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# How to Make a New Tort: Three Paradoxes

Anita Bernstein\*

## I. Introduction

Though forewarned by the historian S.F.C. Milsom that their hopes are doomed to be dashed, scholars and activists continue to believe that new causes of action can right neglected wrongs and tighten the fit between injuries and remedies.<sup>1</sup> Some of these writers purport simply to describe what the courts have done, while others admit that they are engaged in advocacy; all of them state elements of a new cause of action. A small percentage of these efforts ripen into what come to be accepted as “new torts.”<sup>2</sup> This formation-and-birth process is veiled in mystery and ignorance, reminiscent of what young unmarried Victorian women were thought to know about how to make a new baby.

In an effort to lift the veil and generalize about the successful creation of new torts, I ventured a simple inductive approach. First, I drew up a list of new torts, unconstrained by defining criteria, as they occurred to me; Dean Keeton’s enumeration provided a starting point.<sup>3</sup> Next, a

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\* Professor of Law and Norman & Edna Freehling Scholar, Chicago-Kent College of Law. Thanks to Katharine Baker, Fred Bosselman, Jacob Corré, Stuart Deutsch, David Gerber, Sanford Greenberg, Steven Harris, Jim Huttenhower, and Richard Warner for their comments following a Chicago-Kent roundtable presentation of this Paper; to Jim Lindgren, for his written comments; and to the Marshall Ewell research fund at Chicago-Kent. I am grateful also to the participants at the Keeton Symposium, especially its hosts, William Powers, David Anderson, and David Robertson, who so engagingly combined hospitality and tough questions.

1. See S.F.C. Milsom, *A Pageant in Modern Dress*, 84 YALE L.J. 1585, 1585 (1975) (reviewing GRANT GILMORE, *THE DEATH OF CONTRACT* (1974)) (“The law is a reiterated failure to classify life.”).

2. The earliest use of “new tort” in this sense that I have found is William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939) (suggesting that decisions in more than 100 cases spanning more than two decades call for the reognition of a separate tort of intentional infliction of mental suffering). Contemporary invocations of the concept include Rory Lancman, *Protecting Speech From Private Abridgement: Introducing the Tort of Suppression*, 25 SW. U. L. REV. 223, 243, 238-43 (1996) (discussing how tort law “continues to grow” and suggesting several factors to be addressed in developing new torts), and Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 45-47 (1993) (discussing the development of the new tort of spoliation).

3. See W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* 3-4 (5th ed. 1984) (listing torts that did not fit into standard categories when they first arose “but nevertheless have been held to be torts”).

companion list: that is, new causes of action proposed in law reviews that have not been accepted or that looked unlikely to be accepted in the future. What did the successes have in common with one another, and the failures with their fellow failures? Although mystery and ignorance were in the end not defeated, I reached a few conclusions that bear, I think, on the general tasks of understanding and effecting doctrinal change.<sup>4</sup>

Space constraints limited my inquiry to the United States and the twentieth century, even though the process of common-law change did not begin here and now. Because my interest is in contemporary law reform, however, this ahistoricism may not matter. More fundamental was the need to define "new tort," however roughly, in the absence of agreement about what the phrase means.<sup>5</sup>

A new tort, let us suppose, is a tort claim generally identified by scholars and practitioners as both novel and free-standing. Though usually a common-law claim, it might take shape in a new statute.<sup>6</sup> By "novel" I refer to originality rather than current newness, and so some of the new torts in this Paper are no longer young.

What is excluded by the word free-standing falls into three categories. First, one may put aside changes in the law of torts that expand the domain of damages—by allowing new plaintiffs to sue for loss of consortium,<sup>7</sup> for instance, or allowing recovery based on fear of future illness<sup>8</sup>—rather than identify a new form of wrongful conduct. Also excluded as not free-standing are subclasses of negligence that expand duties of care, such as educational malpractice or wrongful life,<sup>9</sup> new torts as seen in this Paper

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4. As I have argued elsewhere, even a preliminary attempt to build a theory of law reform offers benefits in practice to both reformers and their antagonists. See Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 191-92 (1996).

5. See Robert F. Blomquist, "New Torts": A Critical History, Taxonomy, and Appraisal, 95 DICK. L. REV. 23, 36-37, 128-29 (1990) ("[T]he words [new tort] have meant different things to different writers and have varied in different contexts.").

6. See Kenneth M. Murchison, *Enforcing Environmental Standards Under State Law: The Louisiana Environmental Quality Act*, 57 LA. L. REV. 497, 555 (1997) (arguing that citizen enforcement provisions create new torts); see also *infra* notes 16, 98-109 (describing a new tort concerning harms caused by pornography).

7. See *Migliori v. Airborne Freight Corp.*, 952 F. Supp. 38, 43 n.7 (D. Mass. 1997) (detailing the role of the judge in creating a new cause of action pertaining to consortium based on the wrongful death of a plaintiff's child); *Coleman v. Sandoz Pharm. Corp.*, 660 N.E.2d 424, 425 (Ohio 1993) (recognizing a child's claim for loss of consortium based on an injury to a parent).

8. See *Buckley v. Metro-North Commuter R.R.*, 79 F.2d 1337, 1346 (2nd Cir. 1996) (allowing a fear-of-cancer claim based on asbestos exposure); *Madrid v. Lincoln County Med. Ctr.*, 923 P.2d 1154, 1155 (N.M. 1996) (allowing a claim for the fear of developing AIDS).

9. See *Ross v. Creighton Univ.*, 957 F.2d 410, 414-15 (7th Cir. 1992) (discussing an educational malpractice tort); *Procanik v. Cillio*, 478 A.2d 755, 762 (N.J. 1984) (allowing a claim by an infant against his physician for the failure to diagnose congenital rubella syndrome that, if known to the mother, would have caused her to terminate her pregnancy). Other examples are reviewed in Timothy M. Cavanaugh, Comment, *A New Tort in California: Negligent Infliction of Emotional Distress (For Married Couples Only)*, 41 HASTINGS L.J. 447 (1990) (discussing spousal infliction of emotional

grow mainly in the fields of intentional torts and strict liability. The third exclusion consists of expansions in private rights of action based on violations of the Constitution or statutes; although these claims function much as new torts do, they have a different genesis and a more diffuse constituency. In short, new torts are roughly what torts people say they are, except that some of what have been called new torts are eliminated on the ground that they are not free-standing and that statutory reforms may occasionally qualify as new torts.<sup>10</sup>

Four successes have emerged under these criteria: intentional infliction of emotional distress, strict products liability, invasion of privacy, and wrongful discharge from employment.<sup>11</sup> All of these claims, though linked to past causes of action, have achieved the designation of new torts. The first three have achieved legitimacy as novel and free-standing by the addition of new sections in the *Restatement of Torts*.<sup>12</sup> Writers associated with their formation have won praise,<sup>13</sup> as well as the indirect honor of

distress, a subclass of negligence); Maureen Castellano, *Wayward Clerics: Sinners or Tortfeasors?*, N.J. L.J., Apr. 22, 1996, at 5; Robert A. Clifford, *Workplace Violence Generates Two Kinds of Torts*, NAT'L L.J., Apr. 17, 1995, at C32 (explaining how the new torts of negligent hiring and negligent retention in the employment context grew from the ordinary negligence doctrine in master-servant relationships); and Robert A. Clifford & Pamela S. Menaker, "Wrongful Adoption" Gains Acceptance, NAT'L L.J., Sept. 28, 1992, at 38, 39 (discussing the Wisconsin, Illinois, and Minnesota courts' recognition of the new tort of wrongful adoption as an extension of negligence).

10. These definitional criteria, offered as approximate guidelines, are not essential to my argument about origins of new torts; a reader may favor a broader definition (such as Blomquist's, *see* Blomquist, *supra* note 5, at 36-37 (describing the "new tort" as a tool—"a signal, or marker for addressing the ramifications and implications of judicial creativity in responding to cases that seek to change existing tort doctrine"), or the view that Gary Schwartz expressed to me at the Keeton Symposium that erosions or repeals of immunities and defenses can be counted as new torts) without rejecting what is proposed here. The handful of causes of action that fit my criteria are particularly representative of what is salient about twentieth-century new torts.

11. Professor Blomquist offers a longer list, unconstrained by the free-standing criterion. *See* Blomquist, *supra* note 5, at 47-50 (discussing negligent infliction of emotional distress); *id.* at 50-52 (discussing wrongful life).

12. The elements of intentional infliction of emotional distress may be found in RESTATEMENT (SECOND) OF TORTS § 46 (1965). Another version of this tort was included in the supplement to the first *Restatement*. *See* RESTATEMENT OF TORTS (Supp. 1948). The elements of strict products liability may be found at RESTATEMENT (SECOND) OF TORTS § 402A (1965); the tort of invasion of privacy may be found at RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1965).

13. *See, e.g.*, KEETON ET AL., *supra* note 3, at 849 (calling the formation of the privacy tort "perhaps the outstanding illustration of the influence of legal periodicals upon the courts"); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 722-24 (1991) (praising the skillful advocacy of Lawrence Blades in calling for a tort remedy protecting employees from bad faith discharges); John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CAL. L. REV. 1255, 1255 (1972) ("Prosser on Torts! It has a completed sound, a belonging sound, a natural sound, a sound to be remembered for years to come."). One of Prosser's later writings, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter Prosser, *Assault*], is the second-most-cited article ever published in the *Yale Law Journal*. *See* Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1462 (1991).

attack.<sup>14</sup> Reformers that want to create a particular new tort, I contend, should study this handful of precedents.

Proposals that have yet to succeed include suggestions by Richard Delgado and others to remedy certain harms of hate speech<sup>15</sup> and the famous Dworkin-MacKinnon statute—enacted in Minneapolis and Indianapolis—that declared pornography a threat to civil rights and provided a tort-like damages remedy.<sup>16</sup> Such new-tort proposals are

14. For a critical sampler, see PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 36-39 (1990) (recounting the development of strict products liability and the unforeseen consequences of its application); Reed Dickerson, *Was Prosser's Folly Also Traynor's? or Should the Judge's Monument Be Moved to a Firmer Site?*, 2 *HOFSTRA L. REV.* 469, 470 (1974) (criticizing Judge Roger Traynor for his role in giving strict products liability a reach that undermines statutory authority as embodied in the consumer protection measures of the Uniform Commercial Code); 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, 45 (1982) (stating that the new tort has resulted in an "embarrassment of adjudication unencumbered by doctrine"); Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-At-Will*, 45 *CASE W. RES. L. REV.* 999, 1070-94 (1995) (questioning the practical effects on employee terminations produced by common-law changes to the employment-at-will doctrine); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *CORNELL L. REV.* 291, 362 (1983) (stating that the "common law private-facts tort has failed to become a usable and effective means of redress for plaintiffs").

15. See Richard Delgado, *Words That Woand: A Tort Action for Racial Insults, Epithets, and Name-calling*, 17 *HARV. C.R.-C.L. L. REV.* 133 (1982) (describing the limitations of current legal protection from racial insults and advocating a new action based on a defendant's intent to demean through reference to race); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *MICH. L. REV.* 2320, 2356-61 (1989) (arguing that racist hate speech should be recognized and regulated as a *sui generis* category of speech rather than brought under First Amendment exceptions such as the "fighting words" doctrine); John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 *BUFF. L. REV.* 653, 699-711 (1994) (proposing a tort of racial intimidation that would allow recovery if a victim could show that she was the target of a fear-inducing violent threat motivated by racial animosity).

16. The statute is summarized and discussed in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324-26 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Catharine MacKinnon has disavowed tort law as a device for feminist change and would presumably object to the new-tort label for the statute. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 158 (1979) (faulting tort for affirming "the extremes of conventional role expectations" about women); *id.* at 88 (stating that "tort theory fails to capture" the broad harms of sexual harassment for women); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 208 (1989) (objecting to the concept of causation as understood in tort law). But the antipornography statute had at least some origin in torts: MacKinnon and Dworkin had previously worked on a civil complaint on behalf of Linda Marchiano, an actress who contended that she was forced by beatings, threats, and kidnapping to star in the film *DEEP THROAT* (Vanguard Films Productions 1972). The draft complaint, which was later abandoned, alleged assault and battery as well as civil rights violations. See Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 *STAN. L. REV.* 607, 615 (1987). Some commentators share my view that MacKinnon and Dworkin wrote a new tort. See Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 *CORNELL L. REV.* 575, 576 n.6 (1993) (comparing the antipornography statute to a tort action that has been created by statute rather than common law); Martha Minow, *Foreword: Justice Engeudered*, 101 *HARV. L. REV.* 10, 65 n.257 (1987) (suggesting that the antipornography statute was based on "tort theories").

dormant rather than dead, and so these failures may ultimately prevail. However, circumstances suggest that these proposed new torts have experienced a different fate from the four mentioned above. Did the failures fail because they were too radical?<sup>17</sup> Unmanageable?<sup>18</sup> I think not, mainly because successful new torts warrant the same adjectives to about the same degree.<sup>19</sup> The enemy of proposed new torts is indeed conservatism, but this conservatism has been misunderstood. A success-and-failure comparison reveals how these approaches have fared in their struggles to overcome conservative resistance.

To complete the survey, there remain some miscellaneous instances. An inchoate tort, one that has neither succeeded nor failed, is spoliation, which has found acceptance in a few states<sup>20</sup> and has enjoyed some flickering support in the law reviews.<sup>21</sup> This half-developed tort illustrates the traits that correlate with both success and failure. I go on to suggest that the common law has quietly adopted the equivalent of new torts, though not labeled as such. Finally, in what may be a foolhardy public test of my theorizing, I venture predictions regarding new-tort proposals, coming from both the activist left and an opposite perspective that regards the activist left with suspicion. Both Jane Larson's tort of sexual fraud (a common-law action, with a proposed *Restatement* section drafted<sup>22</sup>) and Rory Lancman's tort of suppression<sup>23</sup> are, I think, unlikely to succeed in the immediate future. Another prediction pertains to the new tort of sexual harassment, which may succeed if it can defeat conservatism in its various manifestations, as I describe below.<sup>24</sup> Victory for any of these new torts, however, appears remote.

17. See Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 162 (1992) (characterizing the hate-speech tort as one of several "radical reconceptualizations of existing bodies of doctrine").

18. Cf. Leslie Benton Sander & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment*, 37 ARIZ. L. REV. 1247, 1253-59 (1995) (discussing erroneous fears about triviality, fraudulent claims, and unmanageability that accompany resistance to emotional-distress new torts).

19. See *infra* text accompanying notes 110-15. Sander and Berry make a related point about the fear of fraudulent claims of emotional distress: Good evidence exists that some physical injuries are easier to fake than emotional ones. See Sander & Berry, *supra* note 18, at 1252.

20. The tort of spoliation, which can be used to remedy the intentional or negligent destruction of physical evidence necessary for civil or criminal litigation, is studied as a new-tort case history in Spencer, *supra* note 2, at 45-60 (surveying state law). In *Christian v. Kenneth Chandler Construction Co.*, 658 So. 2d 408, 413-14 (Ala. 1995), the Alabama Supreme Court performed a similar count and found rejection of this tort the majority view.

21. See Steffan Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351 (1994); Spencer, *supra* note 2.

22. See Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 453 (1993) (suggesting liability under the tort of sexual fraud for one who "fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it").

23. See Lancman, *supra* note 2, at 238-62 (proposing and explaining a new tort, suppression, which would protect free speech from abridgment by private individuals).

24. See *infra* notes 123 and accompanying text.

Most new tort proposals indeed will fail. New causes of action are formed so haltingly as to be almost impossible projects for law reformers. Activists face a wall of conservative resistance that, depending on your point of view, impedes progress or stands strong against the vast, nearly unbounded, duties-for-everyone encroachment of tort.<sup>25</sup> This opposition takes three distinct forms, which I call “paradoxes,” in relation to the general project of creating new causes of action and to the phrase “How to Make a New Tort” in particular: first, the paradox of novelty (“new”); second, the tort paradox (“tort”); and third, the paradox of agency (“how to make”). These aspects of conservatism illuminate what lies ahead for law reformers who start from the contention that where there is a wrong there ought to be a remedy at law.

## II. The Paradox of Novelty

For centuries the common law has claimed that the identification of a right, or perhaps a wrong, demands a remedy. *Ubi jus, ibi remedium* goes the maxim, in contrast to the reverse, attributed to “primitive law,” that “where there is a remedy, there is a right.”<sup>26</sup> Scholarship of the early twentieth century described the evolution of a writ-based remedial scheme into the modern contention that wrongs imply remedies.<sup>27</sup> Yet study of the formation of new torts shows the persistence of “primitive” sequencing. Wrongs to many people do imply remedies, but the converse is still strong; and writers who describe or form successful new causes of action make due obeisance to causes of action framed in the past.

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25. My colleague Steven Harris, co-Reporter for the revision of Article 9 of the Uniform Commercial Code, reports a preference for contract rather than tort remedies among the constituencies with whom he works, for reasons of predictability and manageability. See *infra* Part II; see also William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731, 758 (1990) (noting that the economic-loss rule in products liability favors the UCC approach rather than tort precepts). From the vantage point of reformers, this conservative concern about manageability is formidable but not insurmountable, as one may see from the vanquishing of UCC rules in favor of tort-based strict products liability. See DAVID A. FISCHER & WILLIAM POWERS, JR., *PRODUCTS LIABILITY: CASES AND MATERIALS* 562 (2d ed. 1994) (noting that strict liability circumvents many UCC restrictions on recovery).

26. BLACK'S LAW DICTIONARY 1520 (6th ed. 1990) (defining *ubi jus, ibi remedium* and including a comparison to “primitive law”). The maxim seems to have been formed in the early eighteenth century; it was noted by Blackstone, see 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*23 (“[W]here there is a legal right, there is also a legal remedy . . . whenever that right is invaded.”), and by Chief Justice Marshall, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone).

27. See E.F. Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CAL. L. REV. 461, 461-62 (1922) (stating that the traditional sequence was remedy, duty, right, and interest, but that today the pattern is reversed to interest, right, duty, and remedy); see also Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1923) (contrasting the ancient notion that rights are embodied in corporeal things with the modern notion of rights as abstract legal interests pertaining to things).

In their retreat from novelty, successful new-tort advocates embrace formalism: whenever possible they argue that their new tort derives naturally from prior common-law rules. "It is time to recognize that the courts have created a new tort," wrote William Prosser in the first sentence of his article about intentional infliction of emotional distress,<sup>28</sup> implying that this new tort formed and grew without deliberate cultivation and (again following formalism) presuming that law is *found*—through logic and analysis—rather than asserted.<sup>29</sup> Prosser argued that the action for intentional infliction of mental suffering developed in a sequence: assault first, as a medieval variant on trespass; next there developed nineteenth-century actions for indignities inflicted by railroad employees on paying passengers; finally, by 1897, came the realization that "outrage" rather than common-carrier liability explained the expansion of this tort.<sup>30</sup> Formalist themes like these—analogy, synthesis, small increments that move the law forward—also pervade the official history of products liability as told by Edward Levi in his paean to the common-law method.<sup>31</sup> The framer of a new tort can in this way deny novelty. He can claim merely to chronicle a past and (at most) note the direction in which logic points.

For reformers who are forced into a more open declaration that they are innovating, a related way to repudiate novelty is to maintain that one is correcting and tinkering. The new tort advanced is not so much a new creation as an adjustment to well-established law. For instance, in *The*

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28. Prosser, *supra* note 2, at 874.

29. See Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts* (Fifth Edition) and the *Prosser Legacy*, 39 VAND. L. REV. 851, 856-58 (1986) (book review) (crediting Prosser for fashioning the neoformalist "response to Realism"). Other new-tort writers have commented on the strength of formalism in the development of new torts. See Jason A. Lief, Note, *Insuring Domestic Tranquility Through Quieter Products: A Proposed Product-Nuisance Tort*, 16 CARDOZO L. REV. 595, 642-43 (1994) (arguing that the new tort of product nuisance is not new but stems from invasion of privacy theories). Lief has noted that Chief Justice Coke (1552-1634) "was reluctant to admit that law could be made, or even changed" because "[i]t existed already." *Id.* at 630 n.189. The right to privacy as posited by Warren and Brandeis is a partial exception to this tendency toward formalism. See *infra* notes 88-97 and accompanying text.

30. See Prosser, *supra* note 2, at 878 & n.22, 879-87 (citing *Spade v. Lynn & B.R. Co.*, 47 N.E. 88 (Mass. 1897)). For early indications that mental suffering occasioned by outrageous conduct was compensable and tracing the development of the tort, see generally Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) (explaining the emergence of mental suffering as actionable and presenting caselaw that developed liability for breach of mental peace). Both Prosser and Magruder neglect the admiralty case of *Chamberlain v. Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823) (No. 2,575), where Justice Story awarded \$400 to a woman passenger and her husband for the "habitual obscenity, harsh threats, and immodest conduct" of a ship captain. *Id.* at 414-15. *Chamberlain*, whose facts are shrouded in nineteenth-century evasion, appears to rely on the passage contract between the parties: "the wrongs complained of are gross ill-treatment and misconduct in the course of the voyage, while on the high seas, by the master, in breach of the stipulations necessarily implied in his contract." *Id.* at 413. I am indebted to Professor David Robertson for alerting me to this case.

31. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 10-27 (First Phoenix ed., Phoenix Books 1961) (1949).



*Right to Privacy*,<sup>32</sup> a new-tort landmark, Samuel Warren and Louis Brandeis do not entirely want credit for novelty. Warren and Brandeis repeatedly assert the ancient pedigree of their new tort.<sup>33</sup> Similarly, during the writing of Section 402A of the *Restatement*, the newness of strict products liability was downplayed; Prosser contended variously that the new section was a simple extension of warranty protection to nonprivity purchasers of goods<sup>34</sup> and a summary of existing law.<sup>35</sup> Both claims look dubious, especially in hindsight.<sup>36</sup> A few exceptions exist to the rule that emendation rather than novelty is the winning strategy when packaging a new tort. Spoliation, a new tort not identified with the academy, was proclaimed with full cymbal clashes by the California Court of Appeal.<sup>37</sup> More often, however, judges firmly decline implicit or explicit invitations to create new torts;<sup>38</sup> this reticence has been shared, perhaps instinctively, by academic reformers.<sup>39</sup>

32. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

33. *Id.* at 193-95, 204-05, 207-10 (presenting common-law cases that implicitly recognize an intangible property right in personal privacy).

34. See JANE STAPLETON, *PRODUCT LIABILITY* 26 (1994).

35. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 514 (1985) (noting Prosser's citation of early cases ostensibly supporting his claim of a trend toward strict liability in favor of the ultimate consumer).

36. See *id.* at 515 (opining that if Prosser indeed believed in such limited scope of the rule, he "obtained in Section 402A a legal standard far different from what he expected").

37. See *Smith v. Superior Court*, 198 Cal. Rptr. 829, 832 (Ct. App. 1984) (asserting that the law of torts is not static and that a new tort "may be appropriate to cover the intentional spoliation of evidence"). Fanfare also accompanied the holding of *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 743 (Ill. App. Ct. 1952), even though the tort there, invasion of privacy, was no longer a new idea.

38. I found countless refusals in recent judicial opinions. Some federal judges modestly note that they are not competent to declare new torts. See *Great Central Ins. Co. v. Insurance Servs. Office, Inc.*, 74 F.3d 778, 785-86 (7th Cir. 1996) (Posner, C.J.) ("[W]hat Great Central really wants . . . is for us to create in the name of Illinois law a new tort. . . . We keep warning the bar that a plaintiff who needs a common law departure or innovation to win should bring his suit in state court rather than in federal court."); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 129 (3d Cir. 1993) (Cowen, J.) ("We once again refuse to articulate a new tort principle under Pennsylvania law."). Other cases just say no. See *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1079-80 (W.D. Ky. 1995), *appeal dismissed*, 95 F.3d 1168 (1996) (refusing to adopt the tort of intentional interference with the performance of a contract); *Jones v. BP Oil Co.*, 632 So. 2d 435, 439 (Ala. 1993) (declining to recognize a tort for negligence in implementing a corporate reorganization plan that resulted in the dismissal of an at-will employee); *Mack v. McDonnell Douglas Helicopter Co.*, 880 P.2d 1173, 1177 (Ariz. Ct. App. 1994) (holding that the employer had no duty to an at-will employee to exercise reasonable care in implementing a reorganization plan); *Macias v. State*, 897 P.2d 530, 540 (Cal. 1995) (refusing to impose on an insecticide manufacturer a duty to disseminate health warnings when governmental entities using the product were giving defective warnings); *White v. State*, 929 P.2d 396 (Wash. 1997) (rejecting a proposed new tort of "wrongful transfer"); see also Daniel J. Bussel, *Liability for Concurrent Breach of Contract*, 73 WASH. U. L.Q. 97, 109 (1995) (describing the effort of the Minnesota Supreme Court to "clarify" that it had not created a new tort for negligent breach of contract, but rather that it had merged joint-and-several liability into contracts doctrine when joint breaches of independent contracts combine to cause indivisible harm).

39. See *supra* notes 32-35.

Successful new-tort creators further distance themselves from novelty by avoiding references to a new class of victims or non-traditional values. If a remedy follows from a right, as the modernists like to say, then one might expect the law review literature to have paved the way for new torts by detailing the unredressed harms of intentional infliction of emotional distress, invasion of privacy, product-related injury, and wrongful discharge. But it is only the last tort that has provoked any such literature, and not by coincidence, wrongful discharge is the most precarious, the least firmly fixed, of the four successful new torts.<sup>40</sup> Novelty suffers further disdain in the values that advocate-writers claim lie behind their innovations: the more traditional and conservative these values are, the better they support the new tort.<sup>41</sup>

### III. The Tort Paradox

Newness, I have suggested, is a burden to new tort creators. And, as a description of an area of the law, tort is a relatively new term.<sup>42</sup> To many, tort connotes expansion, unpredictable outcomes, and redistribution of power, while contract and property come with a veneer of tradition and continuity. Just as they dodge the novelty bullet, then, successful creators

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40. California established an expansive precedent for wrongful discharge. See *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1333-37 (Cal. 1980) (holding that an employee's discharge should be barred if terminating the employee would frustrate public policy). The California Supreme Court has since retreated from *Tameny's* broad scope. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379-80 (Cal. 1988) (holding that no public interest exists to stop the discharge of an employee who disclosed that his employer had been embezzling). See also Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEXAS L. REV. 1655, 1669-87 (1996) (describing inroads on wrongful discharge actions arising from the continued presumption of at-will employment). Invasion of privacy has been proclaimed dead or mortally wounded. See, e.g., Zimmerman, *supra* note 14, at 365, 362-65 (suggesting that it is time to "give up the efforts at resuscitation" of the invasion of privacy tort). It continues to live in various incarnations, however. See Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 BUFF. L. REV. 1, 1-2 (1995) (suggesting breach of confidence as an alternative to the invasion of privacy tort).

41. In his study of how the wrongful-discharge tort developed, Cornelius Peck writes that the conservative tradition challenged by the cause of action—employment at will—lacked a solid foundation in common law and that because neither employment at will nor wrongful discharge was much more venerable or novel than the other, the new tort was able to gain much-needed ground. See Peck, *supra* note 13, at 724. The seminal article on wrongful discharge, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967), called for a new tort remedy but invoked a host of traditions and conservative approaches to the injustice identified. See *id.* at 1414, 1423-25, 1433 (explaining that his proposed remedy for abusive discharge has parallels in the abuse-of-process tort action and in cases allowing recovery for interference by a third party with the at-will employment relationship and suggesting that the remedy would best be administered by established civil rights and employment practices commissions).

42. See KEETON ET AL., *supra* note 3, at 1 ("Not until yesterday, as legal generations go, did torts achieve recognition as a distinct branch of the law."). The first torts treatise was published in 1859, the first casebook in 1874. See David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 772-73 (1991). Prior to the mid-nineteenth century, "tort law was conceived of and practiced as a collection of unrelated writs." *Id.* at 770.

of new torts dodge the concept of tort<sup>43</sup> and, whenever possible, rely on older common-law vehicles, especially contract and property.<sup>44</sup> The fluidity of these labels, pointed out twenty-five years ago by Calabresi and Melamed,<sup>45</sup> gives reformers room to maneuver.<sup>46</sup> When they can avoid a tarring by the broad brush of torts, reformers make gains against conservative resistance.

Contract and property rationales help the new-tort reform effort immensely, and successful innovators take pains to find them. All four of the new-tort successes owe debts to contract or property rationales. Prosser was lucky to have an obvious contract antecedent for strict products liability,<sup>47</sup> and he made more luck for himself by identifying a contract theme for the new tort of intentional infliction of emotional distress.<sup>48</sup> Warren and Brandeis wrote that property, having already expanded to cover "works of literature and art, goodwill, trade secrets and trademarks," ought to take the "inevitable" next step and protect a person's privacy when they argued, *inter alia*, that a chorine had a right not to be photographed unexpectedly while wearing a revealing costume—property, not the autonomy and dignity honored by tort, was said to be at stake.<sup>49</sup>

43. An almost whimsical example is provided in Jeremiah Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91, 114-15 (1921) (observing that the phrase "Disparagement of Title" appears to be winning out over "Slander of Title").

44. See *infra* notes 47-52, 61-74 and accompanying text.

45. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-93 (1972) (articulating a unified concept of legal "entitlement" which embraces relationships traditionally analyzed in separate subject areas such as property and torts).

46. See generally Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647 (1971) (exploring the line between property and tort conceptions of pollution and nuisance); Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 900 n.9 (collecting numerous examples of contract-related injuries now redressed by tort actions).

47. See Prosser, *Assault*, *supra* note 13, at 1127 (proclaiming an assault on the "citadel" of privity of contract with the statement that "[i]f warranty is a matter of tort as well as contract, and if it can arise without any intent to make it a matter of contract, then it should need no contract; and it may arise and exist between parties who have not dealt with one another"); William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 124, 167-68 (1943) (defining the contract-based implied warranty of merchantable quality, but noting that it was idle to inquire whether liability was grounded in contract or tort because it partakes of the nature of both and in either case equates to liability without fault).

48. See Prosser, *supra* note 2, at 881-82 (identifying "implied contract" as one of the bases more timorous courts have rested their decisions upon rather than the intentional infliction of mental suffering). In this piece, Prosser adverts to contract as a doctrinal label covering actions for outrage that ought to be stripped away as obsolete and fictitious. See *id.* Contract antecedents, though necessary to the statement of many new torts, are often disparaged as inadequate. On this point in the context of invasion of privacy, see *infra* note 50. I am grateful to Keeton Symposium participants David Anderson, for his thoughts on the subject, and David Owen, for naming this phenomenon: "the paradox within the paradox."

49. See Warren & Brandeis, *supra* note 32, at 204-06.

Warren and Brandeis also acknowledged their debt to contract, while claiming that the right to privacy had outgrown its contract heritage.<sup>50</sup> In her recent review of the privacy tort, Susan Gilles proposed to shore it up with a contract analogy—a tort for breach of confidence.<sup>51</sup> Finally, wrongful discharge was identified as a breach of contract first, emerging as a tort several years later.<sup>52</sup>

The semisuccessful tort of spoliation relies on a host of other categories of law. Destruction of evidence may be prevented or remedied by rules of evidence such as the spoliation inference, which allows the factfinder to draw an unfavorable inference against a spoliating litigant;<sup>53</sup> rules of civil procedure, including Rule 37 of the Federal Rules and the “inherent power” of federal courts to regulate litigation;<sup>54</sup> professional responsibility tenets;<sup>55</sup> statutory and constitutional constraints on prosecutors;<sup>56</sup> and obstruction-of-justice statutes.<sup>57</sup> In *Smith v. Superior Court*,<sup>58</sup> the California spoliation case, the court worked with contract-like facts: the parties had had an understanding that the defendant would preserve certain materials to be used as evidence at trial, and later the defendant violated this agreement.<sup>59</sup> Several judicial opinions after *Smith* preferred to think of spoliation as a breach of contract,<sup>60</sup> and the

50. *See id.* at 208-12. For example, the authors argued, breach of contract worked fine in cases involving unwanted distribution or publication of photographs back in the era when photography required “sitting” and could not be done surreptitiously. Photographic technology now demands a broader rationale, the authors wrote. *Id.* at 211. Similarly, the law might imply a promise not to disclose the private letters one solicits and receives, but such a promise could not bind a third party who acquires a copy of such a letter without permission. *See id.* at 211-12.

51. *See Gilles, supra* note 40, at 56-60.

52. *See Petermann v. International Bd. of Teamsters, Local 396*, 344 P.2d 25, 27-28 (Cal. Dist. Ct. App. 1959) (proclaiming that an employer’s breach of an employment contract may result in damage if the discharge was not in good faith and frustrates public policy).

53. *See Lawrence Solum & Stephen Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087-94 (1987) (relating the elements and effect of the spoliation inference as a method of inhibiting the destruction of evidence).

54. *See id.* at 1094-100 (elaborating on civil discovery sanctions as a method of controlling the destruction of evidence).

55. *See id.* at 1125-35 (discussing the law regarding attorney participation in destroying evidence).

56. *See id.* at 1118-25 (noting the “special problem” of destruction of evidence by police and prosecutors).

57. *See id.* at 1106-18 (discussing the ramifications of criminal sanctions for destroying evidence).

58. 198 Cal. Rptr. 829 (Ct. App. 1984).

59. *See id.* at 831 (relating that the defendant had destroyed, lost, or transferred the physical evidence, making it impossible for the plaintiff’s experts to inspect and test it).

60. *See, e.g., Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (stating that only the existence of an agreement to preserve evidence gives rise to a duty to preserve evidence); *La Raia v. Superior Court*, 722 P.2d 286 (Ariz. 1986) (finding *Smith* inapposite); *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 26-27 (Fla. Dist. Ct. App. 1990) (recognizing a cause of action in either tort or contract for spoliation of evidence, depending upon whether the duty breached was imposed by agreement or by law); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1182, 1181-83 (Kan. 1987) (distinguishing the plaintiff’s claim from *Smith* on the ground that “no special circumstance or relationships” existed that would create a duty to preserve evidence).

California court itself may have started from that premise. Nontort protections continue to help justify the existence of a tort of spoliation.

The tort paradox prompts the supposition that a number of new torts may have, in the Jim Crow locution, "passed;" in other words, new causes of action may have succeeded because they escaped the menacing tort label and appeared to be protections of contract or property rights rather than new torts. The zone between contract and tort provides particularly effective cover. Contract scholars like to complain that tort-thinking has engulfed and devoured their discipline,<sup>61</sup> and the successful new tort of strict products liability is only one example of this conquest.<sup>62</sup> But tort need not, at least in theory, be ascendant always. Other possibilities exist, including contracts being dominant (such that the tort is barely discerned) and equal coexistence between the two doctrines.

Examples of the muting of torts are, by hypothesis, hard to detect. One relatively visible example is in insurance law: most states allow a claim against an insurer for bad-faith refusal to provide benefits under an insurance policy.<sup>63</sup> I have found that this cause of action does not come readily to mind as a new tort except among those who specialize in insurance or commercial law. Its status seems peculiarly poised between tort and something else. While some courts speak frankly about the tort of bad faith,<sup>64</sup> many prefer to endorse an action that is limited in some way, and for this purpose a focus on contract doctrine—or on the insurance contract itself—is expedient. Even when judges believe that the contracts label would keep damages too low to compensate plaintiffs for the harms of bad faith,<sup>65</sup> they find the contract cloak reassuring, a device to keep

61. The classics are P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 571-79 (1979) (analyzing the decline of free choice in contract theory and suggesting that benefit-based and reliance-based liabilities are more in line with current paternalistic social philosophy) and GRANT GILMORE, *THE DEATH OF CONTRACT* 96 (Ronald K.L. Collins ed., 1995). See also Scallen, *supra* note 46, at 900-01 n.9 (noting the various methods by which courts and commentators have expanded contract liability through tort sanctions).

62. See Grant Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 115-16 (1970) (pointing to the rise of "Products Liability" within the domain of sales law as only one example of the "reversal of risks . . . [that] has been going on all over the place" in the law).

63. See WILLIAM M. SHERNOFF ET AL., *INSURANCE BAD FAITH LITIGATION* § 2.01 at 2-2 (1990).

64. See *Timberlake Constr. Co. v. U.S. Fidelity & Guar. Co.*, 71 F.3d 335, 340 (10th Cir. 1995) (stating the Oklahoma tort of bad faith by an insurer); *Quick v. National Auto Credit*, 65 F.3d 741, 744-47 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1034 (1996) (stating Missouri's tort of bad faith failure to settle); *Best Place, Inc. v. Pennsylvania Am. Ins. Co.*, 920 P.2d 334, 346 (Haw. 1996) (finding an independent tort cause of action for an insurer's breach of the duty of good faith); *Guaranty Nat'l Ins. Co. v. Potter*, 912 P.2d 267, 272 (Nev. 1996) (upholding a finding against an insurer for tortious breach of the implied covenant of good faith).

65. Tort rules permit wider recovery, sometimes allowing compensatory damages for mental suffering and medical expenses. See SHERNOFF ET AL., *supra* note 63, § 7.03[1]. Occasionally punitive damages are available. See *id.* at § 8.01. Cases where courts deemed contract damages too low include the landmark *Gruenberg v. Aetna Insurance Co.*, 510 P.2d 1032, 1041-42 (Cal. 1973)

entitlements less visible.<sup>66</sup> Rather than proclaim a social wrong—the evil of bad faith—judges have generally hewed to the insurance contracts at issue in the cases while granting themselves a bit of tort-like leeway as to remedy.<sup>67</sup> Contract traditions thus lend old-fashioned respectability to a partially revealed new tort.

Property traditions also dress up claims that would otherwise have to face the world in the less protective garb of tort. For example, property law recognizes implied warranties of fitness and habitability in residential property<sup>68</sup>—a large set of entitlements that would have looked more radical if they had been proposed as new torts. Courts have much freedom to move in this area. In *Miller v. Christian*,<sup>69</sup> an appeal to the Third Circuit from the Virgin Islands, the appellate court had a statutory duty to turn to the *Restatements* for guidance in the absence of governing local law.<sup>70</sup> With a little help from the *Restatement of Torts*, the *Miller* court read the *Restatement of Property* to allow a claim for personal-property damages against a landlord based on his breach of the implied warranty of habitability,<sup>71</sup> even though the *Restatement of Property's* support for this action is far from explicit. In California, the implied warranty of habitability supported a holding of strict landlord liability for latent premises defects.<sup>72</sup> Other courts have helped veil this quasi-new tort in the

(allowing a claim for plaintiff's distress even though the insurer's conduct may not have been "extreme" or "outrageous"). See also *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 821 (10th Cir. 1993) (noting that "bad faith" cases against insurers may involve nominal contract damages and significant egregious behavior worthy of punitive damages); *Hall v. Modern Woodmen of Am.*, 882 F. Supp. 830, 832 (E.D. Ark. 1994) (noting that without tort-damages rules, the amount in controversy would be too low for diversity jurisdiction).

66. See, e.g., *United States v. Benson*, 67 F.3d 641, 646 (7th Cir. 1995) (noting the essential "contractual character" of bad-faith actions); *Pen Coal Corp. v. William H. McGee & Co.*, 903 F. Supp. 980, 983 (S.D. W. Va. 1995) (preferring use of a contract designation for choice-of-law analysis); *Pierce v. International Ins. Co.*, 671 A.2d 1361, 1367 & n.6 (Del. 1996) (surveying other states' caselaw before choosing the contract rubric). One recent state supreme court case that decided to accept the tort label did so with a show of reluctance, noting the particular advantages of a tort approach in third-party insurance cases. See *Taylor v. State Farm Mut. Ins. Co.*, 913 P.2d 1092, 1095 (Ariz. 1996) (alluding to "the almost even split in jurisdictions regarding which rubric best fits bad faith claims").

67. See Daniel S. Bopp, *Tort and Contract in Bad Faith Cases: Is the Honeymoon Over?*, 59 DEF. COUNS. J. 524, 529 (1992) (referring to inroads into the "contract haven"); *id.* at 529-30 (describing the compromise approach of "Bad Faith as Contract, but with Broadened Remedies"). See also *id.* at 534 (noting that some courts accept the tort label but hold plaintiffs to the contract statute of limitations).

68. See, e.g., RESTATEMENT (SECOND) OF PROPERTY §§ 5.1-5.6 (1977) (discussing landlord and tenant duties).

69. 958 F.2d 1234 (3d Cir. 1992).

70. *Id.* at 1237 (citing V.I. CODE ANN. tit. 1, § 4 (1984)).

71. *Id.* at 1238-91.

72. See *Becker v. IRM Corp.*, 698 P.2d 116, 117 (Cal. 1985) (reversing a lower court ruling that "a landlord is not liable to a tenant for a latent defect of the premises absent concealment of a known danger or an expressed contractual or statutory duty to repair"); see also *Johnson v. Scandia Assocs.*,

language of contract and the rubric of property.<sup>73</sup> A rather cryptic property-law promise thus contains the powers of a new tort, as well as the "doctrinal camouflage"<sup>74</sup> needed to conceal those powers.

#### IV. The Paradox of Agency

A law review article on the new tort of spoliation seeks to assist state supreme court judges who are uncertain about whether to accept it. According to the author, Terry Spencer, the decision of whether to adopt a new cause of action is, or ought to be, rationalist, future-looking, and aggregative, like the Hand formula—that is, a comparison of costs versus benefits, based on an estimate of the incentives that the new tort would foster.<sup>75</sup> Spencer enumerates some of the costs and benefits of a spoliation tort and sketches a design for future empirical research that could improve the analysis.<sup>76</sup> This utilitarian approach is absolutely contrary to the life-history of successful new torts. As previously mentioned, new-tort formation looks backward, not forward. Furthermore, whereas Spencer presumes that new torts become effective by the design of policymakers using the litigation process,<sup>77</sup> new torts have been successful only inasmuch as they can be portrayed as independent of individual human creation.

The master portraitist and veiled agent of American tort history was, of course, William Prosser, whose approach to the creation of new torts outmaneuvered all three of the conservative paradoxes, most strikingly the paradox of agency. In his scholarship and in the records of his work at the American Law Institute, Prosser emerges consistently as a man without a plan to leave an idiosyncratic imprint on tort law. To Prosser, changes in

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641 N.E.2d 51 (Ind. Ct. App. 1994) (using the implied warranty of habitability to support an action for personal injury caused by latent premises defects).

73. Like the claim for bad faith, implied warranty of habitability is often characterized by courts as a contract-tort hybrid. See, e.g., *Insurance Co. of N. Am. v. Superior Court*, 800 P.2d 585, 587-88 (Ariz. 1990); *Elizabeth N. v. Riverside Group, Inc.*, 585 So. 2d 376, 378-81 (Fla. Dist. Ct. App. 1991); *Ellis v. Robert C. Morris, Inc.*, 513 A.2d 951, 955 (N.H. 1986). Again, strict adherence to contract is restrictive because of the damages rules. See *supra* note 65 and accompanying text. But even when seen in terms of contract, the implied warranty of habitability recognizes wrongs, rights, and remedies that have much in common with tort actions.

74. Peck, *supra* note 13, at 719.

75. Spencer, *supra* note 2, at 61-71.

76. *Id.* at 61-64. For example, Spencer says that spoliation is a frequent occurrence; one estimate, by Charles Nesson, suggests that destruction of evidence occurs in a large percentage of civil cases. See *id.* at 64 (citing Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991)). Given the scope of the problem, one could devise a study comparing states that accept the tort with states of similar characteristics that do not, measuring the deterrent effect of a tort remedy in the jurisdiction. See *id.*

77. See *id.* at 45-55 (chronicling several state courts' recognition of the tort of intentional or negligent spoliation).

tort law had virtually no role to play in empowering the disenfranchised, identifying new victims, telling untold stories, or shifting any balance of power in any direction. By his own lights Prosser was not a political agent,<sup>78</sup> and so his proposals were seen as undirected and imminent.

A conservative demeanor charmed away a great deal of conservative resistance. In his writings Prosser looked at claimants with a jaundiced eye. He piled additional scorn on a mocked old woman,<sup>79</sup> trivialized sexual assault,<sup>80</sup> snickered at American Indians,<sup>81</sup> impugned the motives and testimony of plaintiffs,<sup>82</sup> and took domestic violence lightly.<sup>83</sup> Readers could be sure that any new torts advocated did not originate in a bleeding heart. This posture served to deny both novelty and agency.

The *Restatement* project gave Prosser additional power to avoid the paradox of agency and preempt conservative criticism. Prosser modified an earlier version of the emotional distress tort in a conservative direction. When the American Law Institute had originally accepted the new tort in 1948, it did not make outrageousness an element; to cover some of the same ground, the *Restatement* allowed a defense of privilege.<sup>84</sup> Unilaterally determining that without the element of outrageousness, the tort would expand too quickly, Prosser added this element to the plaintiff's prima facie case and moved the privilege issue to the comments.<sup>85</sup> When

78. See William L. Prosser, *On Political Questions*, 1 J. LEGAL EDUC. 409 (1948) (reflecting on his refusal to use his position to endorse a political cause).

79. See William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 51 (calling an emotional-distress plaintiff "an eccentric and mentally deficient old maid").

80. See WILLIAM L. PROSSER ET AL., TORTS: CASES AND MATERIALS 95 (8th ed. 1988) ("On a park bench in the moonlight, a young man informs a girl that he is going to kiss her. She says and does nothing, and he kisses her. Is he liable for battery?"). A later edition of the casebook sanitized this illustration. See JOHN W. WADE ET AL., TORTS: CASES AND MATERIALS 91 (9th ed. 1994) (replacing the unnamed recipient of the unsolicited kiss with the man's fiancée). Prosser also enjoyed a good laugh at *Dickinson v. Scruggs*, 242 F. 900 (6th Cir. 1917), in which the female plaintiff "accepted the invitation [to illicit sexual intercourse] and then sued for the insult." Prosser, *supra* note 79, at 46 n.33. See also Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495, 522 (1988) (criticizing note materials in Prosser's casebook as "almost prurient" and degrading to women).

81. See William L. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257, 257 (1948) (faulting a West Coast Indian's failure to follow English grammar rules).

82. See Prosser, *supra* note 79, at 51 ("The pot of gold came at last . . . but only to her heirs."). In another article, Prosser related a case in which he had represented a defendant against one plaintiff, "a little Swedish housewife," who had tripped in her kitchen and "ended up on the floor . . . with tomato juice down her neck, jello in her hair, a fractured hip, lacerations, contusions and abrasions, a great deal of mental suffering, and, believe it or not, a miscarriage!" William L. Prosser, *Modern Trends in the Law of Torts*, 16 NEV. ST. B.J. 51, 52-53 (1951).

83. See Tobias, *supra* note 80, at 513, 522-23 (noting Prosser's omission of wife battering in his treatment of battery and "discipline" and his characterization of husbands' privilege to beat their wives as a "gentle rule").

84. See RESTATEMENT OF TORTS § 46 (Supp. 1948).

85. See Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEXAS L. REV. 1693, 1706 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1964) and *id.* § 46 reporter's note (Tentative Draft No. 1, 1957)).



strict products liability began to take shape as a new tort in the middle of the century, the *Restatement (Second)* gave Prosser another opportunity to downplay his agency and portray strict products liability as part of the emerging new common law, even though only a few state courts had accepted the cause of action at the time.<sup>86</sup> *Restatement* work as a general matter can provide cover for activists who seek to disclaim agency,<sup>87</sup> and Prosser exploited this cover to help build three successful new torts.

*The Right to Privacy* looks like an exception to the paradox of agency, but even this new-tort proposal that is so famously identified with the designs of its two authors can be seen as a work offered in partial humility.<sup>88</sup> Warren and Brandeis identified a wrong and thus a right, "the right [of the individual] to be let alone."<sup>89</sup> But the new tort of privacy was hardly their creation alone.<sup>90</sup> Prior caselaw had recognized a right to privacy in connection with property interests.<sup>91</sup> Later doctrine-builders—notably the ever-present impresario William Prosser—shaped the right to privacy into four distinct new tort actions.<sup>92</sup>

Where Warren and Brandeis had to focus on the specifics of their new cause of action, moreover, they retreated into vagueness. As James Barron points out, the aspect of privacy that mattered most to Warren and Brandeis—the right to keep personal information out of the newspapers—is both inconsistent with the principle of a free press and unattractive to the courts in practice. Moreover, the remedy that Warren and Brandeis proposed—more publicity in the form of a lawsuit—"inhibits the very individuals to be protected."<sup>93</sup> Other writers who admire the article condemn it for its sloppy doctrine.<sup>94</sup> But doctrine was never its point; the

86. See Priest, *supra* note 35, at 514 (stating that Prosser cited 40 cases to support his claim that strict products liability was part of newly emerging common law).

87. I have developed this theme at greater length in Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1679-80 (1995).

88. See James H. Barron, *Warren & Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890); *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 911 (1979) (noting Brandeis's modest assessment of the article by citing a letter written on Nov. 29, 1890 from Louis D. Brandeis to Alice Goldmark).

89. See Warren & Brandeis, *supra* note 32, at 193.

90. "Although the two men are regarded as fathers of the right of privacy, their paternity may well be in name only." Barron, *supra* note 88, at 884.

91. See Leebron, *supra* note 42, at 777-78 (noting a Michigan Supreme Court case, *DeMay v. Roberts*, 9 N.W. 146 (Mich. 1881), in which the plaintiff won damages because the defendant witnessed her in childbirth, and a Supreme Court decision that invalidated the required production of private papers, *Boyd v. United States*, 116 U.S. 616 (1886), *rev'd on other grounds*, 387 U.S. 294 (1967)).

92. See RESTATEMENT (SECOND) OF TORTS §§ 652 A-E (1976) (describing the four new torts); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (listing the four new tort actions: intrusion, public disclosure of private facts, false light in the public eye, and appropriation).

93. Barron, *supra* note 88, at 880-81.

94. See, e.g., Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1135 (1992) (suggesting that the approach taken by

authors seemed almost bored by the idea of a tort claim. Eschewing any ambition to reallocate power in favor of a wronged class of plaintiffs, Warren and Brandeis offered *The Right to Privacy* as a meditation—or “something of a lawyer’s catharsis,” as Clark Havighurst wrote<sup>95</sup>—on the nature of basic liberties rather than as a contribution to torts.<sup>96</sup> The article explored social change and the interests of one class in particular,<sup>97</sup> and it did not insist on its own new-tort originality. By demurring to pertinent questions of tort theory and practice, Warren and Brandeis were able to avoid the penalties associated with new-tort agency.

For those readers willing to accept the MacKinnon-Dworkin anti-pornography statute as a new tort,<sup>98</sup> the story of this crusade illustrates how the paradox of agency can kill a proposed cause of action. In the official story, the anti-pornography statute fell victim to First Amendment constraint rather than to any paradox: the statute suppressed the right to free speech and promoted a state orthodoxy, wrote Judge Frank Easterbrook of the Seventh Circuit Court of Appeals,<sup>99</sup> and the Supreme Court agreed.<sup>100</sup> By contrast, the paradox of agency points to the fame, scrutiny, and activism that accompanied Catharine MacKinnon and Andrea Dworkin. This agency was a central obstacle to their proposed tort.

Consider the new tort. Blaming pornography for a host of injuries, the statute provided a right of action against filmmakers, distributors, exhibitors, and persons “trafficking in pornography” as well as direct perpetrators of harm such as assault and battery.<sup>101</sup> All actions were to be brought by wronged individuals; MacKinnon and Dworkin stood adamantly against letting the state initiate prosecution and refused to write new crimes.<sup>102</sup> In spurning the power of criminal law, MacKinnon and

Warren and Brandeis in analyzing a right of privacy is inapplicable to modern society); Zimmerman, *supra* note 14, at 293 (noting the conflict between the right of privacy and the protection of freedom of speech).

95. Clark C. Havighurst, *Foreword*, 31 LAW & CONTEMP. PROBS. 251, 251 (1966).

96. See Barron, *supra* note 88, at 884 (explaining that Warren and Brandeis believed the right to privacy was implicit in the common law); Leebron, *supra* note 42, at 779-80 (criticizing Edward Bloustein’s assertion that Warren and Brandeis thought of privacy exclusively in terms of torts).

97. See Bezanson, *supra* note 94, at 1139 (“In 1890, the idea of privacy, as expressed by Warren and Brandeis, had a distinctly class-based character. It focused on the ‘problem’ of access by the lower classes of society to information about the upper classes.”).

98. See *supra* note 16 and accompanying text.

99. See *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

100. See *Hudnut v. American Booksellers Ass’n*, 475 U.S. 1001 (1986) (mem.), *aff’d* 771 F.2d 323 (7th Cir. 1985).

101. See Brest & Vandenberg, *supra* note 16, at 619.

102. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 163, 192 (1987); Brest & Vandenberg, *supra* note 16, at 616 (“[MacKinnon and Dworkin] believe . . . [a] civil action, controlled by the plaintiff herself rather than a public prosecutor, offered the possibility

Dworkin built—or at least tolerated—a big escape hatch for pornographers: civil juries, who tend to favor defendants much more than do criminal juries,<sup>103</sup> would presumably find many claims dubious.<sup>104</sup> Thus the statute was hardly the second coming of Anthony Comstock in his prime. Especially if one puts aside as rhetorical the statute's preamble—"civil inequality of the sexes," "exploitation and subordination," "bigotry and contempt"<sup>105</sup>—what remains of the ordinance is an approximate parallel to common-law mainstays like defamation and deceit and to newer actions like intentional infliction of emotional distress.<sup>106</sup> Unquestionably, these traditional torts collide with a strong version of free speech rights,<sup>107</sup> but judges who preside over this intersection have usually seen their task as having to meld the two sets of interests rather than to extinguish the tort.<sup>108</sup>

of putting state power in women's hands and simultaneously offering relief to individuals and moving toward sex equality.").

103. See Richard W. Wright, *The Tort Liability System 18-19* (1996) (unpublished manuscript, on file with the *Texas Law Review*) (gathering empirical data on jury verdicts).

104. Gender roles within the jury may devalue women's claims. See Kent Greenfield, *Our Conflicting Judgments About Pornography*, 43 AM. U. L. REV. 1197, 1201 (1994) (noting juries' indifference to the subordination of women); Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987) (describing the tendency for women to participate less than men in jury deliberations, and consequently, for verdicts to fail to represent female jurors' concerns). Of course, defendants are burdened by the existence of a cause of action long before any lawsuit reaches a jury. Steven Brill, who in his own words is "not someone who instinctively sides with advantaged, deep-pocketed defendants," describes a litigation explosion from his vantage point:

I see [the impact of the meritless lawsuit explosion] as a libel defendant who has never lost a libel suit or even had one get as far as a trial, but who has become so weary of the cost of winning that I'd gladly give up many of my First Amendment defenses in such cases in exchange for a rule that says that if we get it wrong and it damaged someone, we pay those damages and if not, they pay us for our legal fees.

Steven Brill, *Paula Jones: There Ought to Be a Law*, WASH. POST, June 5, 1994, at C7.

105. See Brest & Vandenberg, *supra* note 16, at 619.

106. See generally Edith L. Pacillo, Note, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 SUFFOLK U. L. REV. 123, 148-49 (1994) (advocating that the "risk-utility test" applied in negligent publication cases should also apply to review of civil liability claims against pornographers to "provide[] an equitable and flexible means of balancing free-speech concerns with a woman's right to recover for bodily injury").

107. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (tempering the intentional-infliction tort with the First Amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (reconciling the common-law tort of defamation with freedom of the press); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (noting the conflict between the misrepresentation tort and the First Amendment).

108. Portions of the antipornography statute relating to directly caused harm could have been salvaged, for instance, from an opinion striking down the "trafficking" provision, which permitted any woman to play private attorney general. On merging torts and the First Amendment, *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992) (rejecting the defendant's First Amendment argument in a negligence action); *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975) (allowing recovery for wrongful death following a negligent radio broadcast); and *supra* note 107. See also *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that the First Amendment does not bar a contract claim based on a betrayed promise not to publish an informant's identity).

An uncommonly strong presence of agency overpowered the anti-pornography statute. The courts and the public judged MacKinnon and Dworkin radical and illiberal—a judgment that precluded a more measured conclusion about their new cause of action.<sup>109</sup> To be sure, MacKinnon and Dworkin would have it no other way. Their intention was to provoke, to unleash, to destroy; successful new torts bend and accommodate, an impossible posture for these activists.

The similar fate experienced by those activists who posited another “too radical” new tort, an action for hate speech, when placed alongside the fate of the four successful new torts, suggests that new torts are not inherently too radical to be accepted; instead, new causes of action that cannot defeat the three conservative paradoxes are judged too radical *after* they fail. “Too radical,” “too ideological,” and “incompatible with the First Amendment” are headstones over the graves of failed torts rather than the causes of their death.<sup>110</sup> These labels misdescribe the nature of conservative resistance by emphasizing three things: affected constituencies, right-remedy analysis, and an open attention to power that is alien to the polite reticence of the common law. What cause of action could be more radical than the four successful new torts, especially when considered together? The four successes outline a transformative agenda. They challenge power. They put weapons in the hands of racial minorities,<sup>111</sup>

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109. This hostility spread away from the MacKinnon-Dworkin statute itself: feminist anti-censorship groups that had mobilized against the statute after its enactment in Indianapolis helped to defeat the Pornography Victims' Compensation Act of 1991, S. 1521, 102d Cong. (1991), a similar piece of legislation introduced in the United States Senate in 1991. See Joan Kennedy Taylor, *Does Sexual Speech Harm Women? The Split Within Feminism*, 5 STAN. L. & POL'Y REV. 49, 50-52 (1994) (describing anticensorship feminists' role in defeating the Pornography Victims' Compensation Act through public opposition).

110. My colleague Steven Heyman proposes an alternative cause-of-death explanation, following the work of Robert Post: the pornography and hate-speech torts may have failed because they identify group-based, rather than individual, injury. See Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 330, 334-35 (1988) (asserting that the pornography tort advocated by MacKinnon and Dworkin was ultimately not adopted because it conflicts with the established notion that the First Amendment protects the individual rather than the group, whereas the limited success afforded the hate speech tort in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), was due to the argument that group libel is merely a variant of individual defamation). In other words, tort law aspires to a universalism and neutrality that are precluded by the subgrouping inherent in the two failed torts. While I acknowledge the appeal of this competing explanation, I wonder whether “individual rights” and “group rights” are not conclusions like “too radical,” rather than causes *propter hoc*. There is also some aggregation to be found in the successful new torts, especially strict products liability (available only against certain types of defendants) and wrongful discharge.

111. See, e.g., *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216 (Cal. 1970) (allowing an intentional infliction of emotional distress claim based in part on racial epithets); *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992) (upholding the nonstatutory, public policy wrongful discharge claim of an employee who brought race discrimination and racially motivated retaliatory discharge complaints).

women,<sup>112</sup> consumers,<sup>113</sup> workers,<sup>114</sup> and targets of harassment.<sup>115</sup> Yet because the agents behind them kept their profile low, these new torts developed without being seen as ideology and without providing a handy human target for conservative attack.<sup>116</sup>

The paradox of agency indicates a pitfall for activists. Fearing the radical label, they may be tempted to propose narrower, more conservative formulations of failed causes of action. These concessions chase the too-radical chimera and end up emphasizing the agency of the one making concessions. By casting themselves as new-tort designers, activists affront conservative resistance even when their proposals retreat from a radical agenda.

This error is exemplified, I think, by John Nockleby's effort to rewrite the tort of hate speech proposed about a decade earlier by Richard Delgado.<sup>117</sup> The Nockleby version moves in a conservative direction: it addresses only race-based threats of violence,<sup>118</sup> not all "[l]anguage . . . intended to demean through reference to race," as the Delgado version

112. See, e.g., *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528 (6th Cir. 1993) (using the strict products liability doctrine to support expansive holdings on behalf of a pregnant plaintiff); *Daily Times Democrat Co. v. Graham*, 162 So. 2d 474 (Ala. 1964) (approving liability against a newspaper on invasion of privacy grounds for publishing a photograph of the plaintiff with her dress billowing over her head); *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987) (allowing an intentional infliction of emotional distress claim against an employer for sexual harassment by one employee against another); *Gantt v. Sentry Ins.*, 824 P.2d 680 (Cal. 1992) (allowing a "public policy" wrongful discharge claim for a manager who had supported a coworker's sexual harassment complaint).

113. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) ("The remedies of injured consumers ought not be made to depend upon the intricacies of the law of sales." (quoting *Ketterer v. Armour & Co.*, 200 F. 322, 323 (S.D.N.Y. 1912)); *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W.Va. 1959) (allowing an invasion of privacy action by a customer whose bag was searched in a store); *Winkelman v. Beloit Mem'l Hosp.*, 483 N.W.2d 211 (Wis. 1992) (allowing, on public policy grounds, a wrongful discharge action by an employee who had refused to perform nursing services for which she was not qualified).

114. See, e.g., *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) (approving retaliatory discharge and invasion of privacy claims that supported a large jury award for the plaintiff-employee); *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337 (9th Cir. 1986) (rejecting the manufacturer's defense that it did not know the hazards of its asbestos product in a strict products-liability action by an asbestos worker); *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362 (D. Kan. 1996) (denying the defendant-employer summary judgment on wrongful discharge and invasion of privacy claims by employees whose phone calls at work were monitored).

115. See, e.g., *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1540-41 (M.D. Ala. 1994) (holding that one employee's harassment of a fellow employee raised a jury question of an invasion of privacy by the employer); *Nader v. General Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970) (allowing an invasion of privacy action for the general harassment of a private action by a corporation); Laura Quackenbush, Note, *Workers' Compensation Exclusivity and Wrongful Termination Tort Damages: An Injurious Tug of War?*, 39 HASTINGS L.J. 1229, 1243 (1988) (noting a common thread of harassment running through claims of intentional infliction of emotional distress and wrongful discharge).

116. See Bernstein, *supra* note 4, at 180-81 (discussing attention to individuals within law reform).

117. See Nockleby, *supra* note 15.

118. See *id.* at 707-08.

did,<sup>119</sup> and unlike some other versions of a hate speech tort, the Nockleby tort would not require the plaintiff to be a member of a subordinated or oppressed group: white persons could sue.<sup>120</sup> Professor Nockleby characterizes his retrenchment as necessary in light of the “significant constitutional and practical considerations” of a hate speech tort.<sup>121</sup> My argument, by contrast, identifies constitutional and practical considerations as secondary to an earlier and more fundamental conservatism, expressed particularly in the paradox of agency. If I am right, then conservative resistance will not be mollified by such an effort to concede and compromise. Nockleby, willing to surrender breadth in order to achieve acceptance, fails to part with that which weighs him down more than breadth: his own role as agent. Put another way, although it may be necessary for bold proposals to change into modest ones, this impulse toward modesty is more fruitful when it focuses on reduced agency rather than reduced scope.

#### V. Three New-Tort Proposals: Paradoxes in Action

What’s new in new torts? In her pathbreaking 1993 article, Jane Larson proposes that sexual fraud—telling lies to gain sex, and causing damage thereby—ought to be actionable by the deceived, in the way that commercial fraud is now actionable.<sup>122</sup> A second new tort, also associated with feminism, proposes an action for sexual harassment independent of civil rights statutes or traditional torts now used to remedy this injury.<sup>123</sup> These two examples come readily to the mind of a torts-and-feminism writer asked to name a couple of inchoate new torts. To balance this array of examples, I add a third proposal: the argument by Rory Lancman that infringement of speech by private actors deserves redress by

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119. Delgado, *supra* note 15, at 179.

120. Compare Nockleby, *supra* note 15, at 708 (arguing that such a tort should not be limited to messages directed against historically oppressed groups because of the difficulty in determining which groups have the right to claim subordinated status), with Matsuda, *supra* note 15, at 2361-62 (suggesting that expressions of hatred towards members of a dominant group should be exempt, because these messages are tied to the structural dominance of that group in society).

121. Nockleby, *supra* note 15, at 713.

122. See Larson, *supra* note 22, at 453 (suggesting that the elements of fraudulent misrepresentation be expanded to include liability for physical and emotional injury).

123. See Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1485-94 (1986) (advocating tort liability for unreasonable interference with an individual employee’s right to work in an environment free from sex-based intimidation or hostility); see also Michael D. Vhay, Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328, 356-62 (1988) (arguing that § 48 of the *Second Restatement* be revised to remedy “advances in inappropriate contexts”). A conservative version of a sexual harassment tort, which seems to give plaintiffs no more than what they already have in § 46 of the *Restatement*, appears in Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 362 (1990).

a tort called "suppression."<sup>124</sup> Because Lancman's thesis appears to originate in the center-right of the political spectrum—his two examples of suppression are the destruction of fourteen thousand copies of a student newspaper by African-American activists and the shouting-down of Robert Casey when he tried to give an anti-abortion speech<sup>125</sup>—a sample group that includes the new tort of suppression may help test my conservative-paradoxes theory more completely than would an all-feminist group. Of these three proposals, sexual harassment as a new tort is best equipped to oppose the paradoxes of novelty and agency, whereas sexual fraud and suppression may expect to do better in the future *vis-à-vis* the tort paradox.

Larson and Lancman both admit the novelty and agency behind their proposals. Their titles are plain. "Introducing the Tort of Suppression,"<sup>126</sup> the second half of the Lancman title, announces a bold departure from doctrinal infirmities of the past. Larson heralds novelty with the phrase "feminist rethinking" in her title.<sup>127</sup> The famous buzzword—"the F word,"<sup>128</sup> "a dirty word,"<sup>129</sup> a red-hot signifier<sup>130</sup>—shouts novelty and agency as clearly as Lancman's "introducing," but with more provocation at stake, and this novelty is amplified by the academic gerund "rethinking." When Prosser used the phrase "a new tort" in one of his titles, he was quick to deny, in the first sentence of the article, that he had engineered or invented this entity,<sup>131</sup> and he never used the phrase again in a title. Here my purpose is not to fault the assertion of novelty. One cannot fairly compare young contemporary scholars to Prosser: Larson and Lancman compete for attention in a bigger, more egalitarian, and more glutted law review market, one in which bold contrarian departures attract readers. Prosser's formalism and self-abnegation were not entirely his choice but also the rigid convention of the time. Regardless of what occasioned his posture, however, Prosser was able to avoid claiming novelty and agency as he fashioned new

124. See Lancman, *supra* note 2, at 243-44.

125. See *id.* at 223-24. Chicagoans will be reminded of the time that offended protestors forcibly removed from the School of the Art Institute a painting that satirized former mayor Harold Washington. Because the protestors were local aldermen, however, an action for damages was available under the federal civil rights laws. See Matt O'Connor, *Suit Ended on Picture of Washington*, CHI. TRIB., Sept. 21, 1994, § 2, at 1.

126. Lancman, *supra* note 2, at 223.

127. Larson, *supra* note 22, at 374.

128. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 3 n.1 (1988) (noting that Lucinda Finley compares the term feminism with "the F word").

129. *Id.* at 3.

130. See Susan Hardy Aiken et al., *Trying Transformations: Curriculum Integration and the Problem of Resistance*, 12 SIGNS 255 (1987) (analyzing resistance within the academy to an integration of feminist and traditional educators).

131. See Prosser, *supra* note 2, at 874 ("It is time to recognize that the courts have created a new tort.").

torts,<sup>132</sup> and this small success of avoidance is necessary to the larger success of the new tort.

In similar contrast to successful new-tort efforts, Lancman and Larson see their first task as identifying a wrong and then tailoring their new-tort remedy to this injury. Lancman begins his article by claiming that the *Daily Pennsylvanian* student newspaper and former governor Casey each suffered a wrong that is not adequately remedied by current tort doctrine.<sup>133</sup> Larson details the harm of sexual fraud with a reference to victimized women: her article begins by quoting the lament of seduced-and-abandoned Elvira, from Lorenzo Da Ponte's libretto *Don Giovanni*.<sup>134</sup> Wrongs imply rights, which in turn imply remedies. This sequence, as was mentioned, usually will not lead new torts to success. Speaking for the silenced, Larson and Lancman end up underscoring not so much the entitlements of new victims as the novelty of their claims.

The tort paradox also confounds the proposed new torts of suppression and sexual fraud. In stressing *ubi jus, ibi remedium*, Larson and Lancman neglect more promising avenues. Sexual fraud has a contract argument to develop, while suppression ought to work on an argument grounded in property. Should these new torts succeed in the future, that success will owe a debt to analogies. But the arguments are not yet built. Instead, like Nockleby, who reduced and diluted a hate-speech tort to appease conservative resistance,<sup>135</sup> Larson argues that an action for sexual fraud is conservative because it so closely resembles the common-law actions for misrepresentation and deceit approved in the *Restatement*.<sup>136</sup> This claim to conservatism is weakened by its dependence on torts. A more fruitful approach would emphasize the contractual nature of sexual relationships and other bargains struck in private life, such as the promise to marry.<sup>137</sup> To be sure, a contract-focused proposal is not what Larson wants; it would cede considerable ground. And the novelty paradox would still impede the new cause of action. But as a way to get the new tort moving, a contract

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132. See *supra* text accompanying notes 28-30, 69-77.

133. See Lancman, *supra* note 2, at 226-30. Lancman concedes that the traditional tort of conversion would cover the injury suffered by the *Daily Pennsylvanian's* editors and writers; he argues that a tort of suppression is necessary to protect speakers like Casey and future victims who would not have the fortuitous benefit of a traditional tort remedy like conversion. See *id.* at 227-30.

134. See Larson, *supra* note 22, at 375.

135. See *supra* notes 117-20 and accompanying text.

136. See Larson, *supra* note 22, at 453 ("The [only] novelty of my proposal is to apply the misrepresentation theory in a new relational setting."); see also RESTATEMENT (SECOND) OF TORTS § 525 (1977).

137. See Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1038-39 (1995) (discussing the traditional "breach-of-promise action," which arose from "the premise that engaged parties enter into contracts when they, in essence, exchange promises to marry").



focus is a more feasible (that is, more conservative) beginning gesture than is her bow to deceit and misrepresentation causes of action.

Similarly, Lancman will have to compromise in order to exploit a traditional approach, here based on property theory. As he notes, a property argument would justify a tort action for suppression based on the destruction of tangible goods like student newspapers.<sup>138</sup> Former governor Casey would as yet have no remedy against suppression. Here too, though, the new tort would have a stronger foundation in a traditional doctrine than it now has in Lancman's contentions about free speech rights. Starting with damage to movable property, Lancman could begin to create by analogy a property right—and a remedy—pertaining to ideas and expression.

We come now to sexual harassment as a new tort. Writers have exhorted courts to recognize that sexual harassment may amount to tortious conduct even in cases where none of the tort labels now used in sexual harassment cases—mainly assault, battery, intrusion, and intentional infliction of emotional distress—fits the circumstances exactly.<sup>139</sup> In circumstances where the complainant did not experience harmful physical contact and would thus generally be forced to use the tort of intentional infliction of emotional distress, commentators have urged particular liberality on two points: the plaintiff should not be required to make any special proof of outrageousness, and her emotional distress should not necessarily have to be severe.<sup>140</sup> This new tort would join an array of remedies for harassment that, though numerous, may not be adequate.

The new torts of sexual fraud and suppression have stronger links to contract and property traditions than does a new tort of sexual harassment, but these themes can support a sexual harassment tort as well. Because two new-tort precedents—intentional infliction of emotional distress and wrongful discharge—have some territory in common with sexual harassment, it may profit proponents of this new tort to consider the contracts- and property-based arguments that helped to build redress for injuries to

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138. See Lancman, *supra* note 2, at 227-30 (describing the tort and criminal liability which arose from the incident).

139. See Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1418 (1993) (arguing that although "[a] victim has no guarantee of prevailing in [a] tort action," it provides a better remedy for sexual harassment than workers' compensation); Paul, *supra* note 123, at 335-36 (arguing that a tort claim for sexual harassment would provide a better remedy than Title VII because it would allow for individualized damages and place greater liability on the responsible individual); Schoenheider, *supra* note 123, at 1463 (arguing that because both Title VII and state tort law fail to redress fully the harms of sexual harassment, the courts should "recognize an independent cause of action in tort for sexual harassment in the employment context"); Vhay, *supra* note 123, at 356-60 (modeling a sexual harassment tort on the *Second Restatement's* section 48).

140. See Schoenheider, *supra* note 123, at 1481-85; see also Korn, *supra* note 139, at 1379 (arguing that current tort law does not fit sexual harassment circumstances).

mental tranquility and secure employment. Prosser's success in linking emotional-distress torts with contract may hearten sexual-harassment tort reformers who feel discouraged in their quest.<sup>141</sup>

More encouraging is the excellent position the new tort has with respect to the paradoxes of agency and novelty. Agency is notably absent here. No person is identified as the impresario stage-managing the new tort. The major law review contributions in the area are two student-authored pieces.<sup>142</sup> Catharine MacKinnon has called tort-thinking a problem rather than a solution in feminist law reform,<sup>143</sup> so she is safely distant from the proposal. Similarly, the paradox of novelty is being defeated. The idea of sexual harassment as a tort seems to percolate steadily through the legal system; one sees casual references in both caselaw and journalistic accounts to lawsuits for "sexual harassment" even when the tort labels actually used by plaintiffs were traditional.<sup>144</sup> For the purpose of creating a new tort, an invisible hand writes better and more enduringly, though slower, than the hand of a celebrated agent hoping to effect novelty.

## VI. Conclusion

Although new-tort reformers begin with the belief that where there is a wrong there ought to be a remedy, new torts themselves do not originate

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141. A contract rationale gains further support from the concept of good faith, which one commentator perceives as a simple protection of the parties' expectation interests. See Eric G. Anderson, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 347 (1988). An implied covenant of good faith could recognize a right to a harassment-free workplace, even though this term might not have received deliberate, explicit attention during the formation of the employment contract. See STEVEN J. BURTON & ERIC G. ANDERSON, *CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT* 392 (1995) (noting the influence of "community standards of decency, fairness, or reasonableness" in good faith cases (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979))). I am grateful to my colleague Richard Warner for sharing his thoughts on this subject.

142. See Schoenheider, *supra* note 123; Vhay, *supra* note 123.

143. See *supra* note 16.

144. See, e.g., *Adleta v. General Electric*, No. C-1-94-559, 1996 U.S. Dist. LEXIS 9122, at \*7 (S.D. Ohio May 24, 1996) (referring to "plaintiff's sexual harassment tort"); *Manko v. Volynsky*, No. 95 Civ. 2585, 1996 U.S. Dist. LEXIS 6328, at \*4 (S.D.N.Y. May 9, 1996) ("Because the only relationship described in the complaint is a personal relationship, plaintiff cannot maintain a tort claim for sexual harassment."). *Kerans v. Porter Paint Co.*, 575 N.E.2d 428 (Ohio 1991), is widely believed to have declared a tort of sexual harassment. See *id.* at 436-37 (Holmes, J., dissenting) (characterizing the majority opinion as having improperly created a new tort); Deborah S. Brenneman, Case Note, *Sexual Harassment Claims and Ohio's Workers' Compensation Statute*, 61 U. CIN. L. REV. 1515, 1535 (1993). In *Monteverde v. Baby Superstore, Inc.*, 68 Fair Empl. Prac. Cas. (BNA) 15 (M.D. Fla. 1995), the plaintiff's attorneys added a count to their complaint called "Tort of Sexual Harassment." *Id.* at 16. On motion the defense was able to strike this count, but such a claim is likely to reappear in future court pleadings. *Id.*; see also *Ulrich v. K-Mart Corp.*, 858 F. Supp. 1087, 1095 (D. Kan. 1994), *aff'd*, 70 F.3d 1282 (10th Cir. 1995) (dismissing the plaintiff's count entitled "Failure to Provide a Harassment-Free Workplace").

from this premise. Activists face the future; the common law faces the past. Conservatism, the bane of reformers, is the force that drives the common law—while fighting and often defeating the novelty, agency, and torts-focused attention to rights that animate law-reform efforts.

In short, then, law reform efforts and new torts can be fundamentally different and incompatible creatures. One will tend to defeat the other. New-tort reformers are driven to a choice: they can prefer the new tort and submerge their own agency, their novel contributions, and their righting of the world into a more just orientation; alternatively, they can prefer their activism and submerge the new tort. In the work of Catharine MacKinnon against pornography, observers of American legal change have a clear exemplar of the latter choice. The work of William Prosser, who built new torts while disclaiming politics, exemplifies the former. A new generation of new-tort planners—among whom I have identified Jane Larson, who has written insightfully about the uses and limitations of tort to achieve social change<sup>145</sup>—has available for emulation these two polar approaches to effecting change in the law. Both approaches have much to commend them; reformers will not suffer total defeats. If new-tort gains come at the expense of visible activism and vice versa as I have argued, then it is equally true that progress continues even when new torts or visible activist efforts fail.

As between a new tort and a vigorous display of group-based activism, I admit a bit of bias in favor of the new tort. Last year, I received a letter from a practicing lawyer who had just won a multimillion dollar verdict in a sexual harassment case. Having used common-law tort claims rather than Title VII in an action against a physician by women who were both his employees and his patients, she reflected on the difference between common-law traditions and open social activism as they affected the way she shaped her case:

We didn't have to talk about the esoteric theories of equality in the workplace and the barriers to it raised by demeaning sexual conduct or remarks—theories which I have found really only resonate with women. Instead, men and women alike could easily understand how powerless, ashamed, frightened, confused, and trapped my clients felt when they were preyed upon by the man who was not only their boss—and controlled their paychecks and livelihood—but who had also insinuated himself into their lives as their physician . . . Where jurors might be hostile to all of this "equality" business (and I've found that many of them are), they fully understand and identify with

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145. See Jane E. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1253 (1993) ("Feminism today . . . is facing up to the limits of the law as a vehicle of social change.").

being trapped in a physically and mentally abusive workplace—being a paycheck hostage.<sup>146</sup>

Tradition, analogy, venerable themes, existing doctrines, adaptation to circumstances, and common sense: surely Prosser, from whatever vantage point he now observes tort law, nods his blessing. The measured, respectful movement of a new tort will always appear feeble to activists, threatening to its opposition, and of no moment to nearly everyone else; the few of us who look at new torts with admiration will have much to appreciate in the coming years, as past activism settles into entrenched rights and remedies.

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146. Letter from Alison M. Steele, Esq. to Anita Bernstein 4 (June 6, 1996) (on file with the *Texas Law Review*).

