Bachelors Beware: The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry

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COMMENTS

BACHELORS BEWARE: THE CURRENT VALIDITY AND FUTURE FEASIBILITY OF A CAUSE OF ACTION FOR BREACH OF PROMISE TO MARRY

AND WHY GEORGIA SHOULD ABOLISH THE PSEUDO-CONTRACTUAL ACTION IN LIGHT OF MODERN CASES SUCH AS SHELL V. GIBBS

I. INTRODUCTION

Heav’n has no Rage, like Love to Hatred turn’d, Nor Hell a Fury, like a Woman scorn’d.

—William Congreve

On July 23, 2008, Rosemary Shell finally felt vindicated. After receiving a $150,000 jury verdict against her former fiancé, she was satisfied that the legal system was just. Almost twelve months earlier in Georgia, Shell sued Wayne Gibbs, a man to whom she was previously engaged, after he ended their engagement by leaving her a note in the bathroom. Believing he owed her for the emotional hardship and expenses she incurred as a result of their broken engagement, she asked for pecuniary damages, including damages for humiliation and mental anguish. She took him to court and withstood a three-day jury trial, offering testimony and evidence supporting her position that Gibbs breached a binding contract. And she won.

Under the common law claim of “breach of promise to marry,” an individual may recover damages due to an unfulfilled future promise of marriage. The claim itself is...
based on contract principles, but the available remedies resemble those of a tort claim, creating what has come to be known as a "contort": a combination of the two principled areas of law to create a claim that is in itself a uniquely distinct cause of action.

Although the cause of action has been prohibited by statute and judicial decision, it still survives in many jurisdictions. Twenty-eight states and the District of Columbia have formally abolished the breach of marriage promise action, but the claim is evidently still valid in twenty-two states through adoption and recognition of the common law: Arizona, Arkansas, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Washington.

When evaluating restrictions on personal relationships under family law principles, contract law principles, and general common law principles, it is relevant to note that the

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10. The claim "arises on the failure of one of the parties to perform according to the terms of the contract, and if there has been a failure on the part of the defendant . . . and that failure has been treated by the other party as a breach, a cause of action arises." *Id.* (footnote omitted).

11. *Id.* (citing *Burnham v. Cornwell*, 55 Ky. 284 (1855)).

12. *Id.* (noting that "[a]lthough an action for breach of a contract to marry may be in the form of an action on the contract, and is not generally considered to be a claim for injury arising from a tort or breach of warranty, it is generally recognized that, with respect to the question of damages, it is actually in the nature of an action in tort" (footnotes omitted)).


14. *See id.* at 95 ("Speaking descriptively, we might say that what is happening is that contract is being reabsorbed into the mainstream of 'tort'.) *See generally id.* at ch. IV.

15. *See e.g.* Gilbert v. Barnes, 987 S.W.2d 772 (Ky. 1999) (Kentucky Supreme Court's ruling that the cause of action no longer exists); *Vrabel v. Vrabel*, 459 N.E.2d 1298 (Ohio App. 1983) (discussing the state's "heart balm" statute, which abolished the breach of a promise to marry action).


value of marriage in our society is presumed to be extremely high\(^{20}\) despite the elevated level of divorce rates\(^{21}\) and the escalating controversy regarding the nature of a marriage’s legal construction (consider the volume of cases involving same-sex marriages\(^{22}\)). Nevertheless, a marriage contract (at least between a consenting and able combination of one man and one woman) is, and has always been, an enforceable contract in the eyes of the law.\(^{23}\) States indisputably maintain discretion in policing the marriage union,\(^{24}\) solidifying a relationship that symbolizes not only a social and moral commitment, but a binding legal commitment, as well.\(^{25}\) The question currently raised is whether our legal system should enforce a promise to marry in much the same way as a traditional, commercial contract; or, does an engagement invite more leniency from basic contract principles because of its very nature as a preparatory amorous period\(^{26}\) for the unquestionably binding commitment of marriage?

Wayne Gibbs chose not to marry Rosemary Shell.\(^{27}\) And, as insensitive as that decision may have been, it was his to make.\(^{28}\) Gibbs should not now be forced to explain his choice in front of a jury or judge, no matter how aggrieved his ex-fiancé feels; in fact, forcing him to do so quite possibly violates his constitutional right to privacy. Considering the recent jury verdict for Rosemary Shell, it is clear that the “breach of promise to marry” cause of action is an old-fashioned legal outlet for punishing purely personal decisions, and disregards the freedom that should be afforded to a non-married

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21. The most commonly cited statistic is that one in two marriages in the United States ends in divorce, although this statistic could be misleading. See Dan Hurley, Divorce Rate: It’s Not as High as You Think, N.Y. Times (Apr. 19, 2005) (available at http://www.nytimes.com/2005/04/19/health/19divo.html). The divorce rate increased until the 1980’s and is now slowly declining. Id.


23. See e.g. 1 U.S.C. § 7 (1996) (statutorily defining the legal union of marriage) (“The word ‘marriage’ means only a legal union between one man and one woman as husband and wife.”).

24. E.g. Vrabel, 459 N.E.2d at 1305 (“[S]tate actions regulating marriage and its incidents are so unassailably constitutional that only the quixotic would challenge them.”).

25. There are, however, numerous issues related to the contractual relationship of a marriage contract, and the validity of such agreements in relation to different types of partnerships. See generally 52 Am. Jur. 2d Marriage § 1, 4 (2008).

26. “[M]arriages] must be approached with intelligent care and should not happen without a decent assurance of success. When either party lacks that assurance, for whatever reason, the engagement should be broken.” Fierro v. Hoel, 465 N.W.2d 669, 672 (Iowa App. 1990) (adopting a no-fault approach when determining ownership of an engagement ring); accord e.g. Curtis v. Anderson, 106 S.W.3d 251 (Tex. App. 2003) (case involving ownership of an engagement ring, explaining differing rationales in viewing the ownership dilemma from a no-fault perspective). The court in Curtis explained,

(1) it is practically impossible for courts to determine ‘fault’ in the break-up of an engagement or whether a particular break-up was justified; (2) engagements are meant to be a period of evaluation, and a party should not be penalized for ending a doomed relationship; and (3) the underlying public policy favoring no-fault divorces should also apply to engagements.

Id. at 256 (emphasis added).

27. Pl.’s Compl., supra n. 6.

28. Infra pt. IV (discussing the varying reasons that an individual like Gibbs should be free to make a personal choice about marriage such as this).
individual in his private romantic relationships with other capable and consenting adults.

Beyond the clear distinctions from commercial contracts, strong public policy arguments and substantial constitutional concerns over the fundamental right to privacy demand abolition of this claim; its very existence poses a uniquely outdated and somewhat sexist threat to the continued modernization of our legal system. This article will discuss the makeup, evolution, and current presence of the claim, the application of the claim's principles in Shell v. Gibbs, and the compelling reasons why the Georgia courts or legislature, as well as other state systems, should abolish this antiquated cause of action.

II. BEHIND THE BREACH: A BACKGROUND OF THE CAUSE OF ACTION

A. Historical Roots and the Classic Elements of the Claim

Through all these cases runs the doctrine, always recognized and frequently applied, that the state, or society at large, is the third party to every marriage contract.

—Witt v. Heyen

The breach of a promise to marry is uniquely entrenched in the common law system in the United States; there are cases in state courts referencing the cause of action as far back as 1792, while the earliest case involving a breach of promise claim in an English common law court was in 1639's Stretcher v. Parker. It appears that the claim began as exclusive to the English legal system and was not a principle shared with other countries, specifically those with civil law schemes. The cause of action was initially established in America through the influence of its usage in the English common law system.

In early English canon law, recovery on the claim allowed specific performance of the contract only, and did not afford a litigant the right to seek damages; however, as the older canon law was replaced with newer common law, the rights protected and available remedies changed somewhat. The transition of this claim to a common law claim created damages in the form of ex delicto remedies, essentially tort remedies, while still allowing the claim to retain its basic contract principles. Early American courts accepted the cause of action in this transformed state, albeit with slight hesitation,

29. Because of the nature of the cases, this article refers to the typical plaintiff as “she” and the typical defendant as “he.” Later portions of the article will discuss the inherent gender inequality regarding the cause of action.
30. 221 P. 262, 266 (Kan. 1923).
31. Mott v. Goddard, 1792 WL 143 (Conn. 1792).
33. Id. at 363.
34. Id. at 361.
35. Id. at 364–365.
37. Wright, supra n. 32, at 365, 370.
because of its use in England. In 1896, the Georgia Supreme Court rejected the argument that the right to recover for a breach of marriage promise must be born out of statute, holding that, at least in the state of Georgia, the claim is a valid common law cause of action, and its characteristics arise solely from common law traditions.

A promise to marry has been treated in the common law as analogous to other types of contract and subject to the same conditions, including the right to recover for its breach. The marriage promise “contract” is subject to a valid offer and acceptance, bound with consideration, and must be free of duress, fraud, or incapacity. However, this action is not one that fits within the requirements for the statute of frauds, meaning that a writing is not needed to establish the existence of a valid contract in this context.

As with any legal action, it is subject to the applicable statute of limitations.

Adequate consideration for a legally binding marriage agreement need not be tangible; in fact, the mutual promise to commit to marriage has been declared sufficient consideration. Indeed, the real test is whether “the conduct and actions of the parties, and the attendant circumstances, is enough] to satisfy the jury that there was a serious promise or offer of marriage accepted as such.” Additionally, there is no need to specify a date or time of marriage, as long as the court determines the actual time period to be reasonable. Even if all the elements of a valid contract are present, however, the breach of marriage promise claim cannot be sustained if the marriage itself would have been prohibited by statute.

Differing somewhat from the nature of commercial contracts, available remedies are not limited to pecuniary damages, but, because of the special nature of this specific contractual relationship, a plaintiff may be awarded all of the damages that naturally flow from the defendant's breach. As further clarification, one court has explained, rather imprecisely, that in the absence of special, financial damages, “no measure of damages can be prescribed save the enlightened consciences of impartial jurors.” A plaintiff may seek a multitude of damages, including “out-of-pocket expenses, personal injuries such as mental and emotional suffering and illness, damage to reputation,

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38. Id. at 366 (“In a great many American states it was at first gravely doubted whether the action was a part of our law, but one by one the courts of the late colonies followed more or less reluctantly the example of the mother country.”).
41. Lord, supra n. 9 (citing Burnham, 55 Ky. 284).
43. Lord, supra n. 9 (citing Burnham, 55 Ky. 284). There has, however, been confusion regarding which statute of limitations to apply, since the cause of action is similar to both contract claims and tort claims. Harry Cohen, Student Author, Obligations- Breach of Promise to Marry, 24 Tul. L. Rev. 501, 504 (1950) (citations omitted).
44. Schultz v. Duitz, 69 S.W. 2d 27, 30 (Ky. 1934).
45. Burnham, 55 Ky. at 286.
46. Spence, 125 S.E. at 883.
47. Witt, 221 P. at 266 (citing Campbell v. Crampton, 2 F. 417 (N.D.N.Y. 1880); Reed v. Reed, 32 N.E. 750 (Ohio 1892)).
48. See Parker, 28 S.E. at 400 (briefly discussing the differences in remedies between the breach of a promise to marry and the breach of a commercial contract).
49. Id.
50. Id. at 401.
51. Id.
humiliation, embarrassment, 'loss of worldly advantage' (expectation of sharing defendant's wealth, social position, home, and other marital incidents), and punitive damages.52

Traditional defenses to a breach of marriage contract resemble those of any other contractual breach,53 but there are additional defenses peculiar to this cause of action. These defenses include: an unchaste character of the plaintiff that was unknown to the defendant at the time of the proposal54 (sometimes classified as a "misrepresentation")55, an inability to marry because the defendant was already married (and this was made known to the plaintiff),56 certain hereditary conditions and diseases,57 and, in some cases, evidence of cohabitation before marriage.58

In 1951, the Oklahoma Supreme Court upheld a jury instruction on a defense which provided that a breach of a marriage promise would be justified if, after the promise to marry, "the plaintiff conducted herself in such a manner as would cause a reasonably prudent man to believe that she was guilty of immoral conduct with others than the defendant,"59 inserting the vague requirement of chastity as an implied element of successful recovery.60 While the court acknowledged that that the behavior under review was subsequent to the marriage promise, it did not define "immoral conduct," nor did it require actual proof of the alleged conduct, merely a reasonable belief by the defendant.61

Even more directly, in 1965 The Texas Court of Appeals affirmed and clarified the existence of this defense when it clearly stated as a "general rule that illicit intercourse of the plaintiff prior to the promise to marry ... unknown to the defendant, is a defense ... since it violates the implied representation by the promisee that she is chaste."62 There is also authority for the proposition that a plaintiff's mere bad reputation, even if falsely grounded, will serve as a complete defense.63

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53. Lord, supra n. 9.
54. E.g. Coombs v. Fazio, 386 S.W.2d 650, 652 (Tex. 1965); accord Barrett v. Vander-Meulen, 94 S.W.2d 983 (Ky. App. 1936), overruled, Gilbert, 987 S.W.2d 772 (determining the trial court's refusal to admit evidence of plaintiff's unchaste nature before the marriage promise to be reversible error in a common law breach of marriage promise case) (the case was subsequently nullified when the cause of action was prohibited by the Kentucky Supreme Court).
55. Coombs, 386 S.W.2d at 650.
57. Cohen, supra n. 43, at 503–504 (citing Van Houten v. Morse, 38 N.E. 705 (Mass. 1894) (actionable defense when there was alleged concealment of an existence of negro blood in plaintiff's biological makeup); Shepler v. Chamberlain, 197 N.W. 372, 375 (Mich. 1924) (not allowing defendant's lip cancer to constitute a defense, but noting that "where [a] defendant without his fault after the engagement develops an incurable, communicable disease which affects his ability to perform his marital duty, or which renders marital relations impossible without communicating the disease to his spouse or their offspring, such fact operates as a justification of the breach"); Winders v. Powers, 9 S.E.2d 131, 132 (N.C. 1940) (in a discussion on the effect of plaintiff's syphilis on the breach of promise action, determining that a bodily condition like a sexually-transmitted disease which affects the future children of the couple will render a defense for the defendant).
58. Menhusen, 334 N.W.2d at 436–437.
60. Id.
61. Id.
62. Coombs, 386 S.W.2d at 652 (internal citations omitted) (emphasis added).
A claim for breach of promise of marriage will be barred either if the plaintiff is married or if the plaintiff knew the defendant was married at the time of the proposal; conversely, a hidden marriage of the defendant is enough to sustain a valid contract. A post-engagement, continuing relationship between the parties after the discovery of the unknown marriage, but before the contractual breach, will not ultimately bar the plaintiff from recovery, although it may play a factor in determining damages.

While scholarly commentators have argued over the classification of a marriage promise as a legally sufficient contract, urging that such an agreement is “social and not legal . . . [and] the nature of the agreement is not one of bargain and sale,” the law continues to recognize this promise as a valid contract when all the basic contract requirements are met. Because of this common law recognition and its anomalous character, the action has been barred by statute and judicial common law in a majority of jurisdictions.

B. “Anti-Heart Balm” Acts and Judicial Abolishment

The breach of a marriage promise claim and other, similar claims, including alienation of affections (liability for procuring the affections of another’s spouse) and criminal conversation (liability for having an affair with another’s spouse), have been grouped together as so-called “heart balm” actions, and have been barred in twenty-nine jurisdictions.

Although the actions can be abolished by judicial common law, they are most often barred through legislation that has come to be known as “anti-heart balm” statutes. The first “anti-heart balm” statute was introduced in 1935 by Roberta West Nicholson, the only female member of Indiana’s legislature. Her apparent motivation in introducing the statute was to curb the bad reputation such actions had due to the fear that they were only used for blackmail purposes. As the Ohio Court of Appeals later noted, “[anti-] [h]eart balm statutes, though the wording and reach may differ from state to state, were passed to put an end to what were seen as gross abuses of court process arising from romantic relationships or, perhaps more accurately, arising from the acerbity

65. *Id.*
67. *Id.* (emphasis omitted).
68. Lord, *supra* n. 9.
69. Wright, *supra* n. 32, at 370.
70. *Supra* n. 16.
72. *See* e.g. *id.*
73. *Supra* n. 16.
74. *See* *Gilbert*, 987 S.W.2d at 776.
75. In some cases, theses statutes are referred to as “heart balm” statutes, although the meaning appears to be the same. *E.g.* *Vrabel*, 459 N.E.2d at 1301.
77. *Id.*
78. *Id.*
of cooled ones."\textsuperscript{79}

Other states quickly followed in crafting legislation patterned after Indiana's,\textsuperscript{80} and, since their enactment, the constitutionality of these statutes has occasionally been challenged\textsuperscript{81} on due process considerations.\textsuperscript{82} However, when faced with such a challenge, courts have routinely upheld the legislation as a constitutional exercise of the state's inherent power to regulate marriage.\textsuperscript{83} A due process challenge to the New York "anti-heart balm" statute failed in 1937 in \textit{Hanfgarn v. Mark}\textsuperscript{84} when the New York Court of Appeals upheld the statute on the grounds that it was within the state's domain to police all aspects of the marriage relationship.\textsuperscript{85} Scholars have urged that these "anti-heart balm" acts "... [affect] only incidents of the marital relationship, a field clearly within the domain of the state legislature."\textsuperscript{86}

In \textit{Hanfgarn}, the court also addressed a state constitutional issue; namely, whether the cause of action could be abolished when it existed prior to the enactment of the state constitution,\textsuperscript{87} which provided an express protection for existing common law actions.\textsuperscript{88} The New York court held that if the challenged common law action could not constitutionally be abolished, it would "result in a stagnation of law,"\textsuperscript{89} and went on to note that the state constitution must allow the legislature power to "correct [a]n evil growing out of the marriage relation by altering the provisions of the common law."\textsuperscript{90}

Although the majority of courts addressing the issue have uniformly upheld "anti-heart balm" statutes against constitutional challenges,\textsuperscript{91} at least a few courts have expressed concerns about the issue.\textsuperscript{92} A Pennsylvania district court argued in 1942 that Pennsylvania's "anti-heart balm" statute divested a "fundamental"\textsuperscript{93} common law right to bring a heart balm action, and possibly implicated due process concerns.\textsuperscript{94} The "anti-heart balm" legislation at issue also included a penal provision, making it a misdemeanor for any person to file, or threaten to file, one of the prohibited actions.\textsuperscript{95} The court found

\begin{itemize}
  \item \textsuperscript{79} \textit{Vrabel}, 459 N.E.2d at 1301.
  \item \textsuperscript{80} \textit{Recent Cases}, supra n. 76, at 376.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} \textit{E.g. Langdon v. Sayre}, 168 P.2d 57 (Cal. App. 1946); \textit{Goldberg v. Musim}, 427 P.2d 698, 703 (Colo. 1967); \textit{Rotwein v. Gersten}, 36 So.2d 419, 421 (Fla. 1948); \textit{Vrabel}, 459 N.E.2d at 1305 (holding that there is no fundamental right to bring an amatory action such as for a breach of promise to marry, and that it is clearly within the state's powers to regulate the marital relationship); \textit{but see Heck}, 68 N.E.2d 464 (Illinois Supreme Court's ruling that the 'Heart Balm' Act was contrary to the state's constitution because of an inconsistency between the title of the act and its purpose, as well as in the divestment of the common law right of recovery).
  \item \textsuperscript{84} 8 N.E.2d 47 (N.Y. 1937).
  \item \textsuperscript{85} \textit{Recent Cases}, supra n. 76, at 376 (citing \textit{Hanfgarn}, 8 N.E.2d 47).
  \item \textsuperscript{86} Id. at 377 (citing \textit{Maynard v. Hill}, 125 U.S. 190 (1888)).
  \item \textsuperscript{87} \textit{Hanfgard}, 8 N.E.2d at 48.
  \item \textsuperscript{88} Id. (discussing the constitution of New York, which provided that "such parts of the common law . . . shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same." (quoting N.Y. Const. art. I, § 16)).
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} \textit{Supra} n. 83.
  \item \textsuperscript{92} \textit{Wilder v. Reno}, 43 F. Supp. 727, 728 (M.D. Pa. 1942).
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Id. at 727.
\end{itemize}
this to be the most doubtful and "obnoxious" component of the statute.\textsuperscript{96} Although the court expressed these concerns over the constitutionality of the statute, the comments were mere dicta, and not controlling.\textsuperscript{97}

While the Pennsylvania court's analysis did not effectively eliminate the "anti-heart balm" statute, a 1946 holding from the Illinois Supreme Court \textit{did} strike down the prohibitory legislation as unconstitutional.\textsuperscript{98} In that case, the statute was considered to be contrary to the state constitution because the title of the act did not clearly reflect its purpose (as required by the constitution) and because it divested a constitutionally-prescribed right to recover damages for wrongs committed.\textsuperscript{99}

A federal district court in Illinois was also faced with a challenge to the same statute; that court determined the legislation to be unconstitutional as well, primarily due to the fact that the Illinois' law created only criminal punishment for the filing of a heart balm action, and did not specifically abolish the actions.\textsuperscript{100} In support for its position, the court referred to a 1937 holding from the Indiana Supreme Court, which upheld the section of the Indiana "anti-heart balm" statute that abolished the causes of action but declared the section making it a crime to \textit{file} such an action unconstitutional.\textsuperscript{101} The breach of marriage promise action is still valid in Illinois, although damages have been limited by statute to actual damages.\textsuperscript{102}

With the existence of prohibitory "anti-heart balm" legislation, some broken-hearted would-be plaintiffs have attempted to use other causes of action to obtain a remedy.\textsuperscript{103} Unfortunately for these plaintiffs, "anti-heart balm" statutes cannot be circumvented using a claim of emotional distress or fraud when the underlying conduct would traditionally have been subject to a breach of promise suit.\textsuperscript{104} A district court in Connecticut observed that where the underlying factual situation would require using a claim that had been abolished, the action cannot proceed, even when the actual claim being alleged is still a valid cause of action.\textsuperscript{105} A Maryland court directly addressed the issue, resolving concisely, "we are bound to apply the statute liberally to ensure that it is not being circumvented by artful pleading and artful framing of other causes of action."\textsuperscript{106} These decisions should not be construed to mean that every action involving a marriage promise is barred, as one court has acknowledged that when the cause of action is not \textit{based} on the actual marriage promise but is merely associated with it, as in the recovery of property after the dissolution of a relationship, the prohibitory statute will not apply.\textsuperscript{107}

\textsuperscript{96} Id. at 728.
\textsuperscript{97} Wilder, 43 F. Supp. at 729.
\textsuperscript{99} Heck, 68 N.E.2d at 466.
\textsuperscript{100} Daily, 61 F. Supp at 702.
\textsuperscript{101} Id. at 703 (citing \textit{Pennington v. Stewart}, 10 N.E.2d 619 (Ind. 1937)).
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{107} \textit{Lampus v. Lampas}, 660 A.2d 1308, 1310 (Pa. 1995) ("The Heart Balm Act was interpreted to eliminate only those actions for breach of contract to marry. It does not extend to all causes of action for the recovery of
There has been, however, some question as to the interpretation and scope of these statutes, specifically in reference to purposeful, deceitful promises to marry and fraudulent actions as inducement to these promises.\(^{108}\) As summarized in a 1985 article that analyzed whether willful and deceitful conduct should be included within the judicial interpretation of “anti-heart balm” legislation, courts disagree . . . on whether a party may recover damages for injury from a willful, fraudulent marriage promise. Fearful of the reintroduction of the abuses associated with breach of promise to marry actions, many courts and commentators have interpreted the heartbalm statutes to bar suits in deceit on a fraudulent marriage promise.\(^{109}\)

While it appears that there is still somewhat of an open question of interpretation in the courts, the more recent trend of decisions seems to exclude clearly fraudulent and deceitful actions from within the realm of barred complaints under the “anti-heart balm” legislation.\(^{110}\)

C. The Cause of Action’s History and Application in Georgia

In Georgia, the breach of a promise of marriage has always been subject to the same elements as originally ascertained in the general common law realm; specifically, proof of the existence of a binding contract and evidence of its breach,\(^{111}\) which can essentially be established “by the observed conduct of the parties or their admissions.”\(^{112}\)

The action was recognized in Georgia as far back as 1859, when the Georgia Supreme Court decided that this contract cause of action was subject to an attachment in *Morton v. Pearman*.\(^{113}\) The court noted that the “demand arising from the breach of a promise of marriage . . . is a demand for money.”\(^{114}\)

It was decided twenty years later in 1879 that a breach of a marriage promise

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property based on breach of a contract to marry or all the actions resulting from the breach of contract.”).

108. *Heartbalm Statutes, supra* n. 52, at 1772–1773.


110. *E.g. Albinger v. Harris*, 48 F.3d 711 (Mont. 2002) (noting that the Montana statute, Mont. Code Ann. § 27-1-602 (1963), specifically protects deceit actions as outside the legislative bar); *Turner v. Shavers*, 645 N.E.2d 1324, 1325 (Ohio App. 1994) (holding that there is no immunity to an individual who commits fraud, and that the Ohio prohibitory statute does not “bar a claim for fraud merely because the fraudulent misrepresentation involves an intention to marry”); *see also Lampus*, 600 A.2d at 1310 (noting that deceitful action is not protected by the heartbalm statute in relation to claims of property, but that deceitful marriage promise actions alone are still barred when there is prohibitory legislation: “the [Pennsylvania] Act does not extend protection to an individual who deceitfully uses the promise to marry to deprive another of his property”); *but see Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257, 267 (citing *Boyd*, 228 Cal. App. 2d 374; *Smith v. Pust*, 19 Cal. App. 4th 263 (1993)) (determining that the California statute bars all claims arising out of facts that would amount to a barred heart balm theory); *M.N. v. D.S.*, 616 N.W.2d 284, 287 (Minn. App. 2000) (interpreting the Minnesota statute, Minn. Stat. § 553.01, to prohibit all actions based on the underlying factual situation of a breach of marriage promise, and prohibiting the claim of fraud in this instance when the alleged fraud was a fraudulent promise to marry: “Minnesota law not only bars specific claims for breach of a promise to marry, it also bars any other claim for damages that is predicated on a promise to marry”).


112. *Id.*

113. 28 Ga. 323 (1859).

114. *Id.*
cannot exist after a plaintiff's, or potential plaintiff's, death; analogously, a plaintiff will lose the right to recover for damages on this claim when she marries the defendant (who had previously committed the alleged breach).115 In justifying the termination of the action upon death, the court declared that the "action is for a personal wrong, and, though on breach of contract, it is a personal action, and would not survive to the personal representative."116 In dicta, that court opined on the importance of marriage within the state of Georgia when it observed that "the whole spirit and the policy of our law favors marriage, voluntary marriage, and all contracts mitigating against it . . . are null and void."117

In the later case of Spence et al. v. Carter, the Georgia Court of Appeals described exceptions to the general rule that the action does not survive the death of either the plaintiff or defendant:118 under common law principles, the cause of action will survive death either if the legislature has crafted a specific statute119 allowing for survival of the claim, or if there are special, financial damages requiring the claim to continue to the decedent's estate.120 The court went on to note that the special damages alleged must be damage to property as opposed to mere personal damages.121 The court did not ultimately determine whether the exceptions were even recognized under Georgia common law,122 however, because it held that, under the facts alleged, neither would apply anyway.123

As in the general common law ambit, the Georgia Supreme Court has also recognized the tort nature of remedies available under this cause of action, and that damages "may include full compensation for the pain, mortification, and wounded feelings suffered . . . in consequence of the dishonorable conduct of the defendant."124 Although the Georgia courts have apparently never expressed doubt about the validity of the claim, its presence in the state's high courts is relatively limited.125 Recent cases affirm the cause of action without significant evolution or discussion.126 A 2001 case before the Georgia Court of Appeals addressed the plaintiff's claim for breach of promise to marry,127 affirming the trial court's decision to ignore the claim, noting that there was no evidence the defendant had ever made a promise to marry the plaintiff,128

115. Harris v. Tison, 63 Ga. 629, 630 (1879).
116. Id.
117. Id.
118. Spence, 125 S.E. at 883.
119. Id. (citations omitted).
120. Id.
121. Id.
122. Id. at 884.
123. Spence, 125 S.E. at 884.
124. Graves, 51 S.E. at 320 (citing Parker, 28 S.E. 400).
126. E.g. Folds, 632 S.E.2d 403.
127. Finch, 555 S.E.2d 22.
128. Id.
an overwhelmingl y significant element of the claim. The court quickly and succinctly analyzed the issue, determining, "[b]y the very nature of the action, there must be an actual promise to marry and acceptance of that promise before one can be held liable for a breach."

Another 2001 case in the same court affirmed a decision for the plaintiff on her breach of promise to marry claim (as a counterclaim to her ex-fiancé’s complaint that she improperly withdrew money from a mutual account). The court affirmed the trial court’s judgment of approximately $2,500, specifically determined to be debts incurred as a result of the canceled wedding. The plaintiff’s recovery was limited due to the allegations against her of financial impropriety.

III. SHELL v. GIBBS

There is a good way to break up with someone, and it doesn’t include a post-it.

—Sex and the City

A. Backdrop of the Case

The modern-day scarcity of the claim is what makes Rosemary Shell’s lawsuit so disquieting when viewed in light of the large verdict she received at trial, and the factual elements of this case are a classic example of he said, she said. The arguments played out in a three-day trial to a Hall County, Georgia jury of six women and six men, with Shell’s story ultimately being the persuasive one.

1. She Said

Rosemary Shell claimed that she was in a relationship with Wayne Gibbs as early as July of 1991, which continued for about fifteen years. In July of 2006, she decided to end their relationship because Gibbs had not yet proposed. After this termination of the relationship, Shell moved to Pensacola, Florida, where she took a human resources job with an annual salary of $81,000.

In November of that same year, just a few months after Shell accepted the job in Florida, Gibbs visited her and proposed, offering her a 2-carat diamond engagement
ring,143 which she accepted.144 They decided to get married soon after. In order to facilitate the engagement, and due to discussions between the two, Shell quit her job and moved back to Georgia on November 11, 2006.145 Shell’s current job at North Georgia College and State University pays $31,000 a year.146

Just a few days before the agreed-upon wedding date of December 2, Gibbs informed his fiancée that he was canceling the wedding (but not the relationship) by leaving a note in the bathroom of their shared residence.147 They continued to date, and Gibbs continued to discuss marriage with friends and family, as well as with Shell herself, when, in January of that winter, Gibbs helped Shell move out.148

Shell moved into her own apartment, where she claims Gibbs stayed most of the time.149 Just two months later, at the end of March 2007, Gibbs admitted to Shell that he needed more time, and was going to take this opportunity to decide what he wanted to do in regards to marriage.150 In April, Shell discovered that Gibbs had been seeing another woman.151

Shell claimed to have relied on Gibbs’ proposal when relocating from Florida, and laments the lost opportunity she had to marry other men during the time she continued seeing Gibbs.152 According to her claim, she experienced mental suffering, wounded pride, humiliation, and impaired health.153 She also claimed that her financial reliance on the engagement forced her to file for bankruptcy and damaged her credit history.154 This issue was strongly contested by Gibbs, and became the basis of his countersuit.155

2. He Said

Gibbs made no attempt to deny the proposal or breached promise, but instead made allegations against Shell that he was misled before making that promise.156 In contradiction to Shell, Gibbs claimed their relationship began in 2001, an odd ten-year
discrepancy. He also claimed that he proposed thinking that she had only $30,000 worth of debt, while he later came to find that she owed much more, and that she had materially misrepresented the state of her credit history and financial well-being. Gibbs admitted that Shell moved out after he terminated the engagement, but denied staying at her new apartment most of the time. He also denies seeing another woman while they were together, and maintains that Shell merely discovered him in the presence of another woman after the relationship had ended.

Gibbs says he chose to lawfully end the engagement because Shell misrepresented her financial status and he was unwilling to take on such debt pursuant to a legal marriage. He claims that her bankruptcy problems are hers alone, and he in no way induced her into financial hardship. Gibbs asked the court to deny Shell’s claim and instead grant him relief for the money he expended in helping to pay off her debts, a total of over $40,000. He did not ask for the engagement ring back in his counterclaim, and, after the lawsuit ended, Shell put it up for sale on the Internet for $15,000.

Shell acknowledged that she had an overall debt of almost $42,000, but maintained that Gibbs was always aware of her financial status. As she told The Today Show’s Meredith Vieira a few days after the verdict, “we discussed my debts before I left Florida. We discussed my debts when I came back from Florida. He had a list. He knew exactly what I owed. That’s all just kind of a smokescreen.” The jury apparently agreed with her.

B. Outcome of the Case and Its Current Status

On July 23, 2008, the jury handed down a unanimous verdict. They found for Shell in the amount of $150,000 of unspecified damages. The court entered judgment on August 4 against Gibbs, once again recognizing the breach of promise to marry as a modernly valid cause of action in Georgia.

On August 29, less than a month after a verdict was entered against him, Gibbs filed a motion for a new trial on the grounds that the verdict was contrary to law and was strongly against the weight of the evidence. Most of Gibbs’ argument rests on Shell’s debt and bankruptcy proceedings; he claims that the verdict was a product of fraud, in that Shell did not disclose the value of the engagement ring and the lawsuit against him

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157. Id. at ¶ 2.
158. Id. at ¶ 8.
159. Id. at ¶ 12.
160. Def.’s Ans., supra n. 155, at ¶ 14.
161. Id. at ¶ 15.
162. Id. at ¶ 17.
163. Id. at ¶ 5 (counterclaim).
164. Gurr, supra n. 143.
165. Considine, supra n. 141.
166. Id. (quoting Rosemary Shell during an interview on The Today Show (NBC July 25, 2008) (TV Broad.) (interview available at http://www.msnbc.msn.com/id/21134540/vp/25846190#25846190)).
167. Id.
168. Verdict, supra n. 136.
169. Id.
to her creditors and in the bankruptcy proceedings against her.\textsuperscript{172} He alleges that Shell was legally required to disclose the actual value of the ring and the existence of the civil suit to the bankruptcy court in proceedings based on her debt, which had begun about six months before she sued him (he argues that she was required to amend the bankruptcy filings to reflect possible civil awards and the value of her jewelry).\textsuperscript{173} He also contends that her bankruptcy could not have resulted from his breach of promise, noting the money he expended to pay off her debts and the value of the engagement ring, which she kept.\textsuperscript{174} His argument is that the judgment cannot stand as a matter of equity and judicial preservation.\textsuperscript{175} As of this writing, the court has not addressed these issues.\textsuperscript{176}

Gibbs’ motion for a new trial focuses on his defenses, the sufficiency of the evidence presented, and the possibility of fraud on the part of Shell.\textsuperscript{177} Gibbs did not, however, attack the verdict with the argument that the court should clearly repudiate the entire cause of action.\textsuperscript{178}

Although the majority of states have banned the cause of action by statute,\textsuperscript{179} a state’s high court also has the power to change this common law claim.\textsuperscript{180} In 1999, the Kentucky Supreme Court did just that.\textsuperscript{181} A lower state court in Kentucky had previously granted a motion for summary judgment on behalf of the defendant based on the non-viability of the breach of marriage promise claim, and the Court of Appeals reversed, noting that they had no discretion to ignore precedent (which had been clearly established for the claim in Kentucky).\textsuperscript{182} The highest court in the state noted their specific authority to modify or abolish existing common law claims and emphasized the fact that there were alternative options to recovery for potential plaintiffs still in place, such as breach of contract or intentional infliction of emotional distress.\textsuperscript{183} Options for modernizing the law in Georgia lay either in careful judicial consideration by the Georgia Supreme Court on appeal\textsuperscript{184} or an independent act by the state legislature;\textsuperscript{185} Part IV of this article lays out the varying reasons for abolishing this apparently rarely-used cause of action.\textsuperscript{186}

\textsuperscript{173} Id. at 5–7.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 6–7.
\textsuperscript{176} As of November 11, 2008, Gibbs had tried his motion, but the court had not yet made a decision. Telephone call with the Hall County Court Clerk’s Office (Nov. 11, 2008).
\textsuperscript{177} See Def.’s Br., supra n. 172.
\textsuperscript{178} Id.
\textsuperscript{179} Supra n. 16 (twenty-six of the twenty-eight states that have abolished the cause of action have done so by statute).
\textsuperscript{180} See e.g. Gilbert, 987 S.W.2d 772 (Kentucky Supreme Court’s ruling that breach of promise to marry was no longer valid in the state).
\textsuperscript{181} Id. at 776.
\textsuperscript{182} Id. at 773.
\textsuperscript{183} Id. at 776.
\textsuperscript{184} See Gilbert, 987 S.W.2d 772.
\textsuperscript{185} Supra n. 16 (a listing of state statutes that have effectively abolished the breach of marriage promise cause of action).
\textsuperscript{186} Gurr, supra n. 3.
IV. THE OLD BALL AND CHAIN: THE FUTURE VIABILITY OF THE CAUSE OF ACTION AND WHY THE GEORGIA LEGISLATURE OR COURTS SHOULD CONSIDER ABOLISHMENT

It is common knowledge . . . that in this modern age marriage is considered from a business point of view as much so as a status or companionship.

—Schultz v. Duitz187

Although the above sentiment makes legal considerations easier to classify, a compelling argument presents itself in favor of distinguishing romantic decisions from business agreements and providing more leniency in their enforcement.188 Existing and historical arguments for the abolition of this common law cause of action include fear of the all-too-"enterprising" female,189 sexual discrimination in litigation,190 public policy considerations,191 and personal freedom of choice.192 In analyzing the possible effects of Shell v. Gibbs on the future viability of the breach of promise to marry in Georgia, it is important to consider the modernly applicable arguments favoring its abolition.193 In addition, it is necessary to examine the relatively weak194 arguments supporting the action in order to determine its necessity, or futility,195 in a modern legal system.

A. Why Traditional Contract Principles as Applied to Engagements Just Don’t Cut It

There exists a current and ongoing conflict between commercial law principles and family law principles.196 Attempting to classify familial arrangements solely in the context of commercial regulations creates a much-"too simplistic" model for dispute resolution.197 While contract law may be beneficial and, at times, necessary, in legal disputes over family and personal relationships, it is also essential to relax contract law standards in order to accommodate such sensitive subjects.198

The real problem with using traditional contract principles to create a cause of action for the slighted fiancé is that an engagement cannot be viewed as a traditional contract.199 Just the opposite, an engagement must be thought of more as an emotional, or even social, attachment than a binding legal contract.200 It has been argued that the cause of action creates a binding agreement between the parties only after there has been a breach of it, with the implication being that the law creates an enforceable contract

187. 69 S.W.2d at 30.
188. E.g. Wright, supra n. 32, at 367–370.
189. Id. at 378.
190. Gilber, 987 S.W.2d at 775; Wright, supra n. 32, at 377–379.
191. E.g. Gilbert, 987 S.W.2d at 775.
192. E.g. Jackson, 904 P.2d at 687.
194. Gilbert, 987 S.W.2d at 775–776.
195. See id. at 775.
196. Smith, supra n. 20, at 27–28 (discussing the conflict between contract law and family law regarding the issue of surrogacy).
197. Id. at 28.
198. Id.
199. See Wright, supra n. 32, at 368.
200. Id. at 367–369.
when the parties did not initially intend to create one for themselves. One proponent of this argument has offered as a hypothetical example the idea that no currently engaged couple would consider the possibility of suing the other in the event their relationship were to end. It must be, then, that the parties understand the "contract" to be legally binding only upon its breach. Following this logic, a distinction must be made between commercial contracts and promises to marry on the basis of intent.

If the underlying theme of contract law and enforcement of equitable agreements is the idea of a free marketplace and a bargained-for exchange, an agreement based, not on a bargain for sale, but on a lifelong commitment to a marriage, does not fit neatly within the anticipated parameters of intent. If contracts are considered enforceable and binding because the parties who create the contract have the opportunity to "deal with each other 'at arm's length,' " with full knowledge of the exchange being offered, it is necessary to distinguish a promise to marry because of the unavoidable emotional influences on the decision-maker. It is likely that emotions will cloud the neutrality of the agreement, rendering a promise to marry almost the complete opposite of an impartial, bargained-for contract. Additionally, not only will emotions cloud the formation of the agreement, they will also muddy the factual elements, evidence, and extent of damages, as in Shell v. Gibbs.

Another important difference between marriage agreements and traditional contracts is the authority of the state; private parties generally do not need state approval or authorization for a commercial contract, but a state has the sole authority to provide for a marriage "contract" between two individuals. In 1971, the United States Supreme Court used this reasoning as an argument for allowing free access to the courts in order to obtain a divorce. The Court noted that individuals are free to create, and breach, commercial contracts at their own will, but "private citizens may [not] covenant for or dissolve marriages without state approval." This plenary power of a state distinguishes marriage contracts from other contracts, which presumably only require state intervention at the request of either party to the contract.

Most courts have taken the view that marriage itself is something more than merely a traditional contract. The Supreme Court, in 1888, discussed the classification of marriage as uniquely and fundamentally more important than the classification of

201. Id. at 367–368.
202. Id. at 367.
203. Id.
204. Wright, supra n. 32, at 368.
205. E.g. Gilmore, supra n. 13, at ch. 1.
206. See id.; Wright, supra n. 32, at 368.
207. Wright, supra n. 32, at 368.
208. Id.
209. Id.
210. Id.
211. Supra pt. III.
213. Id.
214. Id.
215. Id.
216. E.g. Maynard, 125 U.S. at 210.
traditional contracts, noting that "[marriage] is an institution . . . which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."\textsuperscript{217} While the legal status of marriage cannot be challenged,\textsuperscript{218} most courts have taken the view that marriage is a unique legal arrangement, sometimes called a civil contract,\textsuperscript{219} deserving more thought than strict adherence to traditional commercial contract law.\textsuperscript{220}

These courts, however, were talking about marriage,\textsuperscript{221} not engagements.\textsuperscript{222} In a peculiar decision, the New York Court of Appeals decided in 1874 that a breach of marriage promise was clearly \textit{not} a contract action within traditional and statutory definitions.\textsuperscript{223} The case involved a challenge to a New York statute, which allowed causes of action based on contract principles to survive death; the court determined the statute did not apply in a breach of marriage promise case.\textsuperscript{224} In distinguishing a marriage promise from a contract as defined by the statute, the court determined that

the action scarcely resembles, in its main features, an action upon contract. In actions on contract, the damages are limited by a fixed rule to the pecuniary loss sustained, while in this the damages are in the discretion of the jury, to the same extent as in strictly personal actions, such as slander, malicious prosecution, assault and battery and the like; and the recovery may be, and usually is, principally for injured feelings, anxiety of mind, wounded pride and blighted affections.\textsuperscript{225}

Viewed in light of the claim's origins and contract principles,\textsuperscript{226} this declaration by the court presents a perplexing dichotomy; however, the contraction is clearly alleviated, at least in New York, by the abolition of the cause of action.\textsuperscript{227} So while it has been argued, and even admitted, that an engagement is not a regular contract in the eyes of the law,\textsuperscript{228} it still maintains its firm roots in contract law principles in order to hold parties liable in Georgia, and twenty-one other states.\textsuperscript{229}

\textbf{B. Policing Pre-Marital Promises as Bad Policy}

Arguably the most persuasive argument for abolition lays in the public policy concerns this cause of action raises.\textsuperscript{230} In the two states that have judicially eliminated

\begin{itemize}
  \item \textsuperscript{217} \textit{Id.} at 211.
  \item \textsuperscript{218} See \textit{id}.
  \item \textsuperscript{219} \textit{Id.} at 210.
  \item \textsuperscript{220} E.g. \textit{id.} at 210–213; \textit{Vrabel}, 459 N.E.2d at 1303. See generally Carole Pateman, The Sexual Contract ch. 6 (Stanford U. Press 1988).
  \item \textsuperscript{221} \textit{Supra} nn. 212–220.
  \item \textsuperscript{222} The Supreme Court has apparently never been faced with the issue of determining the rights or obligations stemming from a promise to marry. Search in Westlaw, set library, using the search "promise engagement & marriage & fundamental" (Nov. 13, 2008) (yielding 76 results); search in Westlaw, set library, using the search "breach & 'marriage promise' " (Nov. 13, 2008) (yielding 2 results).
  \item \textsuperscript{223} \textit{Wade} v. \textit{Kalbfleisch}, 58 N.Y. 282, 285 (1874).
  \item \textsuperscript{224} \textit{Id.} at 284–285.
  \item \textsuperscript{225} \textit{Id.} at 285 (citations omitted).
  \item \textsuperscript{226} \textit{Supra} pt. II.
  \item \textsuperscript{227} N.Y. Civ. Rights § 80-a (McKinney 1992).
  \item \textsuperscript{228} E.g. \textit{Wade}, 58 N.Y. at 285.
  \item \textsuperscript{229} See Lord, \textit{supra} n. 9; \textit{supra} n. 16 (listing the twenty-nine jurisdictions that have abolished the claim).
  \item \textsuperscript{230} See e.g. \textit{Gilbert}, 987 S.E.2d at 774–776.
\end{itemize}
the breach of marriage promise claim, the overwhelming reason was concern over the action’s applicability in a modern legal system and its susceptibility to abuse. The belief that this claim is subject to abuse stems from the fact that the party initiating the lawsuit will undoubtedly be upset over the canceled nuptials, and most likely harboring hurt feelings. The action has frequently been likened to a mere revenge tactic for the broken-hearted female.

Courts and commentators also take the view that the nature of an engagement is one of a preparation period before the binding commitment of marriage, which should allow either party a reasonable opportunity to recognize when the decision to marry is unsound. The Utah Supreme Court has supported this proposition, recognizing that there is “no benefit in discouraging or penalizing persons who realize, before making these vows, that for whatever reason, they are unprepared to take such an important step.” In addition to the possibility of abuse by would-be plaintiffs and the common-sense notion of a non-binding preparatory period, there are other persuasive reasons underlying the rationale for abolition: the outdated makeup of the claim, and the unavoidable gender bias the claim creates.

Older judicial opinions in breach of marriage promise cases reflect an old-fashioned, property-oriented view of both women and marriage, but this out-of-date model has become “unworkable” in a modern legal system. Consider the complete defense of the unchaste conduct of the (female) plaintiff. Consider, in at least one instance, the attempted defense that the would-be bride “had some negro blood in her veins.” Consider also that the cause of action seems to have more relevance when marriage is looked at from a property perspective, a viewpoint that has long since been eradicated.

231. Supra n. 16 (Kentucky and Utah).
232. Gilbert, 987 S.E.2d 772.
234. See id.
235. E.g. Wright, supra n. 32, at 377.
236. E.g. Fierro, 465 N.W.2d at 672; Jackson, 904 P.2d at 686; Wright, supra n. 32, at 369.
237. Jackson, 904 P.2d at 687 (emphasis in original).
238. Id. at 686.
239. Supra n. 26. One must also consider the social perceptions of an engagement, and the idea seemingly imbedded in society that an engaged individual has an obvious right to “bail” before the wedding. Merely consider cinematic history as an example: The Graduate (Embassy Pictures Corp. 1967) (motion picture); Far From the Madding Crowd (MGM 1967) (motion picture); It Had to be You (Columbia Pictures Corp. 1947) (motion picture); Girl Shy (Harold Lloyd Corp. 1924) (motion picture). And, more recently, Made of Honor (Columbia 2008) (motion picture); The Notebook (New Line Cinema 2004) (motion picture); Sweet Home Alabama (D&D Films 2002) (motion picture); Serendipity (Miramax 2001) (motion picture); The Wedding Planner (Columbia 2001) (motion picture); Runaway Bride (Paramount 1999) (motion picture); The Wedding Singer (Juno Pic 1998) (motion picture). None of these films were followed with a sequel in which they defended themselves in litigation (that is not, apparently, part of the magic of movie love).
241. Gilbert, 987 S.W.2d at 775.
244. Winders, 9 S.E.2d at 132.
245. Van Houten, 38 N.E. at 705.
246. Gilbert, 987 S.W.2d at 773 (citations omitted); see generally Pateman, supra n. 220, at ch. 6.
247. See e.g. Gilbert, 987 S.W.2d at 775.
In the past, courts have gone so far as to say that a husband is “entitled” to a healthy wife, as opposed to an “invalid,” and numerous cases discuss the affliction of communicable and other diseases as a defense to an alleged breach. In fact, the physical and mental qualities of the bride have often been evaluated when courts analyze these breach of promise claims as a groom is apparently not required by contract to “take an imperfect woman.”

In one 1886 case, the Pennsylvania Supreme Court compelled the defendant to accept “defect[s]” which were easily observable without excessive investigation, but seemed to promote a defense based on a latent, inoperable medical “defect,” classifying it as a fraud on the part of the female plaintiff. This defense was, of course, necessary, as the defendant “was entitled to have a wife capable of copulation in the usual way.” The court likened the arrangement to the sale of a cow, analogizing that “it would be a fraud to sell a cow with such a defect without making it known to the purchaser.”

The court further acknowledged a man’s rights and expectations, because he obviously “does not contract to marry a woman for the mere pleasure of paying her board and washing. He expects and is entitled to something in return.”

Recognizing a defense based on the female’s chastity (or, more precisely, her lack thereof) also seems extraordinarily archaic by today’s social definitions. The apparent logic behind placing such importance on a woman’s sexual behavior seemingly derives from her presumed place in society, her expected moral standards, and the unique position she is in to bear children. However, the lack of acknowledgment of the groom’s chastity not only emphasizes the “Victorian” notions of the claim in the common law, but also reflects the inequality implicitly condoned by, and precipitated by, this action.

While the claim may not seem inherently biased on its face, one cannot ignore the fact that there is no evidence a man has ever used this cause of action. So, for practical purposes, it appears only to be available to “jilted bride[s].” One scholar noted that while the claim is, of course, available to both sexes, “a man who would have

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248. Shepler, 197 N.W. at 373.
249. Id. (citation omitted).
250. See e.g. id.
251. E.g. Gring, 3 A. 841.
252. Id. at 843.
253. Id.
254. Id.
255. Id.
256. Gring, 3 A. at 843.
257. Id.
259. Id.
260. Id.
261. Id.
262. See Gilbert, 987 S.W.2d. at 774; Wright, supra n. 32, at 370; but see Walker v. Hester, 198 S.W. 912 (Ky. App. 1917).
263. See Wright, supra n. 32, at 370 (“It is anomalous . . . in that, while it is nominally available equally to both sexes, it is practically of use to the woman only.”).
264. Gurr, supra n. 3.
the hardihood to essay such a remedy would be laughed out of court and out of society."265 While this sentiment may be overly harsh and not necessarily fair, perhaps it is grounded in sound observations; the position of a spurned bride might still be perceived differently266 in today’s society, one that strives for an equal footing of the sexes,267 than that of a rejected groom.

Even in the mere linguistic characterization of female plaintiffs by courts and scholars, there is strong evidence of “sexism and paternalism.”268 Plaintiffs alleging this claim have historically been thought of in one of two ways: a woman “who has been robbed of the priceless jewel of chastity and branded with a mark as indelible as the mark of Cain, [against whom] the doors of real love and matrimony have doubtless been closed269 due to the “libidinous advances of the male sex,”270 or a woman who is “indelicate, scheming, enterprising, and eager to seize upon a victim.”271 So a woman, whose fiancé has changed his mind, is either helpless272 or vengeful.273 It is arguable whether true equality between the sexes currently exists, but surely our legal system recognizes the modern advances and opportunities for women in society, and has drifted away from these out-dated perceptions.274

One scholarly article, written in 1924, espouses the view better than any other that women who make these allegations are immoral and vicious creatures, solely out for revenge.275 The author includes this characterization of possible plaintiffs in his explanation of the claim’s intrinsic immorality, saying eloquently:

[In truth, a woman who really loves has nothing but kindness for the object of her affections. Even very inferior women, so long as their own affections remain unimpaired, will submit to the gravest injustice without retaliation. This is the feminine nature, because love is so large a part of their being, and we say it in their honour. So long as a woman loves, therefore, she will never pursue her forgetful lover with legal process for legal retribution . . . . A lady of delicate feeling would die before she would [make such claims] . . . amid all the glaring publicity of a court proceeding, the scowls and jeers of the assembled country . . . .] Is it not possible that the knowledge by women, that they have this powerful weapon, is conducive to immorality?276

With such unequal perceptions of women underlying the historical analyses and scholarly considerations of the action,277 the claim itself has come to adopt these disparate images.

It should be noted that the abolishment of the breach of marriage promise claim

265. Wright, supra n. 32, at 370.
266. See e.g. Gilbert, 987 S.W.2d at 775 ("[O]ne could certainly debate whether equality has been achieved between women and men in our society . . . . ").
267. E.g. id.
268. Id.
271. Wright, supra n. 32, at 378.
272. Scharringhaus, 107 S.W. at 337.
273. Wright, supra n. 32, at 378.
274. See Gilbert, 987 S.W.2d at 775.
275. Wright, supra n. 32, at 377–379.
276. Id. at 377–378.
277. E.g. id.
does not necessarily leave broken-hearted brides empty-handed, thereby burdening deserving plaintiffs; separate causes of action may be available for pecuniary losses, or even severe emotional distress. 278 And with so much baggage accompanying this claim, it is unnecessary to continually validate such an antiquated action. 279

The scant arguments for retaining the cause of action were perfunctorily rejected in the Kentucky Supreme Court's decision to abolish the cause of action. 280 The court addressed two arguments in favor of retention: that it was implicitly accepted by the legislature when it placed a statute of limitations on the action, and that the concept of stare decisis compelled retention. 281 The court dismissed the first argument, holding that it was irrelevant to the issue of retention whether or not the legislature had created a time limit for the common law claim. 282 As to the second argument, the court recognized the importance of stare decisis but stressed its authority to abolish common law actions that are contrary to public policy. 283 Noting how strong the arguments were in favor of abolition, and the lack of relevant arguments made in favor of retention, 284 the court used its authority to abolish the breach of marriage promise claim in Kentucky. 285

In 1942, the same Pennsylvania district court that questioned the constitutionality of "anti-heart balm" legislation also presented arguments in favor of retaining causes of action similar to the breach of marriage promise claim. 286 The court did not accept the reasoning that the statute was an attempt to curb actions brought in bad faith, claiming that it is in the nature of judicial proceedings to determine which claims are meritorious, and that any action could be brought in bad faith, not just the actions which had been prohibited. 287

The court also argued that retention of the heart balm actions was pursuant to good public policy, in that they provided relief for individuals who had been genuinely wronged. 288 The opinion went on to note that, in a democratic society, good public policy means not closing the doors of the courts to the people, which could lead to disrespect for the system and, ultimately, violence. 289 The opinion, however, had no effect; the issue of upholding the prohibition on the cause of action was not directly before the court. 290

278. Jackson, 904 P.2d at 687.
279. See id.; Gilbert, 987 S.W.2d 772.
280. Gilbert, 987 S.W.2d at 775–776.
281. Id.
282. Id. at 776.
283. Id.
284. Id.
285. Gilbert, 987 S.W.2d 772.
287. Id.
288. Id.
289. Id.
290. Id.
C. Respecting Freedom to Marry and the Fundamental Right to Privacy: What Kind of Interest Does that Create? (I.e. This Claim is Unconstitutional)\textsuperscript{291}

Even by its absence, law can shape culture in destructive ways.

—Francis Cardinal George\textsuperscript{292}

An interesting, but admittedly problematic, attack on the claim is a constitutional one: perhaps we have the constitutional right to be free from civil liability when it comes to a decision to marry.\textsuperscript{293} In other words, is there a fundamental liberty interest at stake in choosing a partner and being liable to them for damages\textsuperscript{294} when there has been a breach of a marriage promise? The Ohio Court of Appeals made clear in \textit{Vrabel v. Vrabel}, a 1983 decision, that there is “no fundamental right to bring an amatory action” when the constitutionality of an “anti-heart balm” act was questioned.\textsuperscript{295} It is evident from other cases, too, that “anti-heart balm” acts will clearly pass constitutional muster.\textsuperscript{296} My argument, however, presents the opposite proposition: while there is clearly no fundamental, constitutional right to \textit{bring} an action for breach of promise to marry,\textsuperscript{297} is there a fundamental, constitutional right to be \textit{free} from such an action? This question requires an analysis of the constitutional protections afforded to individuals based on the right to marry\textsuperscript{298} and the extent of a state’s inherent right to regulate the marital relationship.\textsuperscript{299}

The Fourteenth Amendment dictates that a state is unable to “deprive any person of life, liberty, or property, without the due process of law.”\textsuperscript{300} The term “liberty” has been judicially defined to encompass the fundamental right of privacy, including the right to marry, the right to keep one’s family together, the right to procreate, and the right to raise children as one sees fit.\textsuperscript{301} In 1967, in \textit{Loving v. Virginia},\textsuperscript{302} the Supreme Court specifically acknowledged the fundamental right to marry, explaining that “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{303}

That case challenged a state statute that prohibited interracial couples from marrying, which the Court struck down as unconstitutional based on the Fourteenth Amendment due process language (as well as on an equal protection argument).\textsuperscript{304}

\textsuperscript{291} This section was inspired by the cases in and structure of Erwin Chemerinsky, \textit{Constitutional Law} ch. 8 (2d ed., Aspen 2005) and influenced by lectures given in Constitutional Law II at the University of Tulsa College of Law (Lyn Entzeroth, Classroom Lectures (Tulsa, Okla., Fall 2008)).

\textsuperscript{292} Spaht, supra n. 258, at 305 (Winter 2003) (quoting Francis Cardinal George, \textit{Law and Culture}, 1 Ave Maria L. Rev. 1, 12 (2003)).

\textsuperscript{293} \textit{Infra} nn. 300–355.

\textsuperscript{294} \textit{E.g.} \textit{Parker}, 28 S.E. at 400.

\textsuperscript{295} \textit{Vrabel}, 459 N.E.2d at 1305.

\textsuperscript{296} \textit{Supra} pt. II, B.

\textsuperscript{297} \textit{Id.}; \textit{e.g.} \textit{Vrabel}, 459 N.E.2d at 1305.

\textsuperscript{298} \textit{See generally} Chemerinsky, \textit{supra} n. 291, at ch. 8(c)(1).

\textsuperscript{299} \textit{E.g.} \textit{Vrabel}, 459 N.E.2d at 1305.

\textsuperscript{300} U.S. Const. amend. XIV, § 1.

\textsuperscript{301} Chemerinsky, \textit{supra} n. 291, at ch. 8(c).

\textsuperscript{302} 388 U.S. 1 (1967).

\textsuperscript{303} \textit{Id.} at 12.

\textsuperscript{304} \textit{Id.}
While the case recognized the right to marry as fundamental, it also stands to support the proposition that the choice of whom to marry is a fundamental right.\textsuperscript{305} After all, the unconstitutional statute did not mandate that certain people were prohibited from marrying altogether; the legislation was specifically aimed at prohibiting members of different races from marrying each other, thereby not necessarily abridging the ability to marry entirely, but, more accurately, denying an individual the freedom to choose a marriage partner.\textsuperscript{306}

The Court elaborated on the right to marry further in 1978 when it opined that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”\textsuperscript{307} As recently as 2003, the Supreme Court clearly affirmed that “the Due Process Clause protects personal decisions relating to marriage.”\textsuperscript{308}

From these interpretive Supreme Court decisions, it becomes obvious that not only is marriage a fundamental right,\textsuperscript{309} but the freedom of choice in the marriage decision is also a fundamental right worthy of protection under the Fourteenth Amendment.\textsuperscript{310} Additionally, it stands to reason that if the right to marry is a fundamental right afforded constitutional protection, the right to not marry would also be a fundamental right worthy of equivalent protection from state interference.\textsuperscript{311} In \textit{Shell v. Gibbs}, the defendant made a choice not to marry a certain individual, for whatever reason.\textsuperscript{312} If he has the ability to choose to marry without fear of retribution, he must also have a protected interest in choosing not to marry;\textsuperscript{313} Gibbs must have a constitutional right to remain a bachelor.\textsuperscript{314}

This is merely the first step in the analysis, however.\textsuperscript{315} The existence of a fundamental right must be coupled with unconstitutional government infringement of that right in order to create unconstitutional conduct for which the state could be liable.\textsuperscript{316} This part of the analysis is problematic for a few reasons, the first of which being that the state has an unequivocal right to regulate the marriage relationship,\textsuperscript{317} and the second being the possible difficulty in identifying a state actor (the only party against

\textsuperscript{305} Id. at 12 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

\textsuperscript{306} Id. at 4–5.


\textsuperscript{309} Supra nn. 301–308.

\textsuperscript{310} However, any protection of a fundamental right may be abridged by demonstrating that a restriction is compelling and necessary (Chemerinsky, supra n. 291, at 820), as in the case of marriage between relatives or minors. Zablocki, 434 U.S. at 392 (Stewart, J., concurring).

\textsuperscript{311} Compare cf. Skinner v. Okla., 316 U.S. 535 (1942) (holding that the right to procreate is fundamental) with Griswold v. Conn., 381 U.S. 479 (1965) (holding that an individual has a fundamental right to obtain birth control, thereby preventing procreation).

\textsuperscript{312} See Pl.'s Compl., supra n. 6.

\textsuperscript{313} Supra n. 311.

\textsuperscript{314} Id.

\textsuperscript{315} Chemerinsky, supra n. 291, at 819.

\textsuperscript{316} Id.

\textsuperscript{317} See e.g. Califano v. Jobst, 434 U.S. 47, 53–54 (1977); Hanfgartn, 8 N.E.2d 47.
whom a constitutional claim can be made)\textsuperscript{318} when the only action being done by a state is inaction, i.e. allowing the common law claim to survive in courts.\textsuperscript{319}

The second issue (the state actor requirement) can be first analyzed in light of Shelley v. Kraemer,\textsuperscript{320} a 1948 Supreme Court decision which held that the state’s act of recognizing and enforcing racially-discriminative restrictive covenants was sufficient to constitute state action.\textsuperscript{321} While this declaration by the Court may seem clearly dispositive, it “long has been controversial,”\textsuperscript{322} and has never been extended to the outer edges of its linguistic limitations.\textsuperscript{323}

A better argument for identifying a state actor in the recognition of a common law claim is found in 1964’s New York Times v. Sullivan.\textsuperscript{324} There, the Supreme Court held without hesitation that Alabama was a state actor when it applied common law rules to private parties in a libel case, allowing First Amendment restrictions to be placed on private individuals.\textsuperscript{325} The Court declared,

although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms . . . It matters not that that law has been applied in a civil action and that it is common law only.\textsuperscript{326}

Noting the Court’s willingness, in certain circumstances, to conclude that state inaction is equivalent to action,\textsuperscript{327} it seems likely that a state’s mere judicial recognition of a common law claim such as breach of promise to marry would readily be classified as state action.\textsuperscript{328}

The more difficult component of the infringement argument, however, is the determination of the extent to which a state can regulate or interfere with the fundamental right to marry (or not marry).\textsuperscript{329} There is no question that a state can regulate most aspects of legal marriage.\textsuperscript{330} In fact, the state even has the power to prohibit marriage in some instances, as in the case of marriage between siblings.\textsuperscript{331} The Court has made very clear that not every “state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny,”\textsuperscript{332} and “reasonable regulations that do not significantly interfere with decisions to enter into the

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\item \textsuperscript{318} Chemerinsky, supra n. 291, at 469.
\item \textsuperscript{319} See Shelley v. Kraemer, 334 U.S. 1 (1948).
\item \textsuperscript{320} Id.
\item \textsuperscript{321} Id.
\item \textsuperscript{322} Chemerinsky, supra n. 291, at 489 (citing Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 29 (1959)).
\item \textsuperscript{323} Id. at 490.
\item \textsuperscript{324} 376 U.S. 254 (1964).
\item \textsuperscript{325} Id. at 265.
\item \textsuperscript{326} Id.
\item \textsuperscript{327} Chemerinsky, supra n. 291, at 489.
\item \textsuperscript{328} See Shelley, 334 U.S. 1; N.Y. Times, 376 U.S. 254.
\item \textsuperscript{329} See generally Chemerinsky, supra n. 291, at 826-827 (explaining the Supreme Court’s treatment of a state’s right to regulate the marital relationship). “Lines inevitably must be drawn and the Court is understandably reluctant to second-guess the legislature unless there is discrimination against a suspect class or a clear infringement of fundamental rights.” Id. at 827.
\item \textsuperscript{330} E.g. Zablocki, 434 U.S. 378; Califano, 434 U.S. at 53-54.
\item \textsuperscript{331} Zablocki, 434 U.S. at 392 (Stewart, J., concurring).
\item \textsuperscript{332} Id. at 386 (majority).
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marital relationship may legitimately be imposed.”

Under this standard, the state’s action of recognition and enforcement must be “a direct and substantial interference” with the ability to marry and the freedom to choose a partner. In this instance, it must be determined whether the state’s recognition of this common law claim “significantly interfere[s] with decisions to enter into the marital relationship.” Only then will the government’s judicial recognition and enforcement be subject to strict scrutiny, meaning the state must provide a compelling and necessary reason for allowing the claim to survive. If a court cannot find a substantial infringement of an individual’s right to marry in holding him liable for a breached marriage promise, then the government need only show a rational basis for allowing the claim, which generally is not a difficult standard to meet (perhaps the traditional integrity of the common law and stare decisis).

Califano v. Jobst presented the Supreme Court with the issue of determining whether or not there had been a substantial infringement on an individual’s right to marry when, under certain Social Security provisions, disabled children’s benefits were terminated at the time they married. In upholding the legislation, the Court emphasized that even when a law may discourage people from getting married or burden people who do choose to get married, it does not necessarily render the law an invalid exercise of the state’s power. In essence, discouraging an individual from exercising a fundamental right is not necessarily infringement and will not always be an unconstitutional act.

However, in the case of the existence of breach of promise claims, not only might an individual be discouraged from marrying, but he may also be on the receiving end of a lawsuit which subjects him to civil liability (amounting to punishment). To an individual like Gibbs, not only does the common law discourage him from making a promise to marry in the future, it also imposes a certain amount of punishment for making, or unmaking, personal decisions about whom to marry, before a legally-binding marriage commitment has even been entered into. Civil liability in this instance resembles punishment because the award may exceed actual pecuniary damages, thus imposing an affirmative, intrusive, and unwarranted obligation, as opposed to a

333. Id.
334. Chemerinsky, supra n. 291, at 826.
335. Zablocki, 434 U.S. at 386.
337. Id.
338. See Gilbert, 987 S.W.2d at 775.
339. Chemerinsky, supra n. 291, at 826.
340. Califano, 434 U.S. at 54 (“The general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.”).
341. Id.
343. See id. at 96; Wright, supra n. 32, at 374–375.
344. Wright, supra n. 32, at 374–375.
345. Id.
346. E.g. Parker, 28 S.E. at 400.
mire deterrent.347

Surely this claim constitutes an invalid “attempt to interfere with the individual’s freedom to make a decision as important as marriage,”348 and would directly and substantially interfere with that constitutionally-protected right.349 If the argument can be made that imposing liability upon an individual for breaking an engagement attempts to restore injuries that resulted in emotional and financial damage,350 a more significant argument can be made that the constitutionally-recognized right to privacy351 trumps a state’s interest in protecting its citizens from emotional injury.352 Short of Georgia offering a compelling and necessary reason353 for allowing the common law claim of a breach of marriage promise to survive in the modern age, allegedly bad boyfriends (or fiancés) like Gibbs354 must have some protected liberty interest355 worthy of immunity for their acts of terminating an engagement, no matter how insensitive.

V. THE END OF THE AISLE: CONCLUSIONS

Elections are a good deal like marriages, there is no accounting for taste. Every time we see a bride groom, we wonder why she ever picked him—and it’s the same with public officials.

—Will Rogers356

Wayne Gibbs was held legally accountable, and financially liable, for his personal choice not to get married.357 Although one may disagree with his romantic decision, as Ms. Shell certainly did,358 his right to make that choice should be legally protected, whether through legislative measures or judicial action.359 Abolition of this common law claim reflects both the modernization of our legal system360 and beneficial public policy choices.361

While there is a compelling public interest in abolishing the breach of marriage promise cause of action because of the out-dated notions of gender inequality362 and the distinctions from traditional contracts,363 there is also a strong argument in favor of individual autonomy; namely, that every person has a fundamental right to choose whom

347. Califano, 434 U.S. at 54.
348. Id.
349. Chemerinsky, supra n. 291, at 826.
350. Gilbert, 987 S.W.2d at 775; Stanard, 565 P.2d at 97.
351. See Chemerinsky, supra n. 291, at ch. 8(c).
352. See Gilbert, 987 S.W.2d at 776; Jackson, 904 P.2d at 687.
353. Chemerinsky, supra n. 291, at 820.
354. See generally Pl.’s Compl., supra n. 6.
355. As noted previously, the Supreme Court “make[s it] clear that the right to marry is of fundamental importance.” Zablocki, 434 U.S. at 383.
357. Supra pt. III.
358. Pl.’s Compl., supra n. 6.
359. Supra pt. IV.
360. E.g. Gilbert, 987 S.W.2d at 776.
361. Id.
362. Supra pt. IV, B.
363. Supra pt. IV, A.
to marry without fear of legal retribution or liability.364 The apparent lack of any persuasive argument for keeping this claim acts as evidence that the claim is unnecessary and “unworkable” in a modern legal system.365 Gibbs’ hope must lie either in the Georgia courts, that they will recognize the modern illegitimacy of this claim,366 or in the state legislature, that it may craft statutory bars367 to claims of the broken-hearted.

-Kelsey M. May *

364. Supra pt. IV, C.
366. Supra pt. IV.
367. Id.

* Student at the University of Tulsa College of Law, J.D. expected May 2010. I began this article with the expectation that I would support Ms. Shell and her cause of action. After all, what else does a “jilted” woman want but revenge? Along the way, however, I recognized the discrepancy between emotional pain and legal revenge; while there may be a need for restitution, it should not be imposed with a state’s assistance. Special thanks to everyone who read and edited my paper, including Professor Ray Yasser of the University of Tulsa. Thanks also to my law school mentor Wayne Cooper for constant support and encouragement.