THE SOCIAL ORIGINS OF THE PERSONALITY TORTS

*Samantha Barbas**

TABLE OF CONTENTS

The period between 1880 and 1910 was a significant one in the law of torts. Urbanization, industrialization, and the growth of factory labor and the railroads led to an increasing number of personal injury claims.[1] The tort of negligence was developed, and torts became a recognized area of law, both in the world of legal practice and in the legal academy.[2]

---

* Associate Professor of Law, SUNY Buffalo Law School. J.D., Stanford Law School; Ph.D., History, University of California Berkeley.

1. Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 12 AM. B. FOUND. RES. J. 351, 352-56 (1987) [hereinafter Friedman, *Civil Wrongs*].

2. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, REVISED EDITION

This period also produced another distinct set of tort cases and doctrines. These are tort causes of action oriented around the protection of "personality"—one's public image, honor, reputation, and emotions. For much of the nineteenth century, these sorts of intangible injuries were relatively minor concerns of the legal system; such matters were thought better to be worked out in the course of social affairs, in the rough and tumble of daily life.[3] In the late 1800s, however, the law became increasingly involved in the management and protection of people's feelings, reputations, and social relations. Courts created a new body of law in this area, recognizing new torts of "invasion of privacy" and intentional infliction of emotional distress, and expanding the law of libel. Within the span of 30 years, tort law was beginning to intervene in a domain where it had been fairly limited and tangential.

The history of these so-called "personality torts" has received little scholarly attention. Existing scholarship in this area has focused mostly on present-day doctrine; there has been little work on broader questions of causation and origins. To this end, this Article offers a possible historical explanation for the development of these personality torts. It argues that the emergence of these torts can be seen as a response to a social reorientation taking place between roughly 1880 and 1910—a change in the way people constructed their social identities and were known to one another.

In the last decades of the 19th century, large-scale commerce was becoming an important presence in American life. Commercial institutions such as the mass-circulation press, railroads, and department stores transformed work, transportation, and consumption habits.[4] These entities were also affecting the ways individuals constructed their reputations and social personas. In a phenomenon that was becoming increasingly common, people's public images and reputations were injured by commercial institutions and their agents. Intimate, embarrassing personal information was published in gossip columns, and people were libeled in sensationalistic newspaper articles. Men and women were publicly insulted by commercial personnel such as railroad conductors and

---

300 (2d ed. 1985) [hereinafter FRIEDMAN, HISTORY]; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 85 (1977); Gary Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1728-30 (1981); John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 703 (2001) ("[L]egal scholars developed a discrete field [of law] known as 'tort law;'" and by 1900, "law libraries swelled with new treatises on torts.").

3. *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 875-77 (1939).

4. GUNTHER BARTH, CITY PEOPLE: THE RISE OF MODERN CITY CULTURE IN NINETEENTH-CENTURY AMERICA 58-59, 110-11 (1980); DAVID NASAW, GOING OUT: THE RISE AND FALL OF PUBLIC AMUSEMENTS 2-4, 9 (1999).

theater ushers, humiliated before crowds of strangers. At a time when a positive reputation and public image were regarded as prized social assets, these acts of insult, defamation, and shaming were viewed with indignation. Gossip, dueling, and verbal confrontation—tactics used to defend reputation and public image in small communities—were largely ineffective against attacks by these impersonal commercial forces. With informal mechanisms of redress foreclosed, aggrieved individuals turned more frequently to the law. The modern personality torts originated, in part, from this movement.

Between 1880 and 1900, there were an unprecedented number of libel suits against newspapers. Claims were also brought against the press and commercial advertisers for a kind of public humiliation that was being described as an "invasion of privacy." Plaintiffs initiated novel legal claims for "insult," or intentional infliction of emotional distress, against the employees of railroads, theaters, and other commercial institutions who falsely accused them of a crime or otherwise shamed them in public. Sensitive to the imbalance of power between the parties and the inability of plaintiffs to remedy their injuries through means outside the law, courts responded favorably in many of these cases. Through the expansion of existing torts and the development of new causes of action, courts allowed plaintiffs to rehabilitate their public images and assert their own claims to identity against the competing claims of commercial institutions wielding great authority in the public sphere.

Each of the three case studies in this Article focuses on a particular "personality" tort that was developed in this era in response to threats to reputation and public image posed by commercial institutions that were seen as beyond the reach of informal social controls. Part I begins by explaining the historical backdrop—the industrialization, urbanization, and population growth that transformed American life in the late nineteenth century. Part II describes the largely unknown origins of the tort of intentional infliction of emotional distress in a series of lawsuits brought over insults to passengers by railroad employees. Part III explores the growth and transformation of libel law in response to attacks on reputation by the new, sensationalistic mass-market press. Part IV discusses the origin of the tort of invasion of privacy in turn of the century cases where newspapers and advertisers publicly misrepresented and shamed people by using their photographs in ads without consent.

The development of the negligence tort has been described as a response to the increase in industrial accidents in this era—physical injuries caused by industrial enterprises such as factories and

railroads.[5] The rise of these "personality" torts can be seen in a similar vein: as a response to the increasing number of emotional and dignitary injuries—injuries to reputation, social status, and social identity—inflicted upon private citizens by commercial institutions. The development and growth of personality law at the turn of the century is accident law's unexplored corollary. In an era of rising social inequality, when the perceived loss of individuality and autonomy in the face of expanding government and business institutions was becoming a cultural theme, the personality torts became, to use the words of one torts scholar, an "instrument for judicial tinkering" with social relationships "on behalf of the less powerful party in that relationship."[6] In fashioning new remedies for injuries to reputation and public image, and applying them, sometimes generously, the law gave ordinary Americans a "measure of control over, or at least respect from" the institutions that were beginning to "dictate[] many of the terms and conditions of everyday American life."[7]

PART I: THE HISTORICAL BACKDROP

In the era immediately preceding the turn of the twentieth century, the United States underwent significant population growth, urbanization, and industrialization.[8] In the cities, dominated by new commercial forces and modes of transportation and technology, individuals were experiencing new relationships to authority, new life possibilities and limitations, and new ways of imagining and expressing their social identities.[9] These changes led to developments in the law of torts—the increasing movement of tort law into the realm of emotional, reputational, and identity-based harms.

A. The Rise of the Cities

Between 1870 and 1900, the United States completed a historical transformation that began in the decades before the Civil War—a shift from an agrarian economy of rural small towns to a mass urban

5. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 16-18 (2003) (noting that "[a]dvances in transportation and industry . . . made injuries involving strangers more common" and that the tort of negligence arose when "judges and legal scholars sought to establish a theory of liability for stranger accidents."); *see* Friedman, *Civil Wrongs*, *supra* note 1, at 351; John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 519 (2003). *See generally* RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910 (1992).

6. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982).

7. Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 391 (2008).

8. RICHARD HOFSTADTER, THE AGE OF REFORM 173-75 (1955).

9. *See generally* BARTH, *supra* note 4 (discussing the rise of modern city culture in the nineteenth century).

industrial society.[10] In 1860, only one-sixth of the population lived in cities; by 1900, a third of the population did.[11] Between 1860 and 1910, America's urban population increased nearly sevenfold.[12]

The rise of the cities was a function, in part, of unprecedented immigration.[13] Urbanization was also a result of industrialization, the creation of a mass market for consumer goods, and the migration of millions from rural areas in search of employment.[14] New modes of transportation and communication facilitated this flow of people and goods. There were only three thousand telephones in 1876; by 1900, the number had increased to 1.3 million.[15] The number of post offices increased threefold, the distance of telegraph wire by nine times, and the volume of telegraph messages by seven times.[16]

The concentration of the population in the cities and the expanding role of state and local governments in economic and social affairs led to the establishment of administrative structures and institutions—courts, public health offices, welfare boards, and police departments.[17] The infrastructure of America's retail economy was also built in this period—dry goods stores, department stores, and other consumer emporia.[18] Venues of public amusement, such as theaters and dance halls, proliferated by the end of the century.[19] A network of private railways and public streetcars enabled transport within cities and between cities, suburbs, and rural areas.[20] Mass circulated newspapers and magazines facilitated commerce and informed city dwellers of the complex web of political and social activities that surrounded them.[21] People who had once lived in small towns, where social life was mediated by intimate community, traditional religion, and more informal kinds of trade, now found their daily experiences orchestrated by agencies that were distant

10. HOFSTADTER, *supra* note 8, at 173-75.

11. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 164 (6th ed. 1998).

12. HOFSTADTER, *supra* note 8, at 173.

13. *Id.* at 175-76.

14. *Id.* at 173-76.

15. BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 47 (1976).

16. *Id.*

17. HOFSTADTER, *supra* note 8, at 174.

18. *See* SIMON J. BRONNER, *Reading Consumer Culture*, *in* CONSUMING VISIONS: ACCUMULATION AND DISPLAY OF GOODS IN AMERICA, 1880-1920 13, 25-28 (Simon J. Bronner ed., 1989).

19. NASAW, *supra* note 4, at 1-3.

20. *See* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920 (2001) (discussing the role of railroads in the United States in the late nineteenth century).

21. On the rise of newspapers and mass publishing, see BARTH, *supra* note 4, at 58-109.

and faceless.

Even those outside of city lines felt urbanization's effects. The impact of late nineteenth century urbanization was not only to expand metropolitan areas but also to develop broad regional networks of transport, commerce, culture and communication.[22] As historian Thomas Bender observed, by the 1870s, the residents of small towns had begun to notice, with some alarm, that their communities were being drawn into a "metropolitan orbit," and that their "social institutions were being reshaped in ways that enhanced their translocal connections at the expense of their local ones."[23] Small communities, once autonomous units, had become nodes in a national network linked by trains, publishing outlets, chain stores, and the mass distribution of products.

By 1900, these developments had generated cultural resistance. To a number of critics, the individual, private, and personal had been imperiled by the large-scale, corporate, and commercial.[24] Populists and Progressives attacked sharp inequalities between labor and capital and the consequences of industrialization, and argued that institutions should be held socially and legally accountable for the suffering they caused.[25] Anti-corporate and anti-commercial themes were present in the art, literature, culture, and intellectual thought of the time.[26]

Many Americans experienced a sense of dislocation as they adjusted not only to new lifestyles, but to new ways of conceptualizing and presenting their social personas.[27] The institutions and forces that had shaped and determined social identity in small towns—community, family, and local tradition—had become much less significant in the urban environment. The cities were vast and culturally heterogeneous; the "give and take of daily chores, the mingling of people in the crowded streets, in parks and theaters, shops and factories, exposed [people] to a multitude of different influences," historian Gunther Barth wrote.[28] Urban dwellers struggled to define themselves socially in a setting that seemed anonymous, bewildering and even strange, one embodied in the symbol of the vast corporation, the image of the teeming and faceless crowd, the flow of railroad track into a distant horizon.

---

22. *See id.* at 58-60.

23. THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 109 (1982).

24. HOFSTADTER, *supra* note 8, at 175.

25. *See generally* ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE (1991) (discussing popular theories of social reform).

26. *See* T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE 1880-1920 309 (1981).

27. BLEDSTEIN, *supra* note 15, at 46-49.

28. BARTH, *supra* note 4, at 23.

B. Image Consciousness

In this milieu, looks, images, and social appearances were vested with great importance. In contrast to small towns, where people knew each other intimately, in the cities populated by strangers, one's social identity was often a function of first impressions. Unlike small communities, where reputations were forged through close interactions over time, in large urban areas, opinions about others were often formed on the basis of transitory encounters on the streets, in theaters and stores, in railway cars, and the other public and commercial venues that comprised the terrain of urban social life. In order to make a favorable impression on strangers, people had to externalize their identities—display their class, social status, and other markers of identity on the surface of their appearances.[29] In the cities,

> "[w]e find ourselves reading off a whole personality from the gesture which a man uses to smooth down his hair. We glance at a set of clothing or the texture of the skin on a man's hand and read into it a class, an occupation, and a whole way of life,"

anthropologist F.G. Bailey writes.[30]

In the cities and large towns of the late nineteenth century, there developed an *image consciousness*, a preoccupation with mastering and perfecting one's public image and social appearance. There was particular concern with externalities such as fashion, speech, and manners. Advice and etiquette books were published in large quantity, providing "exhaustive specifications of what to do in every conceivable situation: how high to lift one's skirt when crossing a street . . . how to shake hands . . . [and] how to make calls."[31] The metaphor of social life as a "performance" on a "stage" was beginning to be used; one went in public to put forth one's best image, to see and be seen. It was becoming an accepted fact of life "that everyone employed 'fronts' when in public," and that all social appearances were, to some degree, constructed or contrived, observes historian Charles Ponce DeLeon.[32] In the nineteenth century commercial metropolis, the "immediate impressions [people] made upon each other" were coming to be seen as "the very basis of social existence."[33]

There was to be a reward for this scrupulous attention to social

---

29. *See* BLEDSTEIN, *supra* note 15, at IX.

30. F.G. Bailey, *Gifts and Poison*, *in* GIFTS AND POISON: THE POLITICS OF REPUTATION 10 (F.G. Bailey ed., 1971).

31. ARTHUR M. SCHLESINGER, LEARNING HOW TO BEHAVE: A HISTORICAL STUDY OF AMERICAN ETIQUETTE BOOKS 33-35 (1946) ("[E]tiquette books . . . streamed from the press at [a] rate of five or six a year between 1870 and 1917 . . . .").

32. CHARLES L. PONCE DE LEON, SELF-EXPOSURE: HUMAN INTEREST JOURNALISM AND THE EMERGENCE OF CELEBRITY IN AMERICA, 1890-1940 29 (2002).

33. RICHARD SENNETT, THE FALL OF PUBLIC MAN 151-52 (1977).

appearances—upward mobility and the possibility of social and material success. Particularly in the new urban centers, where traditional hierarchies had yet to be fixed, and where the boundaries between classes were relatively fluid, it was thought that individuals could create new identities and advance socially by fashioning desirable public images.[34] The opportunity to transform one's fate by creating a positive image was being described as the essence of the fabled American Dream of self-transformation and social mobility.[35]

C. Institutional Shaming

As people became especially conscious of their public images, they were also attuned to potential threats to their images. One seemingly formidable threat, one that was described richly in the cultural texts of the time, came from the instrumentalities of mass commerce. Newspapers and magazines, railroads, department stores, theatres, and other commercial institutions had become central to urban social life.[36] Increasingly, these entities set the tone of public discourse, channeled the flow of information, and regulated the physical spaces where social interaction took place. These institutions were also beginning to exert control over individuals' reputations and social appearances.

In the last two decades of the nineteenth century, commentators began to describe acts that I refer to as "institutional shaming." These involved commercial institutions or their agents attacking, tarnishing, or otherwise undermining a person's public image, reputation, or other claims to social identity. Such acts were typically committed before a large public audience. They inflicted upon their victims embarrassment, emotional distress, and in some cases, a loss of social standing.

In 1904, a woman who found that her photographic portrait had been stolen and put on a set of commercial trading stamps without her consent suffered ridicule and humiliation.[37] A man publicly accused by a train conductor of having cheated on his fare "in the presence of a large number of his fellow passengers" endured

34. LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 31, 36 (2007) [hereinafter FRIEDMAN, GUARDING] ("Etiquette books . . . always carried an implicit message: You can become a person whose manners are impeccable and whose comportment commands respect.") (emphasis omitted).

35. *See* LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 27 (1990) [hereinafter FRIEDMAN, REPUBLIC] (discussing free choice and "development of the self").

36. *See* BARTH, *supra* note 4, at 58-59, 110-11; NASAW, *supra* note 4, at 2-4, 9.

37. *See* Rhodes v. Sperry & Hutchinson Co., 104 N.Y.S. 1102, 1102 (App. Div. 1907).

"ridicule, humiliation, and disgrace."[38] Newspapers were attaining mass circulations in this era and many adopted a sensationalistic tone. As one subject of a trumped-up and false story in a newspaper commented, the result of the scandalous publication was to "ostracize[] her from the society of reputable people."[39] In 1888, "a writer detailed the anguish suffered by . . . a civic leader when newspapers" publicized the intimate details of his daughter's secret marriage.[40] "No newspaper has a right to publish broadcast a matter which belongs to my hearth-stone. . . . [W]hen I am prostrated with grief, it is an outrage upon me as a citizen to have dragged into print a story which I had kept to myself."[41]

These acts were viewed with outrage and indignation. Being publicly humiliated in this manner not only impaired one's chances for social respect and advancement but his or her very sense of self.[42] The mid-nineteenth century saw the ascendance in the United States, particularly the Northern states, of the concept of dignity, based on the idea of every person's intrinsic self-worth.[43] The essence of dignity was autonomy and self-definition: one's right to express oneself, make life choices, and control one's fate, which included the right to determine one's own reputation and social identity.[44]

The rise of this phenomenon of institutional shaming heralded a new, modern kind of identity politics, one beset by inequalities and vulnerabilities. In traditional small communities, people whose reputations had been attacked by other community members could vindicate themselves through informal social mechanisms.[45] When a person was attacked or maligned by another community member's unfavorable gossip, he or she could confront the gossiper. Verbally accosting a person who injured one's reputation was a time-honored tradition in nineteenth century America.[46] So was physical violence—

38. Bleecker v. Colo. & S. Ry. Co., 114 P. 481, 481 (Colo. 1911).

39. Harriman v. New Nonpareil Co., 110 N.W. 33, 34 (Iowa 1906).

40. ROCHELLE GURSTEIN, THE REPEAL OF RETICENCE: A HISTORY OF AMERICA'S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART 36-37 (1996).

41. *Id.* at 37 (quoting Joseph Bishop, *Newspaper Espionage*, FORUM MAGAZINE, 1886, at 535).

42. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 711 (1986).

43. *See* EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH 19 (1984) [hereinafter AYERS, VENGEANCE AND JUSTICE].

44. *See* FRIEDMAN, REPUBLIC, *supra* note 35, at 27; *see also* AYERS, VENGEANCE AND JUSTICE *supra* note 43, at 19-20; Post, *supra* note 42, at 710-19.

45. Sally Engle Merry, *Anthropology and the Study of Alternative Dispute Resolution*, 34 J. LEGAL EDUC. 277, 281 (1984).

46. *See* AYERS, VENGEANCE AND JUSTICE, *supra* note 43, at 23.

fistfights or challenges to duels.[47] One could also engage in counterspeech—one could circulate negative rumors about one's attacker, or publicize positive information about him or herself.[48] Formal law was not often used to settle disputes over public image and reputation.[49]

As a number of critics observed, such acts of self-defense were less viable, if at all, in the urban world. Someone who was defamed in a small town would know exactly on whom to exact his revenge, but the victim of invasive journalism "would have a difficult time locating his defamer in the modern, anonymous world of large-scale publishing."[50] It was no longer possible to defend one's reputation and character "with the sword," noted one writer in 1890.[51]

One response to this new social dynamic was a turn to the law. Between 1880 and the turn of the century, state statutes were proposed that would give individuals greater control over their public images.[52] In response to scandalous cartoons and illustrations in newspapers, California passed a statute that made it illegal to publish the portrait of any person in a newspaper without the individual's consent.[53] Pennsylvania passed a similar law four years later. Another proposed California law would have required authors to sign all potentially defamatory articles or editorials.[54] There was also a turn to tort litigation. The development of new causes of action for the protection of reputation and public image, and the increase in lawsuits in this area marked a recognition of the importance of social appearances, and that traditional mechanisms for their defense were not always viable or effective in the new social milieu. In a world of strangers, impersonal relations, and mass institutions, individuals had seemingly lost critical agency over their self-presentation and the terms of their public persona.

---

47. *See* AYERS, VENGEANCE AND JUSTICE, *supra* note 43, at 9-10.

48. *See* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 20–21 (1986).

49. In the instances where a member of a small community did undertake legal action for reputational harm, the traditional vehicle was a suit for slander—for false statements that lowered one's reputation in the community. *See id.* at 15-17. Slander cases were rare, however, "only an occasional concern of nineteenth- and twentieth-century courts." *Id.* at 27-28.

50. GURSTEIN, *supra* note 40, at 147.

51. E.L. Godkin, *The Rights of the Citizen. IV.–to His Own Reputation*, SCRIBNER'S, July 1890, at 59.

52. *See* LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880–1920 65-67 (1993).

53. CAL. CIV. CODE § 3344 (West, Westlaw through 2013-2014 2nd Ex. Sess.).

54. *See* LAWSON, *supra* note 52, at 67; *see also* JAMES C. N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 31-37 (1961).

PART II: INSULT AND EMOTIONAL DISTRESS

A familiar story has been told about the origins of the tort of intentional infliction of emotional distress ("IIED"). According to this narrative, under the longstanding common law rule, courts refused to recognize "pure" emotional distress claims—claims for emotional injury in the absence of physical injury or the violation of other established rights.[55] Because emotional injuries were speculative, it was said—"hard to diagnose and . . . comparatively easy to feign"[56]—an emotional distress tort would open "a wide field . . . for imaginary claims,"[57] lead to a flood of lawsuits, and cause difficult problems of proof of causation.[58] It was not until the 1930s, when new medical findings linked emotional distress to physical illness, that the strict stance against IIED claims was reconsidered.[59] By World War II, many American jurisdictions recognized a tort action for severe emotional distress intentionally inflicted by "outrageous conduct."[60]

There is, however, another earlier and less well-known origin to the tort. Around 1900, there were a series of lawsuits involving acts of humiliation and insult committed by the employees of railroads, theaters, and other commercial institutions.[61] In these cases, courts awarded damages for the mental anguish that ensued when a customer was severely insulted before a large crowd—typically accused of a crime or other illicit act—causing embarrassment and potential reputational harm.[62] Courts began to recognize what was, in essence, a cause of action for intentional infliction of emotional distress, although it went under other legal names at the time.[63]

The award of "pure" emotional distress damages in these cases contradicted well-established tort principles. As such, these cases have been described as an "apparent anomaly" in the law of torts, to

55. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) (arguing that the law had been "reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection, even as against intentional invasions").

56. WHITE, *supra* note 5, at 103-04 ("The term 'speculative' subsumed two distinguishable characterizations of emotional discomfort: a sense that emotional illness was hard to diagnose and . . . comparatively easy to feign.").

57. Victorian Ry. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888) (appeal taken from Colony of Victoria).

58. *See* Prosser, *supra* note 3, at 875-77; WHITE, *supra* note 5, at 103-04.

59. WHITE, *supra* note 5, at 103-04; Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 142-43 (1992) (tying recognition of IIED to the advent of depth psychology in the mid-20th century); *see* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1545 (1997).

60. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 46 (1965).

61. *See* John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 66-73 (1951).

62. *See id.*

63. *See id.* at 66-69.

use the words of torts scholar Calvert Magruder.[64] When viewed within their social context, the outcomes are less inexplicable. In granting recovery for "pure" emotional distress, courts manipulated established tort doctrines on behalf of sympathetic plaintiffs—individuals seen as powerless to defend themselves and their public images against the commercial forces that were wielding greater authority over the terms of public and private life.[65]

A. Institutional Insult and Emotional Distress

1. Insult on the Rails

Many of these proto-IIED cases occurred on the railroads. By 1890, the railroads had become central to the nation's economic and social affairs. Between 1865 and 1890, the length of railroad track in the United States expanded by over five times.[66] The number of passengers went from around 241 million to over 498 million.[67] Initially a series of separate lines, by 1890 American railroads had been woven into a national system with service to every region of the country, including the furthest reaches of the West and the South.[68]

Because of their importance for public transportation, railroads were held to the status of a public utility, although they were privately owned.[69] Under the common law of common carriers, the railroads were required to carry any passenger who paid the fare and had to provide equal service.[70] They not only had to accept and carry guests, but also protect the safety of their passengers.[71] The railroad also had an obligation to establish rules to guarantee the "comfort and convenience" of passengers, including rules of race, gender, and class segregation.[72] The law did allow railroads to exclude people who "intend[ed] to harm the railroad or its passengers." [73]

The railroads were not only the most important form of public transportation but also a critical social venue, a place where one sought to "see and be seen." Passengers, particularly middle and upper-class passengers, sought to create favorable public images for themselves through their dress, speech, and behavior. Sitting in the

64. Magruder, *supra* note 55, at 1050 (internal quotation marks omitted); *see also* Wade, *supra* note 61, at 63, 70.

65. *See* Givelber, *supra* note 6, at 44; Magruder, *supra* note 55, at 1057.

66. WELKE, *supra* note 20, at 15.

67. *Id.*

68. *Id.*

69. AMY G. RICHTER, HOME ON THE RAILS: WOMEN, THE RAILROAD, AND THE RISE OF PUBLIC DOMESTICITY 23 (2005).

70. *Id.* at 23-24.

71. *Id.* at 24.

72. *Id.*

73. *Id.*

high priced seats made a public statement.[74] The way one talked and carried oneself conveyed something about one's class and potentially one's character. So too, did one's hat, shoes, and luggage. Hierarchies of gender, class, and race were enforced through the seating arrangements: there were first class cars, separate ladies' cars, and in the South, racially separated accommodations.[75] Distinctions of class and culture were also highlighted and rehearsed in the interactions between patrons and railroad workers—between middle-class passengers and working-class white conductors, and typically African American porters.[76]

Railroad companies were cognizant of the class, cultural, and racial disparities between their workers and their patrons, and they sought ways to bridge that gap. The railroads worked hard to maintain an atmosphere of refinement and politeness in passenger cars, particularly to attract female passengers.[77] Special "ladies' cars" were done up in a style that invoked images of elegant parlors.[78] During the last decades of the nineteenth century, railroad companies encouraged their workers to cast themselves as "working-class gentlemen" and make sure that good manners were observed.[79]

Yet acts of rudeness were common. "The nature of rail travel—the speed, the scale of operation, the rigid organization—often made the cars inhospitable to passengers' notions of courteousness, and the competing responsibilities of conductors compromised their ability to treat passengers politely," historian Amy Richter has written.[80] In 1887, *The New York Times* lamented the poor state of "railroad manners" and the necessity of instilling in trainmen, "a wholesome fear of discipline."[81] "Every day and perhaps a number of times a day, [a conductor] must collect fares of fifty or a hundred persons in less time than he ought to have for ten," noted one observer.[82] "In 1871, after considering '"the constant unceasing petty annoyances' routinely encountered on the job, a convention of train conductors asked, 'Would it be singular if we became harsh in our manners and brusque in our speech?'"[83]

Poorly-paid and overworked, and dealing with a multitude of

74. *See* WELKE, *supra* note 20, at 265.

75. *See id*. at 254-55 (discussing the existence of ladies' cars and segregated cars).

76. *See* RICHTER, *supra* note 69, at 112-14.

77. *Id*. at 113-14.

78. *See* WELKE, *supra* note 20, at 254.

79. RICHTER, *supra* note 69, at 113.

80. *Id*. at 123.

81. *Id*. at 121.

82. *Id*. at 123 (quoting B.B. Adams, Jr., *The Every-Day Life of Railroad Men*, *in* THE AMERICAN RAILWAY: ITS CONSTRUCTION, DEVELOPMENT, MANAGEMENT, AND APPLIANCES 383, 409 (1889)).

83. *Id*. at 123.

hurried customers, the male conductors, ticket-sellers, ticket takers, engineers, and other personnel of local and interstate railroads sometimes had little regard for the feelings, sensibilities, and social aspirations of the passengers they encountered.[84] Exhorted by their employers to collect tickets from every passenger and to eject those customers who refused to pay their fare, train personnel often abandoned politeness and performed their duties with curt efficiency, if not roughness.[85] There were apparently many acts of hostility. Railroad personnel called passengers they perceived to be noncompliant, "lunatics" and "deadbeats;" and in one reported case, one conductor even told a patron that "a big fat woman" like [her] had "no business sitting in front of the car."[86] Sometimes these accusations were shouted loudly at the offending passenger, as a prelude to expulsion from the train.[87]

2. The Railroad Insult Cases

These epithets and outbursts spawned an entire body of legal cases between 1880 and 1910. These "railroad insult" cases—lawsuits brought over the humiliation and emotional distress produced by abusive treatment in train cars—attest not only to the commonness of verbal roughness on the rails, but the priority that patrons placed on maintaining their social images in this particular social venue. So many railroad insult cases were brought in the early twentieth century that they yielded a distinct body of case law that was recognized by the first *Restatement of Torts* in 1934.[88]

Many of the insult lawsuits stemmed from disputes over "fare-skipping," in which the passenger was falsely and aggressively accused by a train conductor of trying to ride without a valid ticket. In one representative late nineteenth century case, *Louisville & Nashville R.R. Co. v. Donaldson*, the conductor destroyed a twenty-trip family ticket given to him by the plaintiff, claiming that it was invalid, and required the plaintiff to pay a cash fare.[89] He said to the plaintiff, "You are a pretty thing,—[sic] trying to beat your way"[90] (a "deadbeat" was another name for a fare-skipper). The man was

84. *See id.* at 123-24.

85. *Id.* at 123-25.

86. Haile v. New Orleans Ry. & Light Co., 65 So. 225, 225-26 (La. 1914); *see also* S. Ry. Co. v. Carroll, 70 So. 984, 984 (Ala. Ct. App. 1915) (rascal and pauper); Lafitte v. New Orleans City & L. R.R. Co., 8 So. 701, 701 (La. 1890) (passing bad money); Huffman v. S. Ry. Co., 79 S.E. 307, 308 (N.C. 1913) (cheapskate); Gillespie v. Brooklyn Heights R.R. Co., 70 N.E. 857, 858 (N.Y. 1904) (swindler).

87. *E.g.*, Shepard v. Chi., R.I. & Pac. Ry. Co., 41 N.W. 564, 564 (Iowa 1889).

88. *See* RESTATEMENT (FIRST) OF TORTS § 48 (1934).

89. 43 S.W. 439, 439 (Ky. 1897) (internal quotation marks omitted).

90. *Id.* (internal quotation marks omitted).

distressed and humiliated.[91] In another case, the plaintiff, boarding a train with her fifteen-year-old daughter and eight-year-old son, was stopped by the conductor and told that she must have "a ticket for the boy."[92] She bought one and boarded the train.[93] Later, when the conductor collected tickets, "in a loud, harsh, and insulting tone of voice and manner, in the hearing of her children and other passengers," [he] said to her: "'The idea of a woman trying to board a train with her child without a ticket! You can go on this time, but don't undertake such a thing again.'"[94] The "language and manner of the conductor "humiliated . . . and insulted her."[95] In the 1904 case *Gillespie v. Brooklyn Heights Railroad Co.*, the plaintiff, a woman doctor, had given a streetcar conductor a quarter to pay a nickel fare and the conductor, who was drunk and believed that the woman was trying to cheat him, not only refused to give her change but called her a "deadbeat" and a "swindler," and even "called the attention of [fellow passengers] . . . telling them how [she] was trying to swindle him."[96]

Often these disputes resulted in expulsion from the train car. In *Shepard v. Chicago Rock Island & Pacific Railway Co.*, a woman, as a result of the conductor's wrong instructions, remained on a train after her intended stop, and the conductor, by "the use of rough and abusive language, compelled and forced [the] plaintiff to leave the train, against her protest, in a steep and dangerous place in the road, with a heavy basket of baggage and her infant child."[97] The woman "suffered great bodily pain and mental anguish . . . [and felt] humiliated, insulted, and greatly wronged."[98] In a 1902 Georgia case, confusion over a transfer ticket led a conductor to eject a woman before other passengers.[99] The woman, who had to walk a mile home, sued for "wounded feelings and 'great physical distress.'"[100] In *Bleecker v. Colorado & Southern Railway Co.*, when the plaintiff refused to bring the tickets for himself and his party to the front of the car on the demand of the conductor, he was publicly accused of not being a "gentleman" and being a "damn little cur . . . in the presence of a large number of his fellow passengers" with "whom he daily met and associated with."[101] He was subsequently kicked off

91. *Id.*
92. Tex. & Pac. Ry. Co. v. Tarkington, 66 S.W. 137, 138 (Tex. Civ. App. 1901).
93. *Id.*
94. *Id.*
95. *Id.*
96. 70 N.E. 857, 858 (N.Y. 1904).
97. Shepard v. Chi. R.I. & P. Ry. Co., 41 N.W. 564, 564 (Iowa 1889).
98. *Id.*
99. Mabry v. City Elec. Ry. Co., 42 S.E. 1025, 1025 (Ga. 1902).
100. *Id.* at 1026.
101. 114 P. 481, 481 (Colo. 1911).

and suffered "ridicule, humiliation, and disgrace."[102]

Another genre of cases in this vein involved racially-motivated actions by train personnel; in particular, the attempts of Southern conductors to relocate passengers sitting in the whites-only train car to the Jim Crow car.[103] Plaintiffs, who claimed to be white, protested these efforts, which resulted in insults and altercations.[104] In a 1910 case, the plaintiff, a white woman, after taking a seat in the white section of a streetcar, "was asked by the conductor, 'Don't you belong over there?'" pointing to the seats behind the sign "Colored."[105] The plaintiff alleged to be shamed before a crowd and "humiliated and embarrassed."[106] In one Georgia case, a working-class male who considered himself to be white seated himself in the car for whites, and was ordered to the blacks-only car.[107] "Haven't I seen you in colored company?" the conductor asked.[108] The man brought suit for intentionally inflicted shame and injury to his feelings.[109]

The "railroad insult" became a fertile field for litigation not only because of the perceived severity of the public humiliation, but also for the reason that it was becoming popular to sue the railroads in the late 1800s.[110] Litigation against railroads expanded in the 1890s as train accidents increased, and as contingent fee practices developed in northern cities, making it easier for injury victims to obtain legal counsel.[111] There was a symbolic dimension to suing the railroads; as America's first national corporations, railway companies were the embodiment of the modern industrial order.[112]

3. Insults in Public Amusements

The railroads were not the only commercial institution being sued for acts of insult and public shaming.[113] Around 1900 there were

102. *Id.*

103. *See infra* notes 106-10.

104. *See infra* notes 106-10.

105. May v. Shreveport Traction Co., 53 So. 671, 672 (La. 1910).

106. *Id.*

107. Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 899 (Ga. Ct. App. 1907).

108. *Id.*

109. *Id.* at 900.

110. WELKE, *supra* note 20, at 70 ("By the closing decade of the nineteenth century, the rate of increase in lawsuits for accidental injury was outpacing even the dramatic rise in accidents themselves."); *see also* BERGSTROM, *supra* note 5, at 19.

111. On contingent fees see BERGSTROM, *supra* note 5, at 88-89.

112. WELKE, *supra* note 20, at 267 ("Railroads were the first national corporations in the South and in the nation more generally . . . . For the vast majority of Americans, railroads were the physical embodiment of industrialization."); CHARLES POSTEL, THE POPULIST VISION 11 (2007) ("[P]rior to the Civil War, the railroad represented unimagined progress, but by the late 1880s and 1890s it increasingly symbolized abusive economic power.").

113. *See supra* notes 78-105.

similar lawsuits brought against the operators of retail outlets and places of public amusement—vaudeville theaters, bathhouses, carnivals, circuses, department stores, and other privately-owned amusement facilities.[114] Like the railway car, these spaces were important venues of sociability in the urban environment. They were also highly regulated and monitored.[115] Stores and theaters were policed by ushers, security guards, ticket takers, and other personnel who made sure that admissions were paid, "undesirables" were kept out, and no pickpocketing or brawls between customers ensued.[116] Rough treatment, false accusations, and at times, downright discourteousness were common. [117]

As in the railway cases, the insults most commonly complained about stemmed from disputes over not paying one's fare or having an improper ticket.[118] Patrons were incorrectly accused of being thieves, line-jumpers, and cheats.[119] The insults often occurred before large crowds of strangers.[120] In *Weber-Stair Co. v. Fisher*, a 1909 case from Kentucky, the plaintiff, who thought he was buying tickets for an afternoon showing, had erroneously been given tickets for an evening theater performance.[121] He attended the afternoon show.[122] When the ticket taker discovered that he had the wrong tickets, the patron was "required, in an offensive and rude manner, to leave the hall in the presence of numerous persons."[123] In *Interstate Amusement Co. v. Martin*, the insults were part of the show.[124] The plaintiff, a member of the audience in the defendant's theater, was invited onto the stage by one of the performers, and, while there, the performer "addressed to him insulting and defamatory language."[125]

In a Tennessee case, *Boswell v. Barnum & Bailey*, the plaintiff and his wife purchased tickets for a circus performance.[126] At the

114. *See supra* notes 78-105.

115. On commercial amusements in this era, see BARTH, *supra* note 4 at 24-25, 133-34; KATHY PEISS, CHEAP AMUSEMENTS 48-50 (1986).

116. On clerks, floorwalkers, and detectives in department stores see BARTH, *supra* note 4, at 133-36; *see also* ELAINE S. ABELSON, WHEN LADIES GO A-THIEVING: THE DEPARTMENT STORE, SHOPLIFTING AND THE CONTRADICTIONS OF CONSUMERISM, 1870-1914, 183-92 (1985) (discussing detection and surveillance in department stores).

117. *See* ABELSON, *supra* note 116, at 202-08.

118. *See supra* notes 89-113.

119. *See supra* notes 89-113.

120. *See supra* notes 89-113.

121. 119 S.W. 195, 196 (Ky. 1909).

122. *Id.*

123. Annotation, *Right to Recover for Mental Pain and Anguish Alone, Apart from Other Damages*, 23 A.L.R. 361 (1923) (explaining the facts in *Weber-Stair Co.*, 119 S.W. 195).

124. 62 So. 404, 405 (Ala. Ct. App. 1913).

125. *Id.*

126. 185 S.W. 692, 692 (Tenn. 1916).

show, they handed the tickets to the usher, who took them to their reserved seats.[127] Those seats were occupied, and the usher "then undertook to move them to undesirable seats near the top of the tent, to which they objected."[128] When the husband asked to be moved to a better seat, the usher became upset and "addressed insulting and profane language to him" and also "addressed profane language to the ladies of the party" in the presence of many others.[129] The Boswells sued over this insult and the ensuing emotional distress.[130] In the 1911 case *Aaron v. Ward*, a woman sought to recover damages for humiliation and emotional distress after being ejected from the bathhouse at Coney Island following a dispute over her place in line.[131]

As with the railroad insult cases, many of the plaintiffs in these "public amusement insult" cases were females.[132] Some were subjected to profanity.[133] Others were subjected to attacks on their reputation for chastity;[134] lack of chastity was regarded as a serious moral offense in the culture of the time.[135] In a 1904 case, a security guard at an amusement park told a woman patron, "after staring her in the face in a rude and insolent manner, . . . 'You must leave these grounds. You can take the next car, coming in, or going out.'"[136] He imputed that the plaintiff "was a lewd and base woman, unfit to be or remain upon said grounds."[137] In reality, the woman was not a prostitute, as accused, but a "lady of refinement and respectability."[138] This accusation occurred "in the presence and hearing of a large group of people."[139] The woman took this matter to court.[140]

B. The Law of Institutional Insult

1. Shame, Humiliation, and Distress

In several of these cases, plaintiffs collected damages for shame,

---

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. 96 N.E. 736, 737 (N.Y. 1911).
132. *See e.g.*, *id.*; *Boswell*, 185 S.W. at 692.
133. *See e.g.*, *Aaron*, 95 N.E. at 737; *Boswell*, 185 S.W. at 692.
134. *See e.g.*, Davis v. Tacoma Ry. & Power Co., 77 P. 209, 210 (Wash. 1904).
135. On the importance of a reputation for chastity in this era, see Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 419-31 (2004).
136. *Davis*, 77 P. at 210.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

mental anguish, and emotional distress from the employer, the liable party under the doctrine of respondeat superior.[141] As the court charged the jury in one railroad insult case:

> Where a passenger is wrongfully compelled to leave a train, and suffer insult and abuse, the law . . . authorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such a sum as the jury may say is right.[142]

In some cases, the harms alleged were purely emotional; in others, plaintiffs recovered both for emotional injuries and pecuniary loss in the form of medical expenses incurred to treat the mental distress. [143]

Judgments typically ranged from $250 to $1000 (approximately $10,000 to $25,000 in 2013 dollars), equivalent to sums awarded in contemporary accident and physical injury cases in this era.[144] Damages could be enhanced based on the degree of the employee's insolent tone and general attitude; provocation on the part of the passenger, however, was allowed in the mitigation of damages.[145] Recovery did not depend on whether the accusation or statements had any actual effect on the public image of the plaintiff or whether they were false; truth was not a defense. In order to recover, plaintiffs simply had to show that the language was merely "insulting to '[a] normal person of ordinary sensibility.'"[146]

What the courts considered to be a legally remediable insult reflected conventional white, middle-class perspectives on class, gender, and race in this time. It was considered an assault for a conductor to falsely accuse a well-off white man of failing to pay his fare, implying that he was a cheat or a pauper.[147] Acts of disrespect

---

141. *See infra* notes 133-37.

142. Shepard v. Chi., Rock Island & Pac. R.R. Co., 41 N.W. 564, 565 (Iowa 1889).

143. *See infra* notes 148-51.

144. *See* BERGSTROM, *supra* note 5, at 164 (noting that "[t]he average plaintiff [in a personal injury case] . . . received . . . just under $1000").

145. *See* Knoell v. Kan. City, Clay Cnty. & St. Joseph Ry. Co., 198 S.W. 79, 81 (Mo. Ct. App. 1917); *see also* Binder v. Ga. Ry. & Elec. Co., 79 S.E. 216 (Ga. Ct. App. 1913); Lipman v. Atl. Coast Line R.R. Co., 93 S.E. 714, 715-16 (S.C. 1917).

146. Wade, *supra* note 61, at 68 n.31; *see* Ga. Ry. & Elec. Co. v. Baker, 58 S.E. 88, 91 (Ga. Ct. App. 1907) ("the question of what would be an insult to a normal person of ordinary sensibility"). This stands in contrast to the requirements of the modern IIED tort, which requires truly outrageous conduct, beyond the boundaries of decency. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

147. In a Texas case, a railroad conductor erroneously expelled a well-to-do white man and his family from the first-class car and forced them to sit in the second-class "smoker" car, insulting them by suggesting that they were not worthy of the class status they professed. WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 130 (1999) (citing St. Louis, Ark. & Tex. Ry. Co. v. Mackie, 9 S.W. 451, 452 (Tex. 1888)). The Texas Supreme Court upheld the decision

toward well-off white passengers by railroad workers, particularly black workers, were regarded as serious and legally cognizable affronts.[148] It was seen as a particularly egregious insult when a white woman, bearing all the signs of respectable, middle-class status was publicly denounced as a woman of ill-repute. As a legal treatise of the time explained, "[e]very woman has a right to assume that a passenger car is not a brothel; and that when she travels in it, she will meet nothing, see nothing, hear nothing, to wound her delicacy or insult her womanhood."[149] White judges and juries, particularly in the South, also regarded with sympathy the pleas of white passengers who claimed to have been falsely identified as black. As one court concluded, it was by definition "an insult to . . . call a white man a negro"[150] and "to charge a white man, even though of dark skin, with being a colored man . . . is to impute the odium of illegitimacy."[151]

These outcomes flew in the face of established tort doctrines. Although awards for emotional distress could be recovered where one had sustained a physical injury, and also as an element of damages in suits for assault and defamation, recovery outside these contexts had been generally proscribed under the common law.[152] An 1861 English case, *Lynch v. Knight*, was famous for originating the proposition that mental disturbance alone did not qualify as a legally cognizable harm.[153]

Courts had traditionally forbidden damages for emotional distress in suits against railroads over near-miss accidents that did not produce physical injuries.[154] The rationale was that such claims could be easily faked, and also that emotional harms were difficult if not impossible to prove.[155] This principle was so strictly adhered to that recovery was denied in what we would now see as obvious cases of shock or post-traumatic stress stemming from near-miss accidents,

---

in favor of the plaintiffs, "finding that the conductor put the family under circumstances calculated to humiliate and mortify the feelings of the appellee and his wife, who, from the record, appear to have been people of refinement and intelligence." *Id.* (quoting Mackie, 9 S.W. at 452).

148. *See* Gulf, Colo. & Santa Fe Ry. Co. v. Luther, 90 S.W. 44, 47-48 (Tex. Civ. App. 1905).

149. Craker v. Chi. & Nw. Ry. Co., 36 Wis. 657, 674 (1875).

150. Wolfe v. Ga. Ry. & Elec. Co., 58 S.E. 899, 901 (Ga. Ct. App. 1907).

151. *Id.* at 902.

152. Prosser, *supra* note 3, at 875-77.

153. *See* Lynch v. Knight, (1861) 11 Eng. Rep. 854 (H.L.) 863.

154. *See generally* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 45-46 (2010) (discussing the "impact rule"); Leon Green, *Fright Cases*, 27 ILL. L. REV. 761 (1933).

155. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814-15, 819-21 (1990).

or from witnessing loved ones injured or killed in rail accidents.[156] Permitting awards for fright or other distressing emotional states without physical injury, it was said, would lead to an avalanche of litigation, turn the courts into a forum for trivialities, and throw open a wide door for people to "mulct the railroads" for damages.[157]

Oral statements that were false and defamatory could be legally actionable under the law of slander. A defamatory statement was one that created serious injury to a person's reputation in the community; it "expose[d] [a person] to hatred [or] contempt . . . injure[d] him in his profession or trade, [and] cause[d] him to be shunned or avoided by his neighbours," in the words of an 1887 treatise.[158] Indeed, in some of these insult cases, plaintiffs did have a viable action for slander, particularly if they were falsely accused of a crime. But mere epithets that were not defamatory were not actionable under established tort law.[159] In contrast to the law in many European countries, there was no generalized action for "insult" in the United States.[160] It was often said that the "jangling of nerves" that occurred in daily social interaction was an inevitable consequence of human existence that was better dealt with by mechanisms outside the law.[161]

---

156. *See id.* at 819-21.

157. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 50-51 (4th ed. 1971).

158. WILLIAM BLAKE ODGERS, A DIGEST OF THE LAW OF LIBEL AND SLANDER: THE EVIDENCE, PROCEDURE, AND PRACTICE, BOTH IN CIVIL AND CRIMINAL CASES, AND PRECEDENTS OF PLEADINGS 19 (1887).

159. *See id.* at 53. Generally, slander is "not actionable unless actual damage is proved." PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 157, at 754. Four exceptions to this rule developed: "the imputation of crime, of a loathsome disease, . . . those affecting the plaintiff in his business, [and] . . . the imputation of unchastity to a woman. For these . . . no proof of any actual harm to reputation or any other damage is required for . . . recovery . . . ." *Id.*

160. The lack of a generalized insult action is a subject beyond the scope of this Article; legal historians have posited that Americans' relative lack of concern with status hierarchy and deference—and the external manifestations of deference, in the form of customs of politeness and courtesy—created a cultural milieu in which mere rude words were not seen as serious enough to warrant legal redress. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1372-84 (2000); *see also* Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1295 n.349 (1994); Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?*, 98 CAL. L. REV. 1925, 1931 (2010)..

161. William L. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 44 (1956) ("The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and inconsiderate and unkind."); *see also* Wade, *supra* note 61, at 99 ("It is still customary to state the general rule to the effect that no tort is committed by the hurling of opprobrious epithets or scurrilous language.").

Why, then, would courts permit a woman to recover damages for having been called a "deadbeat" by a train conductor or by a theater usher, when she could not recover for the fright or trauma caused by a near-miss accident? Why would the institutional insult scenario raise fewer concerns with faked injuries and potentially excessive litigation than a suit brought over an insult between two private individuals? One reason for the outcomes in these "institutional insult" cases was the perceived severity of the injury. In all of the successful "railroad insult" and "public accommodation insult" cases, courts emphasized that the humiliation transpired before a large audience.[162] It was the visibility of the act that led courts to regard these affronts more seriously than the "traditional" insult exchanged between two parties in the midst of a contained, private dispute.[163] In a culture attuned to social appearances and manners, publicly attacking a person with rude, abusive, and false words represented a serious affront. The injuries suffered by the plaintiffs, in other words, were not seen as likely to be faked or trivial: in the mindset of the time, "judges would readily believe that . . . few people would [experience] such [encounters] without definitely suffering."[164] Whereas people should be expected to "cultivate a minimum defense mechanism" for "private insults which reach no other ear but their own," "a person has an interest in not being embarrassed in the presence of third parties."[165]

Courts emphasized the vulnerability of the plaintiffs to these acts of public humiliation. In the railroad situation, the individual was a captive on the offender's moving vehicle; the institution was in a special position to inflict harm.[166] As the Colorado Supreme Court observed in 1911, "passengers are peculiarly under the control of the conductor and are practically helpless when compelled to defend themselves against his abuse."[167] The railroad had "unusual power and opportunity . . . to wound the feelings of those entrusted to its care," individuals "[who] rely [on it] for essential help."[168] Plaintiffs had no way to exact retribution or make the institution suffer for its assault. Particularly in the railroad cases, people could not protest by taking their business elsewhere, as the major railroads had a

162. *See* discussion *supra* Part II.A.2-3.

163. *See* discussion *supra* Part II.A.2-3.

164. Reynolds C. Seitz, *Insults-Practical Jokes-Threats of Future Harm-How New as Torts?*, 28 KY. L.J. 411, 416-17 (1940) ("Our tribunals . . . are doing no more than reiterating the thought, borrowed from the law of libel, that harm has been done when a person is exposed to ridicule, disgrace, contempt, hatred or contumely.").

165. *Id.* at 418-19.

166. Magruder, *supra* note 55, at 1051-52 nn.81-83 (citing various cases from the early twentieth century).

167. Bleecker v. Colo. & S. Ry. Co., 114 P. 481, 482 (Colo. 1911).

168. Prosser, *Insult and Outrage*, *supra* note 161 at, 60.

monopoly over public transportation in many parts of the country.[169]

Attempts by the victim to rebut or fight back against the attack on his reputation would be ineffective, courts noted. Several railroad insult cases pitted a female passenger against an aggressive male conductor. In *Shepard v. Chicago Railway,* the woman who remained on the train after having missed her stop was told by the conductor to leave, and she refused, insisting that she be taken back to the correct station.[170] He then used profanity, threatened to kick her off, and finally, over her protests, did kick her off, saying "I don't care a damn what you do."[171] Crowds who witnessed the insult were more likely to believe the official making the charges than the maligned individual. The passenger's words, particularly the female passenger's words, were not likely to be given weight when they challenged the assertions of a male official who was seen as the master of his domain.

The vulnerability of the plaintiff to these assaults, their potentially severe social consequences, and the unresponsiveness of the institution to informal social pressures made legal intervention necessary to exact justice and right the wrong suffered by the plaintiff, courts suggested in several cases. A large damage award would not only redress the plaintiff's injuries, but force the institution to change its behavior. Courts clearly wanted to teach the defendants a lesson about manners and the importance of maintaining social order and distinction; many of the opinions are punitive and hortatory, and in some cases, punitive damages were awarded.[172] Through a legal judgment for the plaintiff, the institution would be forced to exhibit "a modicum of politeness [towards its] customers" and respect patrons' assertions of status and social identity.[173]

These "institutional insult" cases contradict stereotypes of late nineteenth century courts as biased towards business and hostile towards the victims of industrialization.[174] Judicial opinions often expressed disapprobation towards the institutional perpetrators of

169. *See generally* MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901 (1962).

170. Shepard v. Chi., R.I. & Pac. Ry. Co., 41 N.W. 564, 564 (Iowa 1889).

171. *Id.* at 565.

172. *See, e.g.*, Weber-Stair Co. v. Fisher, 119 S.W. 195, 197 (Ky. 1909); McNamara v. St. Louis Transit Co., 81 S.W. 880, 881-82 (Mo. 1904).

173. Graham, *supra* note 7, at 391. As the *Second Restatement of Torts* observed, "[t]he chief value of the rule [in these cases] lies in the incentive which it provides for the selection of employees who will not be grossly discourteous to those who must come in contact with them." RESTATEMENT (SECOND) OF TORTS § 48 cmt. a (1965).

174. On the difficulty industrial workers faced in obtaining recovery for personal injuries, see Friedman, *Civil Wrongs*, *supra* note 1, at 351, 357, 369; BERGSTROM, *supra* note 5, at 74-75, 127.

insult, particularly the railroads, and sympathy towards the targets of these attacks.[175] They validated plaintiffs' injuries as legitimate, and condemned defendants' conduct as reprehensible and unjustified.[176] Courts demonstrated greater solicitude for the victims of institutional insults than those of railroad and other industrial accidents. In contrast to the accident cases, in which plaintiffs were typically workers, many of the victims of the insult cases were middle-class females, to whom the culture of this time afforded special deference. Judges, who shared in the values and worldview of the middle-class complainants, likely saw such assaults to reputation and public image—critical social currency, particularly among those seeking upward mobility—as a serious assault to dignity and an impediment to one's life prospects. Although there may not necessarily have been a pro-business bias in tort cases in this era, there were racial, gender and class biases:—white, well-off women and their social and emotional injuries were often favored over male industrial workers and their physical injuries.[177]

2. Insult and Honor

There is an obvious regional dimension to these cases. Most of the institutional insult cases were brought in the South. The modern tort of intentional infliction of emotional distress had its roots in the intense concern with social appearances that was a part of the region's longstanding culture of honor.

In the nineteenth and early twentieth centuries, the concept of honor was a central feature of Southern society. In Southern culture, a white man's honor was measured not by what he thought of himself, but what others thought of him.[178] As historian Bertram Wyatt-Brown has written, honor was an "inner conviction of self-worth," then a "claim of that self-assessment before the public."[179] The concept of honor was tied to the intensely stratified nature of Southern society,[180] which was based on sharp inequalities of race and class.[181] A person's honor was breached when he was not treated with the proper respect that should be given him based on his social standing (or when a man's female family members were not treated

175. *See, e.g.*, *McNamara*, 81 S.W. at 882 (finding the conductor's actions "inhuman, cowardly, and contemptible").

176. *See id.*

177. *See* Graham, *supra* note 7, at 392.

178. C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1823 (2001).

179. BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH 14 (1982).

180. Post, *supra* note 42, at 700.

181. *See id.* at 725-26.

as respectable ladies).[182] To insult or publicly shame someone was to question his social status,[183] to suggest that he was unworthy of the social position he claimed. [184]

Historians have long observed the distinctiveness of this Southern model of self and social identity, which was markedly different from its Northern corollary.[185] While Northerners were concerned with social appearances, their model of self also incorporated dignity.[186] When a Northerner was publicly insulted, he was distressed at having lost face before others, and at the tarnishing of his image, but he also likely suffered an inner sense of having been wronged, an affront to his sense of self.[187] By contrast, in the South, to a far greater extent, there was an "overweening concern with the opinions of others," in the words of historian Edward Ayers.[188] "[I]n the South it was considered as brutal and uncivilized to call a man a liar as it was to bruise or cut his body."[189] A public insult knocked a Southerner off his prized social pedestal, an injury that required a different sort of remedy than an affront to one's dignity.[190] While a Northerner might have his sense of self-worth restored by a private apology, in the South, restoring injured honor required public acts of redemption.[191]

Under the Southern code of honor, the male subject of disrespect or insult was obligated to clear his name and resume his social position by performing a ritual of vengeance and status rehabilitation.[192] Typically, this required acts of physical violence.[193] Among working-class white males, this involved physical sparring;

---

182. *See* AYERS, VENGEANCE AND JUSTICE, *supra* note 43, at 26.

183. *See* Post *supra* note 42, at 700.

184. *Id.* ("Different social positions will be more or less honorific, and within each social position either one will have the honor which is due that position, or one will not and be accordingly dishonored.").

185. AYERS, VENGEANCE AND JUSTICE, *supra* note 43, at 9-33.

186. *Id.* at 19-20.

187. *See id.* at 25.

188. *Id.* at 19.

189. Charles S. Sydnor, *The Southerner and the Laws*, 6 J. S. HIST. 3, 17 (1940).

190. WYATT-BROWN, *supra* note 179, at 20.

191. *See* AYERS, VENGEANCE AND JUSTICE, *supra* note 43, at 13-14.

192. *See* Kermit L. Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339, 357-58. "[D]emonstrations of honorable behavior required stylized performances in speech acts and in gesture and demeanor," according to Wyatt-Brown. BERTRAM WYATT-BROWN, THE SHAPING OF SOUTHERN CULTURE HONOR, GRACE, AND WAR, 1760s-1890s 301 (2001). Southern honor "existed not in authenticity of the self but in symbols, expletives, ritual speeches, gestures, half-understood impulses, externalities, titles, and physical appearances." *Id.* at 22.

193. AYERS, VENGEANCE AND JUSTICE, *supra* note 43, at 13-14.

among elites, the preferred ritual was dueling.[194] An important purpose of such acts of physical bravado was to provide an opportunity for both participants to prove that they deserved honorable reputations.[195] Writes historian David S. Parker, "the duel offered a highly effective tool for repairing a damaged reputation" because others viewed one's willingness to duel as "evidence" of his courage, "integrity and conviction."[196]

Dueling persisted well into the late nineteenth century, although there is some evidence that the practice was beginning to die out in the South by the 1890s.[197] Southern officials, concerned with the casualties of dueling and other honor-based violence, and the impression of barbarism that the practice gave the region, had tried to crack down on the practice.[198] In several states, dueling was made illegal and subjected to severe penalties.[199] Dueling was becoming less favored as a means of retribution both because it was against the law, and because it had become impractical, even infeasible in the urban commercial environment.[200]

Decades after it had taken root in the North, large-scale urbanization and manufacturing began in the South.[201] According to Ayers, "[t]housands of new villages came into being between 1880 and 1910," and hundreds of small towns "passed over the line into official 'urban' status."[202] The population of towns in "the South grew by five million people between 1880 and 1910."[203] By the turn of the century, urban Southerners lived in an environment that was dominated by commercial institutions, as did their Northern counterparts.[204] More of daily life was conducted in commercial spaces: train cars, vaudeville houses, dry goods shops, and department stores.[205] A means to protect one's social standing in an agricultural, small-scale society knit together by close communal bonds, acts of physical retribution in pursuit of honor and image fit less readily into the world of modern urban commerce.

---

194. *Id.* at 14-15.

195. Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 325 (1984).

196. David S. Parker, *Law, Honor, and Impunity in Spanish America: The Debate over Dueling, 1870-1920*, 19 LAW & HIST. REV. 311, 319 (2001).

197. Wells, *supra* note 178, at 1838.

198. *See id.* at 1805-807.

199. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, *supra* note 195, at 326.

200. *See id.* at 349 n.56.

201. *See* EDWARD AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 21-22 (1992) [hereinafter AYERS, THE PROMISE OF THE NEW SOUTH].

202. *Id.* at 55.

203. *Id.*

204. *See id.* at 55-60.

205. *See id.*; *see also* WELKE, *supra* note 20, at 309.

It was in this milieu that the institutional insult cases began to appear in Southern courts. A man of honor who had been publicly insulted or humiliated on a railroad car could not reasonably challenge its corporate head—a distant figure likely to be outside the community and region—to a duel or fisticuffs.[206] As a commentator observed in 1890, "[b]ankers, mill-owners, superintendents of factories and railways, do not work . . . in an environment which compels the use of the pistol-pocket."[207] Physical violence as a means of dispute resolution, he observed, was seen as anathema to the practices and norms of commercial culture: "'chivalry' and common sense, the duello and modern business'" were "absolutely incompatible."[208] Though not inconceivable, it was not prudent for a person affronted in a railroad car or a theater performance to take up arms against the usher or conductor who had offended him or ejected him. The attack would, in its own right, justify the expulsion.

Though it may have lacked the performative dimension of the duel, the institutional insult lawsuit may have begun to substitute for duels and other acts of physical violence in social contexts where such means of retribution were no longer appropriate, viable or effective. The rise of the institutional insult lawsuit tracked a more general increase in the use of the law in the South to enforce reputation, honor, manners, and social norms of civility. Three Southern states passed "actionable words" statutes that permitted a cause of action for insulting words that would "'lead to violence and breach of the peace.'"[209] Laws forbidding profanity in certain places—in particular, where women and children were present—were also enacted in several states. [210] As the established social order and

206. Journalism historian Ryan Chamberlain has noted the prevalence of duels in the nineteenth century between Southern gentlemen and newspaper editors over insulting and defamatory statements; in these cases, the publisher was typically a known member of the community. *See* RYAN CHAMBERLAIN, PISTOLS, POLITICS AND THE PRESS: DUELING IN 19TH CENTURY AMERICAN JOURNALISM 72-73 (2009).

207. *The Lingering Duello*, CENTURY ILLUSTRATED MONTHLY MAG., May 1890, at 152.

208. *Id.* at 153.

209. S. J. B., Note, *The Actionable Words Statute in Virginia*, 27 VA. L. REV. 405, 405 (1941) (quoting Acts of Assembly 1810, ch. X, § 8); *see* VA. CODE ANN. § 8.01-45 (1950) ("All words shall be actionable which from their usual construction and common acceptance, are construed as insults and tend to violence and breach of the peace."). The West Virginia statute is the same. *See* W. VA. CODE ANN. § 55-7-2 (LexisNexis 2000). For a substantially identical statute in Mississippi, see MISS. CODE ANN. § 95-1-1 (West 2007). Some of the institutional insult cases were brought under these laws; however, they would not be actionable unless the words spoken were so egregious as to "breach the peace."

210. AYERS, THE PROMISE OF THE NEW SOUTH, *supra* note 201, at 234; *see also* Wade, *supra* note 61, at 107 (noting statutes in the South that penalized the use of abusive, insulting, or profane language to women and children, especially in a public place, and general laws against profane language).

traditional forms of social organization began to dissolve in a diversifying, modernizing, urbanizing culture, the unwritten code that had governed social relations among Southern whites in earlier times began to lose its force.[211]

Southern courts were sympathetic to white plaintiffs in the institutional insult cases. Steeped in the same culture of honor as the complainants, courts and juries empathized with their sense of outrage and affront. In the late nineteenth century, white Southerners shared in what could be described as a regional hostility towards the introduction of industrialization and mass commerce into a formerly agricultural society. Many of the railroads were owned by large Northern corporations, as were the manufacturing and retail outlets that settled in the urban South at the turn of the century. Although they may have come from the South, railroad workers were seen as "corporate men," whose "allegiance was not to the locale but to the corporation."[212] Many Southerners appear to have resented the encroachment of Northern industry and culture on local tradition,[213] and this sentiment may well have encouraged courts to manipulate traditional tort principles to allow recovery in the insult cases. It posed no apparent moral strain to permit affronted ladies and gentlemen to vindicate their honor, reputation and social images in the face of impersonal, Northern commercial forces that threatened regional traditions and ways of life.

3. Doctrinal Justifications

Doctrinally, courts justified judgments for plaintiffs in the institutional insult cases on the notion of an "implied contract" between the railroad and the patron, as part of the railroad's duties as a common carrier.[214] Though no actual contract existed, the

211. *See* Sydnor, *supra* note 189, at 12-13 (noting that the "social order diminished the force of law in the South . . . . In those relatively large expanses of life that were not ruled by the written law the Southerner did not live in a legal vacuum. Instead, he found guidance, particularly in the field of personal relationships, in a[n] . . . unwritten code.").

212. WELKE, *supra* note 20, at 267-70 ("By 1890, Northern men and money controlled the majority of Southern railroads of over 100 miles . . . . Southern railroads were no longer Southern. The shift was not simply in Southern railroads, but held true for railroads throughout the nation.").

213. *See* TRENT A. WATTS, ONE HOMOGENEOUS PEOPLE: NARRATIVES OF WHITE SOUTHERN IDENTITY, 1890-1920 131 (2010) (noting that "[d]ominant voices in the white South in the 1880s and 1890s imagined the American nation . . . in terms of a depoliticized aggregate of diverse regions, each with its own organic history and traditions.").

214. *See* Bleecker v. Colo. & S. R. Co., 114 P. 481, 482 (Colo. 1911); Gillespie v. Brooklyn Heights R.R. Co., 70 N.E. 857, 858-60 (N.Y. 1904); Lipman v. Atl. Coast Line R.R. Co., 93 S.E. 714, 715-16 (S.C. 1917). For a discussion of the importance of contract and property rationales in the recognition of new torts, see Bernstein, *supra* note 59, at 1548-49.

railroad had a duty, it was said, to protect any individual rightfully on its cars from physical harm and threats to their safety, including verbal assault. The breach of the contractual duty also constituted a tort. "The carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment en route," noted one late nineteenth century torts treatise.[215] "Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out."[216] Because the common carrier had a special duty to serve the public, "a public service company is liable if its servants insult a passenger, though no action lies against a private individual for mere insult."[217] In the public amusement cases, where the common carrier rationale technically did not apply, courts sometimes referred to an "implied contract" for courteous service in the customer's ticket for entry—the insult breached the plaintiff's so-called "right to go to any public place, or visit a resort where the public generally are invited, and to remain there, . . . free from molestation, . . . insult, personal indignities, or acts which subject him to humiliation and disgrace . . . ."[218]

As William Prosser and other tort scholars have noted, the breach of contract rationale is a fiction.[219] There is no real contractual agreement in a ticket for railroad carriage or for admission to a place of amusement that a patron will receive non-insulting treatment. Moreover, recovery was had in a number of cases in which there was no contract for service, as in the case of a person who was insulted by train personnel while waiting to buy a ticket.[220] In an ordinary breach of contract case, one cannot recover for emotional distress.[221]

Courts sought to compensate plaintiffs in the institutional insult context, but they did not want to give the appearance of permitting "pure" emotional distress actions, which would potentially open the feared "floodgates of litigation."[222] They had to tread carefully, for

---

215. *Gillespie*, 70 N.E. at 859 (quoting THOMPSON ON NEGLIGENCE § 3186).

216. *Id.*

217. Note, *Liability of Public Service Company for Servants' Assaults & Insults Provoked by the Plaintiff*, 27 HARV. L. REV. 171, 172 (1914) (citations omitted).

218. Davis v. Tacoma Ry. & Power Co., 77 P. 209, 211 (Wash. 1904); *see also* Interstate Amusement Co. v. Martin, 62 So. 404, 405 (Ala. Ct. App. 1913); Aaron v. Ward, 96 N.E. 736, 737 (N.Y. 1911); De Wolf v. Ford, 86 N.E. 527, 530 (N.Y. 1908).

219. *See* Prosser, *Insult and Outrage*, *supra* note 161, at 59-60.

220. Tex. & P. Ry. Co. v. Jones, 39 S.W. 124, 125 (Tex. Civ. App. 1897); *see also* PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 157, at 59.

221. Prosser, *Intentional Infliction of Mental Suffering*, *supra* note 3, at 882.

222. *Id.* at 877; *see* Wade, *supra* note 61, at 100.

fear of setting precedent that could be used in the increasing number of near-miss accident or "fright" cases that were reaching the courts in the late 1800s.[223] The common carrier "implied contract" rationale became a convenient doctrinal hook on which to hang recovery without having to recognize an emotional distress tort.[224] In Prosser's words, "[a]n 'implied contract' to be polite" was the "crutch" that "timorous" courts used to justify recovery in these cases.[225]

4. The Intentional Infliction of Emotional Distress Tort

These "institutional insult" cases lay the foundations for the development and eventual judicial recognition of a freestanding tort of intentional infliction of emotional distress. In influential law review articles in the 1930s, Prosser and Magruder discussed the institutional insult cases as part of their argument that tort law already in practice recognized a freestanding cause of action for emotional distress, despite a formal doctrinal position to the contrary.[226] They argued that courts should come forward and forthrightly recognize an IIED tort rather than relying on "implied contract" rationales and other legal fictions.[227]

In the subsequent decade, there was an upsurge of scholarly and judicial interest in the IIED tort, and courts took Prosser and Magruder's lead; the articles were cited as justification for an independent tort action for emotional distress, based on the principle "that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of [an] acute . . nature . . . . . .is subject to liability in damages for . . . mental and emotional disturbance even though no demonstrable physical consequences actually ensue." [228] By 1936, twenty-one states allowed recovery for mental anguish in the absence of physical injury or an actionable assault or libel.[229] The 1948 *Restatement of Torts* reversed its earlier position and recognized an independent tort action for intentional

223. *See* Green, *supra* note 154.

224. *See* Prosser, *Intentional Infliction of Mental Suffering*, *supra* note 3, at 881-82.

225. *Id.*

226. *See generally* Bernstein, *supra* note 59, at 1545; J.L. Borda, *One's Right to Enjoy Mental Peace and Tranquility*, 28 GEO. L.J. 55 (1939); Magruder, *supra* note 55, at 1035; Prosser, *Intentional Infliction of Mental Suffering*, *supra* note 3; Seitz, *supra* note 164; Lawrence Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222 (1939); Wade, *supra* note 61.

227. *See* WHITE, *supra* note 5, at 104 ("The contribution of Prosser and other tort scholars in the 1920s and 1930s was . . . not to invent the principle of compensation for emotional distress, but to expand the locus of that principle from isolated 'exceptional' cases to an established doctrine of tort law.").

228. Magruder, *supra* note 55, at 1058.

229. WHITE, *supra* note 5, at 104.

infliction of emotional distress.[230]

Although they are still technically good law, the institutional insult cases are no longer particularly important in their own right.[231] This genre of lawsuit largely disappeared by the 1940s. In a 2008 article called *Why Torts Die*, Kyle Graham put the institutional insult cases in his dustbin of "dead torts," noting that there have been "only a smattering of . . . decisions over the past half-century in which plaintiffs have recovered even a pittance under an insult theory."[232] Graham attributes the demise of the tort, in part, to the "disappearance of passenger rail traffic," which "dealt a blow to the cause of action by eliminating the setting . . . that produced most insult claims."[233] Another reason is that commercial employees have been trained to be more polite to patrons.[234]

The scope and focus of the IIED tort changed substantially over the twentieth century. In general, plaintiffs in modern IIED cases appear less concerned with ridicule and scorn—the negative opinions of others—than with inner, subjective feelings of distress and shock caused by the actions of the defendant, regardless of whether or not anyone else witnessed them. Nonetheless, the tort still partakes of the spirit of its foundational cases. With its vague and porous definition (the essence of actionable harm is that it is "outrageous") the tort is used not only to remedy emotional distress, but to condemn socially reprehensible conduct, such as acts of oppression by a more powerful party (e.g., a landlord, employer, or debt collector) committed against a relatively powerless victim, in a cruel and unconscionable manner.[235] The unjust exercise of authority remains a central theme. [236]

PART III: LIBEL AND PRIVACY

The years between 1890 and 1910 saw an outpouring of

230. *See* Bernstein, *supra* note 59, at 1541 ("All of these claims, though linked to past causes of action, have achieved . . . legitimacy as novel and free-standing by the addition of new sections in the *Restatement of Torts*.").

231. *See* Whitman, *supra* note 160, at 1377.

232. Graham, *supra* note 7, at 372.

233. *Id.* at 389; *see also* Wiggs v. Courshon, 355 F. Supp. 206 (S.D. Fla. 1973) (involving a racial epithet delivered by a waitress at a motel restaurant); Gebhardt v. Pub. Serv. Coordinated Transp., 137 A.2d 48 (N.J. Super. Ct. App. Div. 1957) (insulting language and ejection from a bus); Brown v. Fifth Ave. Coach Lines, Inc., 185 N.Y.S.2d 923 (N.Y. Mun. Ct. 1959) (bus driver became abusive when passenger asked him to stop).

234. *See* RICHTER, *supra* note 69, at 24 (explaining that employees were trained to deal "gently" with unruly passengers).

235. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965).

236. *See id.* ("The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or relation with the other, which gives him actual or apparent authority over the other or power to affect his interests.").

publishing in the United States.[237] The growth of the print media led to a new kind of institutional shaming—humiliation and misrepresentation through false, sensationalistic publications in the mass-market press.[238] As in the institutional insult scenario, tort law—the tort of defamation and the tort of invasion of privacy—was mobilized to redress these harms to reputation and public image, injuries that resulted from unequal relationships between private individuals and large commercial institutions.[239]

A. The Rise of the Popular Press

The late nineteenth century saw the significant growth of mass-circulated newspapers and the making of the daily newspaper into a major social institution. As a result of urbanization and new printing technologies, the readership of daily urban newspapers increased 400% between 1870 and 1900.[240] The portion of the population subscribing to a newspaper increased from 3% in 1840 to 20% by 1900. [241]

The news became big business. Major national publishing chains developed, as did wire services such as the Associated Press. Newspapers could not have existed without the cities, and the cities could not have functioned without a press that was accessible to the public. Newspapers became a vital conduit of information about politics, local affairs, and other current events. They were also an important source of amusement. This era saw the rise of sensationalistic "yellow journalism," with prominent illustrations, large type, bold headlines, and melodramatic language.[242]

Before the late nineteenth century, the typical subjects of press coverage had been politicians and other public officials.[243] By the end of the century, publishers learned that gossip and stories about ordinary people doing ordinary things—albeit reported in a sensational manner—sold more papers than the official doings of presidents and statesmen.[244] The centerpiece of popular journalism was coverage of "daily life."[245] The front pages of the papers featured

237. *See* DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 10-12 (1972).

238. *Id.* at 16-17.

239. *Id.* at 18-19.

240. *See id.* at 10.

241. PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 252 (1980).

242. LEONARD TEEL, THE PUBLIC PRESS, 1900-1945: THE HISTORY OF AMERICAN JOURNALISM 7 (2006).

243. HAZEL DICKEN-GARCIA, JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA 30-31 (1989).

244. *Id.* at 40-41, 52.

245. BARTH, *supra* note 4, at 106.

divorce cases, stories of secret affairs, crimes of passion, and the dramas of ordinary people lost in the "shuffle of daily life."[246] Stories were written in a breathless tone with screaming headlines:

> A Regular Roarer . . . . Gone in the gloaming. A leading business man missing from his familiar haunts. He loved another man's wife too well. The veil lifted from a most remarkable condition of affairs. 'Tis the talk of the town. The people wonder how such naughtiness can exist. Overfond of wedding. A dapper dude with one wife in Pottsville, and another in Philadelphia. He has fallen into the consomme. In consequence a term in prison stared him in the face, holding the mirror up to nature. For sale by newsboys on the street. Only a nickel a copy. Don't miss it. [247]

Sometimes these accounts were true. Often they were faked. Publishers had few qualms about running stories that were exaggerated, distorted, unverified, or even wholly fabricated.[248] The concept of journalistic ethics had not come into being.

Historians and journalism scholars have made much of the similarities between the popular press of the late nineteenth century and "village gossip." As Janna Malamud Smith has written, "[c]ollective stories [in the press] create[d] a shared culture, and their task was partly to replace the informal gossip of village life; it was impossible to whisper fast enough to pass important gossip to a whole city, and few were inclined to whisper to strangers."[249] Yet the gossip analogy should not be made too literally. Press "gossip," concocted in newsrooms, was not the equivalent of rumors and stories in the small town, which arose organically from the collective life of the community. It was not the same as village gossip, in which both gossiper and gossipee typically had equal access to a public audience and the means to rebut malicious statements. Press gossip was not a participatory enterprise, but usually a one-way exercise of power.

In the last two decades of the nineteenth century, public outrage mounted around the media's apparent abuse and exploitation of the reputations and public images of ordinary people. In an effort to "pander to the degraded appetites of the reader," newspapers threw people onto the public stage against their will, and "carried the "craft of misrepresentation to the level of a fine art," . . . "to the sacrifice of all dignity, conscience, and truth."[250] This animus led to attempts throughout the country to legally regulate the press. Between 1880

246. *Id.*

247. Commonwealth v. Place, 26 A. 620, 621 (Pa. 1893).

248. *See* DICKEN-GARCIA, *supra* note 243, at 122.

249. JANNA MALAMUD SMITH, PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE 86 (1997).

250. Dion Boucicault, *The Decline and Fall of the Press*, 145 N. AM. REV. 32, 34-35 (1887); *see also* DICKEN-GARCIA, *supra* note 243, at 188.

and 1910, several states passed statutes that criminally punished the publication of gossip and crime news.[251] There was also a turn to libel litigation.

B. A New Chapter in the History of Libel

The law of libel and slander—written and spoken defamation, respectively—is an elaborate system of complex doctrines that dates back to the earliest history of the common law. The focus of the libel tort is the protection of personal reputation against false and defamatory statements.[252] The plaintiff in a defamation suit needed only to present the derogatory statement and prove that the defendant was responsible for publishing the statement to others, not that the statement was false, or the defendant's state of mind in publishing the material.[253] Similarly, the plaintiff did not need to prove that his reputation had actually been harmed by the publication or demonstrate any pecuniary losses; general damages were presumed.

In the last two decades of the nineteenth century, libel suits against the press "exploded."[254] In the words of historian Norman Rosenberg, "the colorful content of [nineteenth century] popular journalism" increased the number of libel suits and also gave rise to new kinds of libel cases.[255] In his study of tort litigation in turn of the century New York, Randolph Bergstrom found that the number of defamation cases litigated before the New York Supreme Court increased by over 20 times between 1870 and 1910.[256] Major urban newspapers faced increasing libel litigation.[257] Observes journalism scholar Timothy Gleason, the publishing trade journals "*The Journalist* and *The Fourth Estate* reported a rising trend of libel actions at the pretrial and trial level from lows of twenty-three in 1884 . . . to a high of 300 in 1895 . . . . Libel suits [became] part of

251. Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J. L. & HUMAN. 171, 179 n.44 (2010).

252. A defamatory statement "expose[d] [a person] to hatred [or] contempt, . . . injure[d] him in his profession or trade, or cause[d] him to be shunned or avoided by his neighbours," in the words of an 1887 treatise. ODGERS, *supra* note 158, at 19.

253. PROSSER, HANDBOOK OF THE LAW OF TORTS, *supra* note 157, at 798 ("Out of a tender regard for reputations, the law presumes in the first instance that all defamation is false and the defendant has the burden of pleading and proving its truth.").

254. TIMOTHY GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA 66-67 (1990) [hereinafter GLEASON, THE WATCHDOG CONCEPT].

255. ROSENBERG, *supra* note 48, at 197 (historical evidence "conclusively shows that libel suits became more common in the late nineteenth century").

256. BERGSTROM, *supra* note 5, at 20.

257. GLEASON, THE WATCHDOG CONCEPT, *supra* note 254, at 66-67.

journalism's daily fabric."[258]

Many libel suits were brought by public figures and public officials. For much of the nineteenth century, the typical libel case had involved a man employed in government or business suing the press over criticism of his political or professional activities.[259] The media's increasing coverage of the lives of average citizens led to a number of "private figure" libel lawsuits. My informal review of appellate cases between 1880 and the end of the century shows an upsurge in libel cases brought by ordinary people against the mass-market press. A study of nearly 1,500 trial records of libel suits between 1884 and 1899 indicates that more were brought by private figures than public figures.[260]

Most of these alleged libels involved moral accusations. A married woman in Florida claimed that her reputation was maligned when a newspaper falsely reported that she had "run off with another fellow."[261] A serious academic critic was mortified when a paper claimed, falsely, that he had been writing obscene books.[262] A woman lost face in her community when a newspaper made an unfounded statement that she was involved "with a sensational police court case . . . and that she had a record well known to the police."[263] A woman working in a laundry sued the *Washington Times* when it wrote that "she had been seen swinging out of a window in her night robe in a contest with another employee; . . . that she had 'cursed the boss like a sailor [sic]' . . . ; [and] that she had thrown a cup of hot tea in the face of another employee."[264]

While public figure libel suits almost always involved male plaintiffs, both males and females brought libel cases as private figures.[265] As newspaper publishers used sexually-tinged gossip about women as a means to sensationalize, copy, and attract readers, women brought suit over false accusations of unchaste conduct.[266] In

---

258. Timothy W. Gleason, *The Libel Climate of the Late Nineteenth Century: A Survey of Libel Litigation 1884-1899*, 70 JOURNALISM Q. 893, 894, 895 (1994) [hereinafter Gleason, *The Libel Climate*].

259. *Id.* at 895; *see also* David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 734-745 (1942) (noting that the roots of libel law emanate from a legal attempt to protect the ruling class from scorn and criticism); *see generally* ROSENBERG, *supra* note 48.

260. Gleason, *The Libel Climate*, *supra* note 258, at 895.

261. Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443, 446 (1891).

262. *See* Fisher v. New Yorker Staats-Zeitung, 114 A.D. 824, 825 (N.Y. App. Div. 1906).

263. Harriman v. New Nonpareil Co., 110 N.W. 33, 33 (Iowa 1906).

264. Wash. Times Co. v. Downey, 26 App. D.C. 258, 259 (D.C. Cir. 1905).

265. *See* FRIEDMAN, GUARDING, *supra* note 34, at 49 (noting that "[o]ut of 130 reported defamation cases published between 1897 and 1906, only 43 were brought by women" and "[a]ll but one of these cases dealt with 'imputations of immorality'").

266. *See, e.g.*, Ervin v. Record Publ'g Co., 97 P. 21, 21-22 (Cal. 1908); Gates v. N.Y.

the 1898 case *Gates v. New York Recorder*, the newspaper reported that the plaintiff, a blonde who was allegedly twenty-years-old and a dancer at Coney Island, had secretly married a seventy-five-year-old man who was "fond of pretty women."[267] In reality, the plaintiff was a thirty-five-year-old schoolteacher who had never been a stage performer or in a dancing hall.[268] The appeals court expressed outrage that a woman of high virtue should be described by the paper as a "fallen woman."[269]

As in the institutional insult cases, private citizens initiated legal actions against newspapers because it was becoming more feasible for them to do so. Nineteenth century America saw the creation of the contingency fee contract, which opened up legal services to the public by allowing people to hire an attorney without paying fees up front.[270] Some victims of newspaper libels may have felt that suing represented the only path to recourse against a distant commercial institution that was seen as irresponsible, exploitative, and unresponsive to social pressures. Courts recognized the importance of the libel action as a means for private individuals to redress their reputational injuries and achieve vindication against their institutional assaulters, and this understanding was reflected in libel doctrines.

C. Private Figure Libel Doctrine

By the late 1800s, common law libel doctrines were fairly developed when it came to suits brought by public officials and public figures. Yet owing to the relative dearth of cases, the law governing libels about private figures was less well-defined.

Although nineteenth century libel law was generally more protective of reputation than it is today, when press rights are paramount, there were a few privileges that gave the press "breathing room" when reporting on public figures and public affairs.[271] A "fair comment" privilege permitted publishers to make

---

Recorder Co., 49 N.E. 769-70 (N.Y. 1898); McFadden v. Morning Journal Ass'n, 51 N.Y.S. 276-77 (N.Y. App. Div. 1898); Barth v. Hanna, 158 Ill. App. 20, 21-22 (Ill. App. Ct. 1910), *cited in* Pruitt, *supra* note 135*; see also* Andrew J. King, *Constructing Gender: Sexual Slander in Nineteenth-Century America*, 13 LAW & HIST. REV. 63, 68 (1995) ("In dealing with sexual slander, courts and legislatures carried forward with the idea that sexual propriety constituted the principal element of female reputation. As part of the social underpinning of society, middle-class men esteemed chastity for unmarried women and fidelity for their wives.").

267. *Gates*, 49 N.E. at 769.

268. *Id.* at 770; *see also* Morrison v. Smith, 83 A.D. 206 (N.Y. App. Div. 1903) (Laughlin, J., dissenting) *rev'd* 69 N.E. 725.

269. Pruitt, *supra* note 135, at 437 n.132.

270. PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA 191 (1997).

271. *See* Van Vechten Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413,

defamatory statements of opinion on public officials and "matters of public interest and general concern" without incurring liability for defamation.[272] A few states had adopted a conditional privilege for false statements of fact on public officials and "matters of public concern" made without malice.[273]

Neither of these privileges, however, applied to defamatory statements about private citizens and their private affairs.[274] In cases involving ordinary people, newspapers faced liability unless they could mount a successful truth defense, which could be difficult and costly. Who was a "public official" or "public figure," and who was a "private figure" under law of defamation? Why did the private person deserve more reputational protection than the public figure? These questions had not yet been clearly addressed by the law, and the wave of late nineteenth century libel suits called upon courts to answer them.

Courts defined the "private citizen" as an individual who had not achieved prominence in his community either by action or by status. One remained a "private citizen" unless he had voluntarily assumed a public position. Politicians, officeholders, and business or religious leaders were quintessential "public figures." The reasons why private citizens deserved more reputational protection than public figures were threefold. These rationales have remained central to modern libel doctrine.

The first was that while potentially libelous comments about public figures could be important to debate on public issues, attacks on ordinary people usually were not.[275] The second was that, unlike public figures, private citizens did not voluntarily put themselves before the public eye and invite criticism. A politician or public official implicitly agreed to some measure of reputational abuse by virtue of his entering a public position, but the ordinary person had made no such "waiver" of his reputational rights.[276] Private figures

---

418-19 (1910).

272. *See id.*; *see also* Harold A. Jones, *Interest and Duty in Relation to Qualified Privilege*, 22 MICH. L. REV. 437, 439-41 (1924).

273. *See* ROSENBERG, *supra* note 48, at 168.

274. *See* Jones, *supra* note 272, at 439.

275. Pfister v. Milwaukee Free Press Co., 121 N.W. 938, 944 (Wis. 1909) ("The plaintiff held no office, and was not a candidate for any. Neither did he belong to any class which by seeking and inviting public patronage renders itself amenable to public comment and criticism which could not rightly be applied to a private citizen. It appears that the plaintiff is a private citizen, and a false and defamatory publication concerning such a one is not privileged merely because it may relate to some public matter.")

276. As one court commented in a case involving a young woman who had been accused in a newspaper of having adulterous affair, "[t]he plaintiff was a private citizen, living in the kindly obscurity that hides and shelters the lowly. She was not a public official; a candidate or applicant for office; a teacher, calling attention to herself

also deserved strong legal protection for their reputations because, unlike public figures and officials, they lacked means outside the law to defend themselves, particularly against attacks by the press. A politician who had been criticized in the press could command a podium and attempt to sway public opinion in his favor; he could publicly attack or denounce the publisher. Private figures had few, if any, means of counterspeech.

Courts also noted that physical confrontation, a traditional weapon in the battle over reputation, was not a viable defense against attacks by the mass-market press. As journalism historian Ryan Chamberlain has illustrated, in the early nineteenth century, individuals who had been libeled by local newspapers in small towns often challenged publishers to duels.[277] But by the latter nineteenth century, as we have seen, dueling was not only being outlawed in many states, but had become impractical and infeasible in the modern, urban commercial setting.[278] In the 1870s, an artist who was defamed by a magazine sought the advice of a lawyer, who assured him that no one expected him to brawl with the editor.[279] The remedy instead was to file a lawsuit.[280]

The large circulation of many newspaper publications made reputational assaults particularly damaging. A defamatory accusation that had potentially hundreds of thousands of readers could result in serious mental anguish and reputational harm. As one judge wrote, "no one can tell into whose hands [the publication] may come. Every one can now read. The circulation of a newspaper is enormous, especially if it be known to contain libelous matter." [281] As a judge commented in an opinion upholding a $1300 judgment against the press for having written about the alleged adultery of a local barber, the award was justified because in contrast to oral gossip, the injury caused by "defamation . . . through the columns of a newspaper" was great.[282]

Not only did mass-circulated publications achieve a wide audience, but readers had no personal knowledge of the libeled individual. Whereas gossip in a small town "only reaches the immediate bystanders, who can observe the manner and note the tone of the speaker,—[sic] who have heard the antecedent

---

and her methods by puffing circulars and advertisements, or a keeper of a public house . . . . she had done nothing to attract or invite public attention or criticism." Shelly v. Dampman, 1 Pa. Super. 115, 124 (Pa. Super. Ct. 1896), *aff'd*, 34 A. 124 (Pa. 1896).

277. CHAMBERLAIN, *supra* note 206, at 77-78.

278. *See* E.L. Godkin, *Libel and Its Legal Remedy*, THE ATLANTIC MONTHLY, Dec. 1880, at 730-31.

279. *Id.* at 731.

280. *Id.* at 731-32.

281. Hermann v. Bradstreet Co., 19 Mo. App. 227, 230 (1885).

282. Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443, 449 (Ill. App. Ct. 1891).

conversation which may greatly qualify his assertion,—[sic] who probably are acquainted with the speaker, and know what value is to be attached to any charge made by him," printed libels met an unknowing audience, and the "mischief" to the subject was much greater.[283] Written publications were permanent and could never be removed from the public record. Whereas victims of oral gossip in a small town were shielded by the fact that the statements were ephemeral—spoken in haste and perhaps likely to be forgotten in haste—"newspapers . . ."are preserved for years and years;"[284] . . . "publication in the newspaper not only gives the charge a more extended circulation, but gives it a permanent lodgment in the memory of the living, and it may be reproduced when all else concerning the person has been forgotten."[285]

The rules on private figure libels yielded favorable judgments for plaintiffs in several cases.[286] Popular animus against the press led to jury awards for private figure plaintiffs ranging from between $500 to $45,000 (between $12,500 and $9 million in 2013 dollars).[287]

As in the institutional insult cases, punitive damage awards were common, particularly when women's reputations had been tarnished. Unlike modern practice, courts did not use the device of remittitur to reduce large jury awards against the press.[288]

"The license which the press assumes to itself in the ruthless hunt for sensational news, and in the unsparing invasion of private affairs with which the public has no rightful concern, is the disgrace of modern journalism, and one of the greatest menaces to free institutions. It may well dispose juries in a proper case to give large damages, both compensatory and punitive, and with such verdicts the courts will not be readily moved to interfere," noted the Pennsylvania Supreme Court in 1897.[289] Large damage awards were a means to "impress[] upon reporters and publishers of newspapers that the law does not sanction the publication of all the low scandal they can gather up in the streets or alleys of a city or town."[290] Concerns with freedom of the press would eventually temper this expansive protection of reputational interests, but not until the mid-

283. ODGERS, *supra* note 158, at 3.

284. Riley v. Lee, 11 S.W. 713, 713 (Ky. 1889).

285. *Id.* at 715.

286. Gleason, *The Libel Climate*, *supra* note 258, at 894-95.

287. For the $45,000 figure, see Smith v. Times Publ'g Co., 36 A. 296, 299 (Pa. 1897). *See also* BERGSTROM, *supra* note 5, at 164 (noting that the average plaintiff in a personal injury case in the late nineteenth century received just under $1000).

288. Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and its Modern Application in* Food Lion, 24 VT. L. REV. 299, 309-10 (1999-2000).

289. *Smith*, 36 A. at 298.

290. Commonwealth v. Place, 26 A. 620, 621 (Pa. 1893).

twentieth century.

We can see the private figure libel cases as a corollary and complement to the institutional insult cases. Courts and legal commentators were cognizant of the importance of reputation and social appearances to plaintiffs, the serious injuries inflicted by newspaper libels, and the difficulties that the victims of such libels faced in achieving recourse outside the law. As the next section suggests, similar concerns gave rise to another, somewhat parallel genre of lawsuits at the turn of the century, and one of the most famous "new torts" in history. These cases also involved ordinary Americans, public insult or humiliation, and another industry that had become central to late nineteenth century culture and commerce–mass advertising. From these lawsuits originated a new "personality tort," the tort of invasion of privacy.

PART IV: THE RIGHT TO PRIVACY

The press was not only criticized for its libels, but also for its "invasions of privacy." A new, popular feature of the late nineteenth century press was its exposure of people's private lives. As one commentator lamented, newspaper gossip columns allowed "hungry eyes" [to] "peer into private houses, [and] study banquets [and] balls . . . as spectators."[291] Romantic affairs between young people, one critic observed, were coming to be viewed as "'public property.'"[292] Though this information was often false and fabricated, in some cases it was true, which eliminated the possibility of a libel lawsuit. Yet the publication of truthful, intimate and embarrassing information could be more injurious to a person than a defamatory falsehood.

The 1880s and 1890s saw a number of attacks on the press for its "invasion[s] of privacy," and calls for legal remedies.[293] In an 1890 essay, the critic E.L. Godkin advocated a legal "right to privacy," distinct from libel, which he described as the individual's right to "decid[e] how much or how little the community shall see of him, or know of him."[294] Godkin's piece inspired the writing, later that year, of the famous *Harvard Law Review* piece by Samuel Warren and Louis Brandeis that is credited with originating the legal right to privacy.[295] The article, titled *The Right to Privacy*, decried gossip columns and embarrassing information about personal affairs

291. George T. Rider, *The Pretensions of Journalism*, 135 N. AM. REV. 471, 479 (1882).

292. DICKEN-GARCIA, *supra* note 243, at 193.

293. *Id.* at 192.

294. Godkin, *supra* note 51, at 65, 67.

295. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1891).

"spread broadcast in the columns of the daily papers."[296] To a respectable person seeking respect and status, having the details of one's intimate life widely publicized could lead to embarrassment, loss of face, and "mental pain and distress, far greater than could be inflicted by mere bodily injury."[297] The authors underscored the imbalance of power between the "too enterprising press," with its mass circulation and ruthless "business methods," and "innocent" private citizens who had been wronged through no fault of their own.[298] The article proposed a tort cause of action that would allow the victims of press gossip to sue and recover damages for dignitary and emotional injuries[299]—for "injury to feelings."[300] The right to privacy was, in effect, the right to recover damages for injuries to one's public image and one's feelings about one's public image.[301]

The Warren and Brandeis proposal was well-received. There was a "general agreement" among the public, in the words of one historian, "that the time and place were ripe for the invention of a legal theory for enforcement of the right to privacy."[302] Since it was aimed at newspaper publications and imposed liability based on publication content, the invasion of privacy tort raised free speech concerns.[303] Unlike the libel tort, the privacy tort punished *truthful* information, which made it constitutionally questionable.[304] Very few privacy cases brought over truthful publications were successful; most were defeated on free speech grounds.[305] The privacy tort really never took off, at least as applied to the sensational journalism targeted by its creators.

The invasion of privacy tort did flourish, however, in different terrain—in cases involving the unauthorized use of photographs in advertisements. In a common practice at the time, advertisers for consumer products stole people's portraits from photography studios and published them in ads for consumer products without the subject's consent.[306] Around 1900, courts began to award damages to these victims under an "invasion of privacy" theory.

---

296. *Id.* at 196.

297. *Id.*

298. *Id.* at 206.

299. *Id.* at 198-99.

300. *Id.* at 219.

301. *Id.*

302. Dorothy J. Glancy, *The Invention of the Right of Privacy*, 21 ARIZ. L. REV. 1, 7 (1979).

303. *See* GURSTEIN, *supra* note 40, at 156, 330 n.24.

304. *Id.*

305. Glancy, *supra* note 302, at 14-17.

306. *See* Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1120-26 (2013).

A. The Appropriated Photograph

This phenomenon—the theft and unauthorized publication of photographs in advertisements—arose from an unusual conjunction of technological and social circumstances.[307] Commercial advertising was relatively novel in the late nineteenth century, when a mass market for consumer goods was just beginning to develop.[308] There was not yet an advertising "industry;" the manufacturers of various products were responsible for creating their own advertisements, and ad "agents" secured places for them in periodicals and other public places.[309] The practice of advertising was held in low regard; advertisers of consumer products were widely viewed as "liars and crooks," bearing "an odor of snake oil."[310]

Manufacturers sought to draw attention to their ads by using photographs, particularly of people's faces.[311] Yet photography was still a new and fairly crude technology, and it was difficult to obtain portraits for commercial use.[312] Photography required bulky, specialized equipment, and images could generally be produced and developed only in a photography studio.[313] There were no portable cameras or "roving cameramen."[314] Not only were photographs complex to take and develop, but it was also challenging to find people who would pose for advertising photos.[315] There was not yet a commercial modeling industry, nor a celebrity culture that would provide a source for advertising images and endorsements.[316] "Respectable" people did not pose for ads; materialism and the world of commerce were associated with forbidden desire, and advertising carried immoral connotations. [317]

Hungry for photographic images, and without a steady source of them, advertisers sometimes resorted to deception or theft. Newspapers reported stories of random individuals who quite literally woke up one morning to find photographs they had taken in studios for personal use depicted "in ads for patent medicines,

307. *Id.* at 1135-37.

308. *See generally* STEPHEN FOX, THE MIRROR MAKERS: A HISTORY OF AMERICAN ADVERTISING AND ITS CREATORS 13-39 (1984) (discussing the early history of advertising and the rise of the modern advertising agency).

309. *Id.* at 14.

310. *Id.* at 67.

311. *See* Elspeth H. Brown, *From Artist's Model to the "Natural Girl": Containing Sexuality in Early-Twentieth-Century Modeling, in* FASHIONING MODELS: IMAGE, TEXT AND INDUSTRY 50-52 (Joanne Entwistle & Elizabeth Wissinger eds., 2012).

312. *See* Barbas, *supra* note 306, at 1136.

313. *Id.*

314. *See id.*

315. *Id.* at 1136-37.

316. *Id.* at 1136.

317. *Id.* at 1137.

complexion beautifiers, and [five] cent cigars."[318] By 1890, this practice had generated a public outcry. As one commentator lamented, "[a]ttractive young women were 'liable to the shock of seeing [their pictures] used [in an advertisement] to blazon the alleged merits of a certain brand of cigar or whiskey,'" and "prominent [citizens had] . . . no immunity from the mortification of seeing [their] photograph[s] in the advertising columns of a newspaper."[319] It was "the extreme of impudence for a firm or company to take the photograph of any living person, and, without permission, use it as a label for their goods."[320]

The subjects of these so-called "circulating portraits" expressed embarrassment and shame.[321] They were outraged when they found that their images had been used in advertisements for consumer products—that they had been publicly associated with the "taint of commerce."[322] Friends and acquaintances saw the ads and jeered at them, or were shocked to find a person they had considered to be upstanding and respectable had committed the disreputable act of "selling her face" to an advertiser. Plaintiffs "were scandalized by the possibility that people would assume they actually endorsed commercializ[ed] products . . . ."[323] The *New York Times* wrote in 1907 that a local beauty queen suffered "mental anguish" when her picture appeared in an ad without her consent.[324] She began to notice that some of her friends were looking at her strangely.[325] A woman complained to the editor of a popular magazine, "I had such a sweet photograph taken of myself the other day which was in great demand by all my admirers. Imagine my intense horror and disgust at seeing it used for an advertisement . . . ."[326] The unauthorized use of one's photograph in an ad created a profound sense of "exposure and violation."[327]

B. The "Right to Privacy"

Between 1880 and 1910, a series of cases were brought in state

---

318. *Id.* at 1126.

319. *Id.* at 1143 (quoting *The Right of Privacy*, ATLANTA CONST., Nov. 10, 1902, at 4.).

320. *The Right of Privacy: A Deficiency of Protective Legislation Which Ought to be Remedied*, WASH. POST, Sept. 14, 1902, at 18.

321. Barbas, *supra* note 306, at 1126.

322. *Id.* at 1125.

323. GURSTEIN, *supra* note 40, at 164.

324. *Medicine Boomed by Girl's Picture*, N.Y. TIMES, Aug. 21, 1907, at 7.

325. *Id.*

326. Belinda Briggs, Letter to the Editor, *A Monstrous Outrage*, PUCK, Jul. 14, 1880, at 344 (alteration to original).

327. Robert E. Mensel, *"Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24, 32 (1991).

courts over the unauthorized use of personal photographs in advertisements.[328] The allegation was that in publishing one's photograph in an ad and falsely associating her with a commercial product, the advertiser had humiliated the plaintiff, injured her reputation for good character, and caused her shame and distress.[329] Claims were brought under the Warren and Brandeis concept of an unwarranted interference with one's public image, as an "invasion of privacy."[330]

In the seminal 1905 case *Pavesich v. New England Life Insurance Co.*, Georgia became the first state to recognize the right to privacy.[331] The lawsuit involved the unauthorized use of the picture of the plaintiff, an artist, in an ad for life insurance.[332] The plaintiff's picture was placed next to a false testimonial: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day [sic] my family is protected and I am drawing an annual dividend on my paid-up policies."[333] Pavesich alleged that the ad, insofar as it falsely portrayed him as an endorser of a product he did not own, "tend[ed] to bring [him] into ridicule," ruined his reputation, and invaded his "right of privacy."[334] The court agreed.[335] Pavesich had been publicly shamed, and his social identity tarnished.[336] He had lost control over his public appearance: the advertisement could be posted "upon the streets. . . . [above] the bar of the saloon keeper, or . . . [upon] the walls of a brothel," the court observed.[337] Seeing the plaintiff's image in such disreputable contexts, audiences would form unfounded opinions about his character and motivations, assumptions he could not rebut or counter.[338]

In the advertising appropriation cases, as in the libel and institutional insult situations, courts were attuned to the power imbalance between the parties. The typical appropriation case pitted a mass advertiser against a private individual, often a woman, who

328. *See, e.g.*, Rhodes v. Sperry & Hutchinson Co., 104 N.Y.S. 1102 (N.Y. App. Div. 1907); Roberson v. Rochester Folding-Box Co., 65 N.Y.S. 1109 (N.Y. Sup. Ct. 1900) *aff'd*, 71 N.Y.S. 876 (N.Y. App. Div. 1901) *rev'd sub nom.* Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902); Henry v. Cherry & Webb, 73 A. 97 (R.I. 1909).

329. *See Roberson*, 65 N.Y.S. at 1109.

330. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74-78 (Ga. 1905).

331. *See id.* at 81.

332. *Id.* at 68.

333. *Id.* at 69.

334. *Id.*

335. *Id.* at 81.

336. *Id.*

337. *Id.* at 80.

338. *Id.* at 80-81.

was especially vulnerable to the social consequences of this particular genre of public humiliation.[339] Insofar as consumerism and consumer desire carried connotations of illicit lust and temptation—and thus an implicit sexual connotation—putting a woman's image in an ad for a commercial product was "seen as equivalent to the loss of a woman's virtue or at least an invitation to the loss of that virtue."[340]

The severe injury that women could suffer from the commercial exploitation of their images was highlighted in the famous 1900 case *Roberson v. Rochester Folding Box Co.*[341] In *Roberson*, the image of a young woman, Abigail Roberson, had been used without her consent in an ad for Franklin Mills flour.[342] Twenty-five thousand copies of the ad were made and "conspicuously posted" in various locations, including "stores, warehouses, [and] saloons."[343] Being publicly associated with a consumer product was so "distasteful" to Roberson that she suffered extreme mental distress and had to be treated by a doctor.[344] When Roberson was informed of the use of her likeness she "suffered a severe nervous shock, and was confined to her bed, and compelled to employ a physician."[345] She was "greatly humiliated by the scoffs and jeers of persons who have recognized her face."[346] She brought suit against the advertiser, the Rochester Folding Box Company, on the theory that the advertisement had injured her public image and invaded her "privacy."[347]

The trial court upheld Roberson's claim, noting that "[a]ny modest and refined young woman might naturally be extremely shocked and wounded in seeing a lithographic likeness of herself posted in public places as an advertisement of some enterprising business firm."[348] The intermediate court of appeals affirmed, yet the highest court in New York reversed the decision, opining that the recognition of a right to privacy "[would] necessarily result . . . in a vast amount of litigation."[349] A public outcry ensued.[350] One critic of

339. *See, e.g., Roberson*, 65 N.Y.S. at 1109.

340. Thomas Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 785 (1980). As Lisa Pruitt has noted, in the nineteenth and early twentieth centuries, the "vast majority of women who turned to defamation law did so to get redress for statements that impugned their chastity." Pruitt, *supra* note 135, at 419.

341. *Roberson*, 65 N.Y.S. 1109.

342. *Id*.

343. *Id.*

344. *Id.* at 1109-10.

345. *Id.* at 1109.

346. *Id.*

347. *Id.* at 1110.

348. *Id.*

349. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902).

350. *See The Right of Privacy: Georgia's Highest Court Makes Ruling Adverse to that of Judge Parker*, L.A. TIMES, Jul. 28, 1905, at II4.

the decision expressed the prevailing mood when he observed that it was "outrageous that modest women who in no way put themselves before the public" could have their reputations and images tarnished by any commercial entrepreneur "who thinks he can fill his pockets by exploiting them."[351] In response to the unfavorable decision in *Roberson*, the New York state legislature passed a Civil Rights Law—a so-called "privacy" statute—that made it both a misdemeanor and a tort to publish, without consent, a person's "name, portrait, or picture" for the purposes of "trade."[352] Damages were awarded for the emotional and dignitary harms that occurred when one was shamed before the public by having one's image appear "in connection with the advertisement of some . . . commodity which the advertiser was interested in selling . . . ."[353]

Similar statutes were enacted in other states, and in some, a common law privacy tort was recognized, primarily in cases involving the use of people's images in advertisements. In *Kunz v. Allen*, a dry goods store surreptitiously took a film of a woman and used it an ad.[354] The Kansas Supreme Court held that the woman had a cause of action for invasion of privacy, observing that the display of the woman's photo would bring her into disrepute, as it would lead viewers to assume that she was a paid model, calling her morals into question.[355] In a 1909 case, *Munden v. Harris*, a Missouri appeals court concluded that a boy whose portrait had been used in an ad for a jewelry store had a legitimate claim for invasion of privacy.[356] The use of his image "as an advertising aid to business" led viewers to make false assumptions about his character, and the plaintiff suffered "vexation and . . . ridicule . . . ."[357]

Like the law of institutional insult and the law of libel, the developing tort of "invasion of privacy" reflected cultural anxieties around personal agency and identity in an age of mass commerce and mass communications. Perhaps even more than being affronted on a train car or libeled in a gossip column, having one's photo appear in an advertisement for consumer goods represented a serious affront to one's public image and reputation for virtue and propriety. The

---

351. *Id.*

352. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009) ("A person, firm, or corporation that uses for advertising purposes or for the purpose of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."); *see also* Mensel, *supra* note 327, at 39-41 (discussing the backlash that followed the decision in *Roberson* and the passage of the right to privacy statute in New York).

353. Moser v. Press Publ'g Co., 109 N.Y.S. 963, 965 (N.Y. Sup. Ct. 1908).

354. 172 P. 532, 532 (Kan. 1918).

355. *See id.* at 532-33.

356. 134 S.W. 1076, 1077, 1079 (Mo. Ct. App. 1911).

357. *Id.* at 1079.

offense to one's feelings was profound, as were the potential social consequences. The law of privacy would compensate victims of advertising exploitation for their emotional, dignitary, and reputational injuries, and deter such acts of "unbridled license by commercial pirates."[358]

PART V: CONCLUSION

The years leading up to the turn of the twentieth century witnessed the reorientation and expansion of American tort law. New kinds of injuries and social situations led to new legal claims, new causes of action, and the increasing involvement of the legal system in problems stemming from novel, often unequal social relationships. Advertisers exploited personal images to attract attention to consumer products. Newspapers published sensationalistic falsehoods to generate circulation. Hurried and overworked, railroad and other commercial personnel sometimes abused their authority over customers, insulting and publicly humiliating them. Individuals' efforts to obtain legal redress in these contexts spurred the development of new torts (privacy and "insult," or intentional infliction of emotional distress) and the expansion of an existing tort (the law of libel). This legal intervention into the realm of the social, personal, and intangible can be seen as part of a larger trend in this era, in which tort law expanded more generally to correct injustices and imbalances of power caused by industrialization and the rise of large-scale commerce.

The scope and focus of these "personality" torts have changed substantially over the past hundred years. Notably, the claims of "privacy" plaintiffs who sue over the commercial exploitation of their images are more oriented towards lost profits rather than recovering damages for emotional, dignitary, or reputational harm. As earlier suggested, plaintiffs in modern IIED cases seem less troubled by embarrassment and shame than inner feelings of distress and shock. The attention of libel doctrine has shifted away from an exclusive focus on reputation, in the sense of the opinions of others, to the plaintiff's feelings; the bulk of the money paid out in damage awards in libel suits now compensates for emotional distress. These changes, which reveal much about broader transformations in cultural norms, are matters that deserve further exploration. These shifts notwithstanding, it is fair to say that the personality torts are alive and well. Libel litigation is robust today; once considered marginal or fringe torts, by the 1940s, privacy and IIED had become mainstream—recognized in the majority of states and acknowledged by the *Restatement of Torts*.

In many ways, the period described in this paper was a high

358. Brief for Petitioner at 7, Peck v. Tribune, 214 U.S. 185 (1909) (No. 191).

point in the law's protection of reputation, public image, and "personality." Between 1890 and 1910, claims were recognized and damages awarded for harms that might not be legally cognizable today. Manners—particularly the norm of deference and politeness towards women—no longer exert the cultural force they once did. Mere insults, even if delivered on a public conveyance, are less likely to be seen as legally compensable. In a culture that has become much rougher, violent, and emotionally expressive than the genteel world of Victorian America, garden variety epithets, acts of disrespect, and shows of temper do not constitute behavior seen as worthy of the law's attention. While more claims than ever are brought in these areas, the bar for recovery has been set much higher. These torts have also been limited by constitutional doctrines of freedom of speech. Although we care a good deal about our reputations and public images, we have also come to place high value on our right to speak our minds—to make comments about people that are insulting, disparaging, or humiliating.

The digital age has created an array of new possibilities for humiliation and reputational destruction. Online assaults to personal image and reputation have spurred a wave of privacy, defamation, and IIED lawsuits, as well as proposals for new torts to address cyberbullying, online shaming, and other internet-based threats. As new technologies revolutionize how we present ourselves and are known to others, we may be on the threshold of another era of innovation in tort law.