin* court also emphasized that Georgia's seduction law permitted an action by the seduced female's parents on her behalf, and concluded that this further attenuated the law from its purported interest in addressing the harm of underage pregnancies.²⁵⁶ Unlike the crime of statutory rape, the purpose of seduction is to recover damages rather than deter the sexual conduct at issue.²⁵⁷ The same argument may be made in the context of Idaho law to distinguish both of Idaho's seduction statutes from the statutory rape laws that were previously upheld as unconstitutional. Seduction is a tort, not a crime. Because seduction does not deter sexual conduct as directly and aggressively as criminal punishment, its relationship to the interest of preventing underage pregnancies may be too attenuated to meet equal protection requirements.

b. *Edwards v. Moore: Overturning a Made-Up Version of the Law*

Edwards v. Moore analyzed Alabama's seduction law in a similar manner as the *Franklin* court.²⁵⁸ The statute at issue in *Edwards* stated:

The father or, in case of his death or desertion of his family, or of his imprisonment for a term of two years or more under a conviction for crime, or of his confinement in an insane hospital, or of his having been declared of unsound mind, the mother, may commence an action for the seduction of a daughter under the age of 19 years though she be not living with or in the service of the plaintiff at the time of the

253. *Franklin*, 444 S.E.2d at 781.

254. *Id.*

255. See IDAHO CODE § 5-308 (1881).

256. *Franklin*, 444 S.E.2d at 781.

257. *Id.*

258. *Edwards v. Moore*, 699 So. 2d 220, 221–22 (Ala. Civ. App. 1997).

seduction or afterwards and there is no loss of service; provided, that an action by the daughter is a bar to an action by the father or mother.²⁵⁹

Like the *Franklin* court, the *Edwards* court relied on the 1979 Black's Law Dictionary's gendered definition of "seduction," and on its own prior precedent to conclude that seduction applies only to male defendants.²⁶⁰ Its reliance on precedent was even more dubious than *Franklin*, however:

"Seduction" has been defined in Alabama as "inducing a chaste, unmarried woman, by means of temptation, deception, arts, flattery, or a promise of marriage, to engage in sexual intercourse." "Seduction," by its very definition, applies only to male seducers.²⁶¹

The notion of women seducing women is, once again, simply out of the question. Incredibly, though, the notion of seduction committed by women arises later in the analysis:

Even assuming that the seduction statute was designed to redress "wrongful conduct inducing [the] loss of chastity by the female," including the "consequent degradation, mortification and wounded feelings visited upon her, as well as her parents," the statute is not substantially related to that governmental interest. The gender-based limitations of the statute ignore the same "degradation, mortification and wounded feelings" *visited upon a daughter seduced by a woman*—the emotional and physical consequences of such a seduction should arguably also be guarded against. Section 6–5–351 does not afford such protection and thereby discriminates, allowing only the prosecution of men.²⁶²

There is one glaring problem with this: Alabama's statute *does* allow lawsuits against female defendants. The text of the statute does not specify the sex of the defendant—only the sex of the daughter who is seduced.²⁶³ Even the quoted portion of precedent that the court includes in its reasoning specifies the sex of the defendant.²⁶⁴ The court does not discuss the more defensible government interest of preventing underage pregnancy as the *Franklin* court did—relying instead on a misstatement of Alabama's law to justify its conclusion.²⁶⁵

259. *Id.*

260. *Id.*

261. *Id.* (quoting *Mitchell v. State*, 151 So.2d 752, 758 (Ala. Ct. App. 1962), *cert. denied*, 151 So.2d 761 (Ala. 1963)).

262. *Id.* at 222 (emphasis added) (citations omitted).

263. *Id.* at 221–22.

264. See *Edwards*, 699 So. 2d at 221–22 (quoting *Mitchell v. State*, 151 So. 2d 752, 758 (1962)).

265. See *Franklin v. Hill*, 444 S.E.2d 778, 781 (Ga. 1994).

The Georgia Supreme Court's equal protection analysis is dubious at points, but raises some worthwhile arguments. Alabama's treatment of its seduction law, on the other hand, is so misguided that it is of little use to anyone.

c. *Commonwealth v. Gallimore: Striking Down the Crime of Seduction*

In *Commonwealth v. Gallimore*, the Circuit Court of Virginia of Floyd County took up a challenge to the constitutionality of a Virginia law criminalizing seduction.²⁶⁶ The law at issue provided that:

If any person, under promise of marriage, conditional or unconditional, seduce and have illicit connection with any unmarried female of previous chaste character, or if any married man seduce and have illicit connection with any unmarried female of previous chaste character, he shall be guilty of a class 4 felony. For the purpose of this section, the chastity of the female shall be presumed, in the absence of evidence to the contrary. In all criminal prosecutions for seduction under this section, evidence respecting the general reputation of the prosecutrix for chastity may be introduced either by the Commonwealth or the accused.²⁶⁷

The Commonwealth argued that the crime of seduction was not unconstitutional, arguing that it upheld the interests of protecting the institution of marriage and "preventing those relationships in which children may be born out of wedlock."²⁶⁸ The court rejected both arguments. As to the institution of marriage argument, the court found that the law failed to sufficiently meet the objective, noting that "[i]t would be as easy for a married woman to seduce an unmarried man as it is for a married man to seduce an unmarried woman."²⁶⁹ As for the interest in preventing pregnancy out of wedlock, the court noted that the law only applied where women "of previous chaste character" were seduced, and pointed out that "[u]nchaste women are as equally capable of getting pregnant as chaste women."²⁷⁰

While the *Gallimore* court's reasoning is far cleaner than the *Franklin* and *Edwards* courts', the arguments may be of tenuous relevance to Idaho's seduction statute. The text of the Idaho statutes do not require that those seduced be of previously chaste character—limiting the relevance of the analysis regarding pregnancies out of wedlock.²⁷¹ This does not mean that *Gallimore* is irrelevant to Idaho law, however. While qualifications of chastity are absent from Idaho's statutes, Idaho's courts have previously read in a requirement that the plaintiff be

266. *Commonwealth v. Gallimore*, 30 Va. Cir. 426, 426 (Va. Cir. Ct. 1993).

267. *Id.*

268. *Id.* at 427.

269. *Id.* at 428.

270. *Id.*

271. See IDAHO CODE §§ 5-308, 5-309 (2022).

of chaste character when bringing a seduction suit.²⁷² Were such a requirement to be imposed in a modern seduction case, the equal protection analysis of *Gallimore* would apply, and it would be far more difficult to claim that the law effectively serves the interest of preventing underage or out-of-wedlock pregnancy.

There are lessons to be learned from this tour of other states' approaches to the constitutionality of seduction torts and crimes. At a basic level, these cases demonstrate that seduction laws are vulnerable to equal protection challenges. It seems that courts are aware of the gendered nature of seduction suits and hold views of those who tend to be targeted by these suits—an awareness that may motivate the dubious characterizations of seduction laws in *Franklin* and *Edwards*. Seduction laws today are likely to come across as relics and may prompt a more critical approach by a reviewing court.

As for specifics, these cases—particularly the *Franklin* case—demonstrate a possible means of distinguishing Idaho's seduction laws from Idaho's previously upheld crime of statutory rape. While the crime of statutory rape and its threat of criminal prosecution and imprisonment may serve to deter underage pregnancies, it is not so clear that a civil lawsuit serves the same function. While punitive or exemplary damages may be available, these damages still fall short of outright imprisonment and the stigma of a criminal record for a sexual offense. This suggests that the connection between Idaho's seduction laws and the interest in protecting against underage or out-of-wedlock pregnancies is not as solid as may be needed in the face of an equal protection challenge.

In addition to successful challenges to seduction in other states, the Idaho Supreme Court itself may have suggested that Idaho's seduction laws are vulnerable to a constitutional challenge. Idaho's most recent appellate case that mentions seduction, *Hei v. Holzer*, includes a footnote in which the court goes out of its way to state that the defendant did not challenge the constitutionality of Idaho's law of seduction and that the court therefore did not address that issue on appeal.²⁷³ That the court felt that this was a point worth noting could indicate a receptiveness to arguments against seduction's constitutionality.

iii. Does Idaho's Seduction Law Violate Substantive Due Process?

What of the Fourteenth Amendment's Due Process Clause?²⁷⁴ The United States Supreme Court has recognized that the Due Process Clause protects

272. See *Kralick v. Shuttleworth*, 49 Idaho 424, 289 P. 74, 79–80 (1930).

273. See *Hei v. Holzer*, 139 Idaho 81, 85 n.2, 73 P.3d 94, 98 n.2 (2003).

274. U.S. CONST. amend. XIV, § 1, cl. 3 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]").

substantive rights, which include a right to contraception,²⁷⁵ interracial marriage,²⁷⁶ same-sex marriage,²⁷⁷ and consensual, private sexual conduct.²⁷⁸ Despite the Supreme Court's recent ruling in *Dobbs v. Jackson Women's Health Organization* which removed the right to abortion from that list, the Court insists that those rights remain in place.²⁷⁹

The right to engage in consensual, private sexual conduct is the most applicable Due Process protection in the seduction context. But applying this right to seduction may be a problem. *Lawrence v. Texas* did not involve civil suits over sexual conduct, it involved a state's criminalization of sodomy.²⁸⁰ And the *Lawrence* Court emphasized what the case before it did *not* involve:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."²⁸¹

A defense of Idaho's seduction statutes can highlight the "full and mutual consent" language from *Lawrence* and argue that sexual conduct rises to tortious seduction because it vitiates consent. Idaho's case law elaborating on the meaning of seduction may support this reading. In *Seamons v. Spackman*, for example, the plaintiff's testimony described facts amounting to rape, as she claimed that the defendant had forced himself on her despite her stated refusal and physical attempts to resist.²⁸² Treating such behavior as tortious should not raise due process concerns in light of the lack of sufficient consent. Should Idaho courts treat seduction as only applying in circumstances where consent is lacking due to force,

275. *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965) (including the Fourteenth Amendment as one of several constitutional rights guarantees, the penumbras of which protect a right to privacy).

276. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

277. *See Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

278. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

279. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277–78 (2022).

280. *Lawrence*, 539 U.S. at 563.

281. *Lawrence*, 539 U.S. at 578 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)).

282. *Seamons v. Spackman*, 81 Idaho 361, 368, 341 P.2d 442, 446 (1959).

fraud, or other subterfuge, Idaho would have a strong argument that its seduction tort survives due process scrutiny.²⁸³

B. Should Idaho Permit Seduction Torts?

Setting these significant concerns over constitutionality to one side, questions remain over whether it is a good thing for Idaho to have seduction laws in the first place. Idaho's Supreme Court has been unsparing in its criticism of other heartbalm actions.²⁸⁴ Do its critiques apply to seduction suits and, if so, should Idaho's legislature simply do away with the tort?

i. Doubts Over the Standard Critique

The answer may be more complicated than Idaho's Supreme Court suggests. To fully address the issue, it is worth stepping back to appreciate the historical context of Idaho's law of seduction. Lea Vandervelde writes that, historically, victims of rape or sexual assault lacked means of recovering damages from the perpetrator.²⁸⁵ Some jurisdictions, while recognizing a crime of rape or sexual assault, failed to recognize a private action for damages arising from the same misconduct.²⁸⁶ Vandervelde writes that "no established legal tradition existed to legitimate and support this type of remedy," noting an absence of historical cases involving actions for damages brought by rape victims.²⁸⁷ In some cases, the victim of a sex crime was required to press criminal charges under the doctrine of "misprision of felony"—a rule that required those who knew a felony had been committed to prosecute that misconduct.²⁸⁸ This, Vandervelde argues, likely reduced the chances of settlement for injuries arising from rape and sexual assault, as "accepting money for not pressing a crime would be deemed to compound it."²⁸⁹ As a result, "the obstacle of first pursuing the criminal charge dimmed the prospect of civil recovery."²⁹⁰

In the face of these and other obstacles, "the tort of seduction bypassed several doctrinal, evidentiary, and procedural minefields barring a woman's direct action for recovery."²⁹¹ Thorny issues over whether a woman consented or sufficiently resisted advances were irrelevant where her father was the one who held the right to bring the action.²⁹² And he could sue without worrying about

283. See J. Richard Broughton, *The Criminalization of Consensual Adult Sex after Lawrence*, 28 NOTRE DAME J. L., ETHICS & PUB. POL'Y., 125, 142–43 (2014).

284. See *supra* Section D.

285. Vandervelde, *supra* note 7, at 842.

286. *Id.*

287. *Id.* at 844.

288. *Id.* at 847.

289. *Id.*

290. *Id.* at 848.

291. See Vandervelde, *supra* note 7, at 867.

292. *Id.*

misprision of felony because he was not the victim of the crime.²⁹³ To be sure, the early law of seduction left women in a subordinated role—relying on their fathers or (occasionally) on other close relatives to bring suit on their behalf.²⁹⁴ But as the tort developed into what it is today in Idaho, plaintiffs gained the ability to sue on their own behalf.²⁹⁵

This development was soon met by opposition, resulting in widespread abolition of heartbalm torts.²⁹⁶ Those who sought reform of heartbalm statutes from the 1930s, as well as courts today, stress concerns over the use of seduction suits for blackmail and the difficulty in calculating damages in seduction cases.²⁹⁷

These arguments persist, and motivated the Idaho Supreme Court's decision to eliminate those heartbalm torts that it has already abolished.²⁹⁸ Given the prominence of these concerns in historic heartbalm reforms, including the abolition of alienation of affection and criminal conversation in Idaho, they should not be excluded from a discussion of whether Idaho ought to retain its seduction tort.²⁹⁹

But worries over blackmail and a lack of standards for damages may be exaggerated to the exclusion of other, more pressing considerations. Kyle Graham notes that, starting in the mid-1930s, concerns over heartbalm torts being used "as tools in the hands of unscrupulous blackmailers and canny gold diggers best resonated among state legislators."³⁰⁰ The high-profile nature of those cases that sought or resulted in inflated verdicts also likely attracted the most media attention—likely feeding modern concerns over the difficulty of calculating damages in heartbalm suits.³⁰¹

But the specter of a malicious plaintiff hoping for a substantial payout appears to be grounded in little more than outmoded and baseless stereotypes. Graham adds context, stating that despite the high level of publicity devoted to heartbalm lawsuits, "this publicity disguised the fact that relatively few amatory actions were being filed with the courts by the early 1900s."³⁰² Still, the picture is a complicated one. Jane Larson notes a "curious tension between misogynistic backlash and feminist idealism in the anti-heartbalm movement."³⁰³ Misogynistic concerns over gold-digging, blackmailing women were in play, but so were feminist critiques of "heartbalm actions as antithetical to 'modern' values of female emancipation,

293. *Id.* at 868.

294. *Id.* at 873.

295. *Id.* at 891–92.

296. *See* Sinclair, *supra* note 26, at 66.

297. *See id.* at 68; *see also* Larson, *supra* note 29, at 394–95; Graham, *supra* note 130, at 417.

298. *See* O'Neil v. Schuckardt, 112 Idaho 472, 476, 733 P.2d 693, 697 (1986).

299. *See id.*; *see also* Neal v. Neal, 125 Idaho 617, 621, 873 P.2d 871, 875 (1994) (arguing that a criminal conversation suit "may expose the defendant to the extortionate schemes of the plaintiff, since it could ruin the defendant's reputation").

300. Graham, *supra* note 130, at 417.

301. *See id.* at 412–14 (summarizing highly publicized heartbalm suits and noting that plaintiffs often demanded "enormous sums," which juries occasionally granted).

302. *Id.* at 409.

303. Larson, *supra* note 29, at 398.

sexual liberation, and compassionate marriage,” as the “seduction tort assumed that women were by nature sexually passive and had sex only because men pressured them.”³⁰⁴ Feminist critics of heartbalm laws also took issue with the notion that extra-marital sex “destroyed [the seduced woman’s] self-respect, her reputation, and her chances to marry,” as these claims “rested on the premise that women were dependent on men and marriage for economic support and social identity.”³⁰⁵

In a broader historical context, though, the backlash and abolition of seduction actions appears to be a denial of women’s ability to advance sexual harassment and assault claims—especially when those instances reflected longstanding power imbalances.³⁰⁶ For centuries, women had either no recourse for these harms, or were reliant on men to bring claims on their behalf. In the 1930s, not long after changes that permitted women to bring suit on their own behalf, women’s ability to recover damages was again removed—this time in the form of the abolition of seduction torts.³⁰⁷

As for concerns over a lack of standards for damages, this does not seem to be meaningfully different from other aspects of tort law which require the calculation of damages to account for emotional distress and loss of consortium.³⁰⁸ Loss of consortium is especially relevant here, as it is routine for courts to instruct juries regarding the calculation of damages resulting from the loss of comfort and companionship of one’s spouse as a result of injury or death.³⁰⁹ While this calculation may not necessarily be easy, it is one that is common in tort law and not a unique problem for seduction (or heartbalm actions in general, for that matter).

ii. Alternate Arguments Against the Tort of Seduction

In light of all of this, are concerns over seduction overblown? Perhaps Idaho should keep its law of seduction (questions of constitutionality aside).

The discussion above reveals some problems with common critiques against seduction, but these criticisms are by no means the only arguments against the tort. In addition to the constitutionality concerns noted above, the existence of alternate causes of action for sexual assault and harassment, along with the possibility of a more measured reform to seduction laws all present preferable alternatives to keeping Idaho’s seduction tort.

304. *Id.* at 395–97.

305. *Id.* at 397.

306. *See Vandervelde, supra* note 7, at 895.

307. *See id.* at 895 (arguing that changes permitting women to bring suit on their own behalf “finally brought the significance of these cases directly into the legal consciousness”).

308. *See Phillips v. Erhart*, 151 Idaho 100, 109, 254 P.3d 1, 10 (2011) (upholding jury award for loss of consortium and noting the unchallenged instruction to the jury indicating that “[l]oss of consortium’ means the loss of the aid, care, comfort, society, companionship, services, protection and conjugal affection of an injured spouse.”).

309. *See id.*; *see also* Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987, 2020–21 (2012) (making this argument in the context of a defense of alienation of affection torts).

While seduction served as one of the only means by which women could sue for damages after enduring rape or sexual assault, other means to seek damages exist today. Federal and state laws provide avenues for victims of sexual harassment in the workplace to seek damages.³¹⁰ Minor plaintiffs may bring civil causes of action arising from sexual abuse or exploitation within five years after they reach eighteen years of age.³¹¹ Broader torts like battery and intentional infliction of emotional distress may be brought in circumstances involving sexual assault or misconduct.³¹²

Doing away with seduction entirely is not the only option either—the tort could be narrowed or reformulated into a clearer cause of action that targets conduct deemed particularly harmful. Jane Larson, for example, proposes a tort of “sexual fraud” in cases where a defendant’s misrepresentations induce the plaintiff into consenting to sexual relations to the extent that the plaintiff suffers “serious physical, pecuniary, and emotional loss” as a result of the misrepresentation.³¹³ Narrowing the tort of seduction, rather than doing away with it entirely, may yet be of some use for plaintiffs who seek to recover damages for physical harm or emotional distress arising from exposure to sexually transmitted infections—particularly in instances where the defendant has such an infection and lies about this fact.³¹⁴ Narrowing seduction laws in this way may prevent the tort from being weaponized, used too frequently, or abused in the manner that criminal conversation and alienation of affections may be.³¹⁵ Idaho’s seduction law could also be revised to remove gendered language and permit seduction suits for everyone, thereby taking much of the force out of equal protection arguments against the statutes.³¹⁶

And eliminating Idaho’s seduction law (leaving open the possibility of replacing it with something else) does seem to address some of the Idaho Supreme Court’s worthwhile concerns. In abolishing the tort of criminal conversation, the

310. See IDAHO CODE § 67-5909 (2022); 42 U.S.C. § 2000e-2.

311. See IDAHO CODE §§ 6-1701, 6-1704 (2022).

312. See, e.g., *Curtis v. Firth*, 123 Idaho 598, 600–01, 850 P.2d 749, 751–52 (1993) (involving claims arising from an abusive intimate relationship and rejection of the defendant’s arguments that the facts failed to show a cause of action for intentional infliction of emotional distress); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 619–20 (2005) (noting that the wrong of “deceiving an unmarried woman into consenting to sex” was “already tortious as a battery under the law of every state” when states began enacting legislation abolishing heartbalm torts).

313. See Larson, *supra* note 29, at 453.

314. See DEBRAN ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN’S RIGHTS IN AMERICA* 463–64 (2004) (discussing cases upholding damage awards where defendants lied about whether they had sexually transmitted infections, as well as cases like *Neal v. Neal* that leave open the possibility for such recovery should there be sufficient proof).

315. See *O’Neil v. Schuckardt*, 112 Idaho 472, 477, 733 P.2d 693, 698 (1986).

316. But see MACKINNON, *supra* note 246, at 231–32 (arguing that the strategy of critiquing sexual inequality and working toward purportedly neutral treatment denies that “social reality is split by sex inequality”).

court noted the “medieval rationale” for the tort—one which no longer existed in modern circumstances.³¹⁷ In crafting a constitutional defense of the law, its advocates may formulate arguments about preventing teenage pregnancies, but seduction’s history reveals centuries’ of focus on stereotypes of women’s chastity and reinforcing patriarchal social and family dynamics. With alternative means for recovery now existing, and a history of development out of necessity in a world where women were deemed incapable of maintaining legal actions on their own behalf, a strong argument exists for removing the tort of seduction from the statute books in favor of modernizing the legal system. Idaho’s courts have done away with alienation of affections and criminal conversation. The legislature has saw to the end of criminal laws against adultery, fornication, and sodomy. Perhaps it is now seduction’s time to go.

V. CONCLUSION

Seduction first emerged as one of the only means for the legal process to account for the harm women suffered from sexual misconduct.³¹⁸ The tort’s development reflects changing legal conceptions of women, as seduction evolved from a tort only fathers could assert due to their daughters’ lack of legal capacity, to an action women could assert on their own behalf.³¹⁹ Seduction’s final stage is, in many cases, its disappearance, resulting from a contradictory combination of misogynistic concerns over gold-digging blackmailers and feminist critiques of the importance of chastity in maintaining one’s social standing.³²⁰

Yet seduction still exists in Idaho, even if the state’s recent abolishment of other heartbalm torts, and the crimes of adultery and fornication suggest otherwise. As a creature of statute, Idaho’s seduction laws cannot simply be done away with through judicial action. The legislature must act absent a successful constitutional challenge.

Such a challenge is not out of the question. Idaho’s gendered seduction statutes make it a target for equal protection challenges. Between the nature of the conduct at issue and other states’ overturning of their own seduction statutes, a constitutional challenge to Idaho’s seduction laws has a fair chance of success.

Of course, such a challenge will likely only arise if a plaintiff sues for seduction in the first place. And this returns us to this Article’s final question: should Idaho retain its law of seduction? With other avenues of seeking recovery such as battery, sexual harassment, and intentional infliction of emotional distress, it does not seem that seduction in its current form adds much to Idaho’s tort law landscape. Between the constitutional obstacles seduction faces and its modern redundancy, there is little reason to keep the tort on the books. In any event, Idaho’s law of seduction lives on—for now.

317. See *Neal v. Neal*, 125 Idaho 617, 620, 873 P.2d 871, 874 (1994).

318. Vandervelde, *supra* note 7, at 867–68.

319. *Id.* at 867, 891–93; Larson, *supra* note 29, at 385–86.

320. See Larson, *supra* note 29, at 394–98.

