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Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited

[H]owsoever people fast and pray,
The flesh is frail, and so the soul undone:
What men call gallantry, and gods adultery,
is much more common where the climate's sultry.
Happy the nations of the moral North Where all is virtue, and the winter season
Sends sin, without a rag on, shivering forth
('Twas snow that brought St. Anthony to reason);
Where juries cast up what a wife is worth,
By laying whate'er sum, in mulct, they please on
The lover, who must pay a handsome price, Because it is a marketable vice.

– Hanover v. Ruch, 809 S.W.2d 893, 894-95 (Tenn. 1990) (quoting Lord Byron, Don Juan, Canto I, LXIII-IV)

I. INTRODUCTION

In August, 1997, a North Carolina jury ordered the "other woman" to pay her lover's ex-wife one million dollars, after Dorothy Hutelmyer's husband, Joe, informed her that he was leaving her for his secretary.[1] Dorothy did more than get mad: she slapped the alluring secretary with a civil lawsuit charging adultery and alienation of affections.[2] What was Dorothy's motivation? "I'm not getting back at anyone," Dorothy proclaimed after the verdict was read. "I'm standing up for my family and the only way I could do that was to file a [law]suit," continued Dorothy.[3] The nine-woman, three-man jury awarded Dorothy $500,000 in

1. *See* Terry Carter, *'She Done Me Wrong:' A Jury Agrees, Awarding a Jilted Wife $1 Million in an Alienation of Affection Suit Against the 'Other Woman,'* A.B.A. J., Oct. 1997, at 24.

2. *See id.*

3. Maggie Hall, *Wages of Sin Are Dollars 1 Million; Dorothy Hutelmyer, the Wife Who Sued Her Husband's Mistress*, SCOT. DAILY REC. & SUNDAY MAIL LIMITED., Aug. 17, 1997, at 30, *available in* LEXIS, News Library, Curnews File.

compensatory damages and $500,000 in punitive damages.[4] Although a jury recently awarded another jilted spouse $86,000 earlier in the year, the magnitude of the Hutelmyer verdict attracted national media attention, sparking "debate about morality and marriage."[5]

The varying reactions to the verdict reflect the many different views concerning the wife's underlying tort claim: alienation of affections. "I'm hoping with this verdict, America is speaking out and saying that family is important and we agree marriage is a gift from God," said Dorothy Hutelmyer.[6] "It's not right for someone to destroy that gift," she continued.[7] Hutelmyer's attorney also echoed those sentiments, stating that "the people in our community are saying with this verdict that families are important."[8] The courthouse clerk, Shirley Lang, expressed a more pragmatic view stating that "we see cases like this, oh, one every two or three years usually. But I have a feeling we're going to have a run on them now."[9] In fact, over 200 such actions are filed annually in North Carolina.[10] At least one foreign observer views the verdict as confirmation of a growing trend in America, "where being 'the other woman' is turning costly."[11] Further evidence of the "changing climate in America" includes Louisiana's new "covenant marriage" law, which allows couples to elect a fault-based divorce system.[12]

The American legal community has not been so kind in its opinion of the Hutelmyer verdict. When asked for comment on the case, Ira Lurvey, chair of the ABA's Family Law Section, dismissed the case as an attempt to use an archaic tort to "go back to the future."[13] The ABA Journal revealed both its position and the prevailing legal attitude toward the verdict when it reported that, "[i]t was . . . difficult finding someone in the legal community to defend the alienation of affection law, dating back centuries to times when the law treated women as chattel."[14] Linda Elrod, a professor of family law at Washburn Law School, scornfully explained the verdict as an attempt to "put fault back into divorce."[15]

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4. *See Jury Awards Jilted Spouse $1 Million*, CHARLESTON DAILY MAIL, Aug. 7, 1997, at 1A, *available in* LEXIS, News Library, Curnews File.

5. *See Dateline NBC* (NBC television broadcast, Dec. 15, 1997) (describing the Hutelmyer as "a symbol for the prevailing thoughts about marriage and relationships in this area").

6. Hall, *supra* note 3, at 30.

7. *Id.*

8. *See Financial Cost of Adultery*, INDIANAPOLIS NEWS, Aug. 15, 1997, at A14, *available in* LEXIS, News Library, Curnews File.

9. *See id.*

10. *See* Paul Nowell, *Lawsuit by Jilted Wife Nets $1 Million Award*, AUSTIN AM.-STATESMAN, Aug. 9, 1997, at A4, *available in* LEXIS, News Library, Curnews File.

11. *See* Hall, *supra* note 3, at 30.

12. *See id.*

13. *See* Carter, *supra* note 1, at 24.

14. *See id.* This may be an overstatement. For example, civil rights attorney Gloria Allred offered a hearty and apparently sincere defense of the action and the Hutelmyer verdict. *See Equal Time* (CNBC television broadcast, Aug. 8, 1997).

15. *See id.*

Nevertheless, the legal community does not deny that the verdict may indicate a new social trend in America. "Family values," grunted criminal defense attorney Gerald Lefcourt,[16] "this is really absurd, I mean, if it was the law in New York, could you imagine? This whole city would be, like, at the courthouse all the time."[17] Fellow guest and family law attorney Raoul Felder agreed, scorning suits like this as "feelings" that should not be allowed to clog up the courts.[18] Mr. Felder added that Mrs. Hutelmyer had "every right to be offended . . . every right to be broken down, to cry at night. But to get a Superior Court judge to sit and listen to this nonsense . . . what about a principle?"[19]

Invocation of "principle," however, is just what has kept alienation of affections, its cousin tort, and criminal conversation (adultery) on the books in a minority of states. While a majority of states have either judicially or statutorily abolished alienation of affections and criminal conversation,[20] a minority of states still recognize at least one of the torts.[21] The reaction to the Hutelmyer verdict echoes the legal community's historic concerns with the torts which, beginning in the 1930s, led to the abolition of these torts in the majority of states.[22] The positive reactions to the verdict, fueled by concerns about family values and the sanctity of marriage, have led some commentators to hope and critics to fear that these so-called "heartbalm"[23] torts might experience a revival.

This Comment seeks to analyze the torts of criminal conversation and alienation of affections, both historically and in light of the growing national interest in providing further protections for marriage, as evidenced by the debate spawned by Louisiana's new "covenant marriage" law.[24] Part II of the Comment briefly traces the history of the torts from ancient times to modern American abolition of them in the majority of states.[25] Part III identifies and addresses the criticisms most often cited as reasons for the abolition of the torts and analyzes the merits of those criticisms.[26] Part IV discusses arguments in favor of the torts,

16. *See Rivera Live* (CNBC television broadcast, Aug. 11, 1997).
17. *Id.*
18. *See id.*
19. *See id.*
20. *See infra* notes 76-80 and accompanying text.
21. *See infra* note 80 and accompanying text.
22. *See infra* notes 80-83 and accompanying text.
23. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 125 (5th ed. 1984); Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935). The "heartbalm" torts, which seek to protect relational interests, include criminal conversation, alienation of affections, seduction, and breach of contract to marry. *See id.*
24. *See* LA. REV. STAT. ANN. §§ 272-74 (West 1997); *infra* notes 141-46 and accompanying text.
25. *See infra* notes 29-86 and accompanying text.
26. *See infra* notes 87-183 and accompanying text.

including the idea that problems with the torts may be corrected by judicial or legislative tinkering.[27] Part IV further points out that, while most commentators acknowledge the important goals that the torts purport to further, critics believe that the torts do little to promote their goals, resulting in an absence of adequate safeguards for marriage. While this Comment does not deny the truth of many of the torts' criticisms, it does suggest that a more hearty attempt to correct the shortcomings of the torts should be considered, rather than the repetitions of earlier judicial criticisms that pervade many of the statutes and opinions abolishing the torts.

A consistent theme throughout this Comment is that the decision to retain, modify, or abolish actions for criminal conversation and alienation of affections rests in a philosophical question for lawmakers. The philosophical objections to the torts are difficult to rebut because they are based upon fundamental, subjective views of the very nature of human beings and the institution of marriage. Any attempt to avoid the philosophical implications of the torts, by justifying them on simple contract or property principles, must fail because those fields do not adequately describe the marital state. The more legislators modify these torts, shaping them to best protect the rights of both the jilted plaintiff and the accused, the closer the torts resemble a "fault divorce" model. Thus, legislators must decide whether "family values" are a sufficiently important goal to justify a back-door infusion of fault in divorce actions along with the problems critics assert accompany fault divorce actions and these torts.

This Comment concludes that, based upon the long history of anti-adultery legislation leading to the torts of alienation of affections and criminal conversation,[28] it is incredible that the majority of states and legal commentators conclude that the problems associated with laws seeking to protect family relationships justify throwing them out completely, leaving deserted spouses with no legal remedies other than the right to divorce and receive no more support than an errant spouse in a similar position.

II. THE HISTORY OF ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION

A. Early Penalties for Adultery

The current lack of penalties for adultery and interference with family relationships is shockingly new. Ancient punishments for adultery ranged from

27. *See infra* notes 184-202 and accompanying text.
28. *See infra* notes 29-39 and accompanying text.

mere fines to being eaten alive by dogs.[29] While the earliest punishments were largely self-help,[30] "[v]arious monetary penalties were at times imposed as a substitute for the violence of self-help," and "most ancient kingdoms had laws forbidding adultery and providing for its punishment."[31]

Under Mosaic law, adultery was punishable by the death of both guilty parties.[32] Similarly, under Roman law, the husband and the father of an adulterous wife were given a right to kill the guilty parties.[33] Under Roman law, however, a double standard existed for men and women: a Roman wife possessed no right of redress for her husband's adultery.[34] English common law, based somewhat on Roman law, viewed adultery not as a crime, but as a tort for which a husband had the right to collect damages in a criminal conversation action.[35] When, in 1660, the ecclesiastical courts were given exclusive power to punish sex offenses of laymen (although the common law courts retained their civil jurisdiction), the canonical view that marriage was a sacrament pervaded these tort actions.[36] In America, the Puritans reduced the punishment for adultery from death to the bearing of the scarlet "A" on one's outer garments; or, in Connecticut, the "A" was branded upon the forehead of a condemned adulterer.[37]

While the majority of states now have criminal statutes providing for the punishment of adultery, there are very few instances of criminal prosecution for adultery in America.[38] In summarizing the varying historical penalties for adultery, Daniel Murray concluded that, rather than the "truly cruel and harsh" laws of ancient times, modernly we "have attempted by statutes in every state of the union to regulate the problem of adultery."[39] Given the very low incidence of criminal prosecutions for adultery in America[40] and the elimination of fault as a requirement

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29. *See* Henry H. Foster, Jr. & Doris Jonas Freed, *Offenses Against the Family*, 32 UMKC L. REV. 33, 87 (1964).

30. *See* Daniel E. Murray, *Ancient Laws on Adultery–A Synopsis*, 1 J. FAM. L. 89, 90 (1961).

31. *See id.*

32. *See Leviticus* 20:10 (King James) ("And the man that commit the adultery with . . . his neighbor's wife, [both] the adulterer and the adulteress shall surely be put to death.").

33. *See* Foster & Freed, *supra* note 29, at 87.

34. *See id.* at 87-88.

35. *See id.* at 88.

36. *See id.* at 88-89.

37. *See id.*

38. *See id.* at 85-86; *see also* William V. Vetter, *115 I.R.C. § 152(B) (5) and Victorian Morality in Contemporary Life*, 13 YALE L. & POL'Y REV. 115, 115 (1995) (stating that "in a substantial number of states, statute books still include criminal laws prohibiting adultery," but that "prosecutions for private, adult consensual acts violating these prohibitions are essentially nonexistent").

39. *See* Murray, *supra* note 30, at 104.

40. *See* Foster & Freed, *supra* note 29, at 85.

for divorce in family courts,[41] civil law, and more specifically the imposition of damages, is the one remaining area of the law that provides some form of protection against adultery.[42]

B. Development of Civil Penalties for Adultery

Considering modern America's distaste for "legislating morality,"[43] it is perhaps more palatable to allow civil courts to punish errant sexual encounters because it is a wronged individual and not the state bringing the charges. Thus, the uncomfortable appearance of a police state is avoided. Historically, "there was no sharp line of demarcation between tort and criminal punishment for adultery."[44] The relevant distinction arose with the separation of the common law courts and the ecclesiastical courts in the seventeenth century.[45] The Anglo-Saxons based actions involving interference with marriage relations by third persons as actions in trespass.[46] Because wives were considered their husband's chattel, a husband could sue a wife's lover for loss of consortium.[47]

Early English common law recognized two tort causes of action against third parties who interfered with the marriage relation: enticement and seduction.[48] Enticement, which evolved into the tort of alienation of affections, punished the inducement of a wife to leave her husband.[49] Unlike enticement, seduction, which evolved into the tort of criminal conversation, required an adulterous relationship between the plaintiff's wife and the defendant.[50] Some commentators assert that

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41. *See infra* notes 139-45 and accompanying text.

42. *See infra* notes 38-40 and accompanying text.

43. Of course, those who scorn the idea of "legislating morality" appear to do so only on a limited scale. For example, the criminal and civil law rest upon legislating morality; laws exist that prohibit murder, rape and robbery because our legislators (and by extension, we,) think these acts are morally wrong. *See* Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 312 n.300 (1997) (quoting Deputy District Attorney Chuck Middleton as saying, "[y]ou can't legislate morality, but you can legislate criminality"). Thus, it appears foes of legislated morality are concerned with a narrow category of acts–usually those acts that include consensual sexual intercourse among competent adults. *See, e.g.*, S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1260 (1997) (discussing the debate regarding whether legal enforcement of "popular morality, in particular sexual morality," is appropriate.).

44. *See* Murray, *supra* note 30, at 89.

45. *See* Foster & Freed, *supra* note 29, at 88-89.

46. *See* Elizabeth Herlong Campbell, *Tort Law: Court Abolishes Alienation of Affections*, 45 S.C. L. REV. 218, 219 (1993).

47. *See id.* (discussing the loss of consortium claim to be measured by a wife's services, society and sexual relations).

48. *See id.* at 219-20.

49. *See id.*

50. *See id.* at 220. Blackstone described criminal conversation as follows:

> Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by an action of

alienation of affections did not really evolve from enticement, which was grounded squarely in property rights, but arose as a separate tort in America and one that was never formally recognized in England.[51] It is true that the term "alienation of affections" first appeared in a New York suit in 1866.[52] Many jurisdictions, however, use the terms alienation of affections and enticement interchangeably.[53]

Quickly after its introduction, every U.S. state, except Louisiana recognized the tort of alienation of affections.[54] A majority of U.S. jurisdictions also recognized the tort of criminal conversation.[55] While the elements of the two torts varied slightly from jurisdiction to jurisdiction, the fundamental elements were virtually the same in every state adopting them.[56]

1. Common Law Elements of Criminal Conversation

Criminal conversation is, quite simply, adultery. The action protects the plaintiff's interest in exclusive sexual intercourse with his or her spouse, while the action for alienation of affections protects an interest in the affections and mental state of the spouse.[57] Criminal conversation requires proof of adulterous relations between the plaintiff's spouse and the defendant, as well as proof of a valid marriage between the plaintiff and the allegedly errant spouse.[58] Damages are awarded to compensate for loss of consortium.[59] Due to the lack of defenses, criminal conversation is virtually a strict liability tort.[60] The fact that the plaintiff's

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trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary.

Feinsinger, *supra* note 23, at 989-90 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 140 (1768)).

51. *See* Gregory L. Thompson, Note, *The Suit of Alienation of Affections: Can Its Existence be Justified Today?*, 56 N.D. L. REV. 239, 240-41 (1980).

52. *See id.* at 241-42 (citing Heermance v. James, 47 Barb. 120 (N.Y. App. Div. 1866)).

53. *See id.* at 241. Technically, there is a slight difference between the two actions in that an alienation of affections action does not require the plaintiff to prove physical separation of the spouses. *See id.* at 241 n.19.

54. *See* Phillip Sykes, *Intentional Torts–Alienation of Affections–An Inference of Defendant's Intentional Interference in Plaintiff's Marital Relations is Sufficient to Prove Alienation*, 63 MISS. L.J. 249, 251 (1993).

55. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124 (5th ed. 1984).

56. *See generally id.*

57. *See* Kay Kavanaugh, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 324 (1981).

58. *See* RESTATEMENT (SECOND) OF TORTS § 685 (1997).

59. *See* Marshall L. Davidson III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 653 (1989).

60. *See* James Leonard, Cannon v. Miller: *The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina*, 63 N.C. L. REV. 1317, 1321 (1985).

spouse was the aggressor in the relationship is not a defense, nor is the fact that the adultery occurred while the spouses were living apart.[61] Liability is so severe that, not only is it no defense that the defendant did not know that the plaintiff was married, but it is no defense even if the errant spouse actively misrepresented his or her marital status.[62] The only defense to the tort is the plaintiff's consent to the adulterous act; however, such consent will not be readily implied.[63]

2. Common Law Elements of Alienation of Affections

Alienation of affections includes more elements than criminal conversation and is thus more difficult to prove. Courts have variously described the injury addressed by alienation of affections as one to property, to the person, to personal rights, or to feelings.[64] In a legal action for alienation of affections, the plaintiff must first prove that true affection existed in the marriage at one time; second, it must be shown that the affection is now destroyed; and third, that the defendant caused that destruction, or at least impairment, of the marital relationship.[65] The essence of the tort is that the defendant must be shown to have actively and aggressively lured the plaintiff's spouse away.[66] Included in this active enticement is actual malice or improper motives on the defendant's part.[67]

Regarding element one, most jurisdictions have a rebuttable presumption that affections existed between the husband and wife.[68] In a minority of jurisdictions, the absence of affections only serves as a mitigating factor in calculating damages and does not bar the tort action.[69] Unlike criminal conversation, adulterous relations are not necessary to prove that the defendant interfered with the marital relationship.[70] Thus, in a traditional action for alienation of affections, any third party who alienated the affections of one spouse for another may be charged with

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61. *See* Davidson, *supra* note 59, at 654.

62. *See id.*

63. *See id.* Consent, however, must be very close to express. In Tennessee, for example, a court held that where the plaintiff husband actually watched his wife and defendant duck into a field where the plaintiff presumed they were engaging in sexual intercourse, in order to "catch them in the act," did not constitute consent because the plaintiff did not create new opportunities for, or invite, the wrong. *See* Stepp v. Black, 14 Tenn. App. 153, 157-60 (1931).

64. *See* Feinsinger, *supra* note 23, at 993.

65. *See* RESTATEMENT (SECOND) OF TORTS § 684 (1997).

66. *See* Davidson, *supra* note 59, at 633.

67. *See id.* at 635.

68. *See id.* at 637-38.

69. *See id.* The rational for this is the belief that a possibility of reconciliation always exists. *See id.* at 638.

70. A concise comparison of criminal conversation and alienation of affections notes that some courts have held the two actions "distinct in that alienation of affections requires not sexual intercourse but only the defendant's knowledge that the woman was married, whereas criminal conversation requires sexual intercourse but not knowledge that the woman concerned was married." *See* Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COLUM. L. REV. 241, 254 (1952).

the tort. This includes family members (e.g., mother-in-laws, etc.), whose consistent criticism of the plaintiff affects the marital relationship.

Typically, the amount of damages is left for the jury to decide, with the primary consideration being the loss of affections, rather than the defendant's method of alienation.[71] Punitive damages in both criminal conversation and alienation of affections suits are often available as well as in cases malicious in nature.[72] Unlike criminal conversation, a number of defenses to alienation of affections actions are available. For example, if the defendant's actions were not malicious, but rather inadvertent, the plaintiff's claim could be defeated.[73] Moreover, a complete defense exists if the defendant did not know that the plaintiff's spouse was married.[74]

C. The Rise and Fall of the Heartbalm Torts

While the torts were originally adopted in America in accordance with the early common law principle that only men could sue, passage of the Married Women's Property Acts in the late nineteenth century afforded women the right to sue.[75]

Beginning in the 1930s, criticism of alienation of affections and criminal conversation torts reached a fevered pitch. In 1935, Indiana became the first state to enact a "heartbalm statute,"[76] abolishing the jurisdiction's heartbalm torts, including alienation of affections and criminal conversation.[77] The Indiana law, entitled "An Act to Promote Public Morals," simply abolished "all civil causes of action for breach of promise to marry, for alienation of affections, for criminal conversation, and for the seduction of any female person of the age of twenty-one years or more."[78] New York and Illinois followed Indiana's lead almost

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71. *See* Davidson, *supra* note 59, at 642.
72. *See id.*
73. *See id.* at 643.
74. *See id.*
75. *See* Thompson, *supra* note 51, at 243. Initially, the acts were supported by the rationale that the wife has a protected interest in the services of her husband similar to the interest the husband has always enjoyed in her services. *See id.* This rationale of a mutual "property" interest between spouses fueled criticism of the tort as an anachronism. *See id.; see also infra* notes 113-21 and accompanying text.
76. This Comment refers to statutes and judicial opinions abolishing the heartbalm torts as "heartbalm" legislation and opinions. Some commentators, however, refer to such legislation as "anti-heartbalm" legislation, resulting in some confusion.
77. *See* Feinsinger, *supra* note 23, at 987.
78. *See* N.P. Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417, 420 (1935).

immediately by enacting similar statutes.[79] By 1997, all but a few states had abolished the tort either statutorily or judicially.[80] Although there was initially discussion and litigation regarding the constitutionality of the heartbalm statutes, these statutes were ultimately deemed constitutional.[81] In 1935, law professor Nathan Feinsinger reported that "public resentment over the abuses incident to 'heart balm' suits [had] . . . culminated in sweeping legislative reform."[82] Feinsinger explained "this unusual legislative receptivity" as a "reaction against the prevalence of blackmail peculiar to these actions, the incongruity of applying the damage remedy to injured feelings, and the perversion of the remedy by courts and juries to express their emotional sympathy and moral indignation."[83]

Commentators often quote the Feinsinger article when urging abolishment of

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79. *See id.* at 417.

80. The following states have statutorily abolished both alienation of affections and criminal conversation: Alabama (ALA. CODE § 6-5-331 (1997)); Arizona (ARIZ. REV. STAT. § 25-341 (1997)); Arkansas (ARK. CODE ANN. § 16-118-106 (Michie 1997 Supp.); California (CAL. CIV. CODE § 43.5 (West 1997)); Colorado (COL. REV. STAT. ANN. § 13-20-202 (West 1987)); Connecticut (CONN. GEN. STAT. ANN. §§ 52-572b, 572f (West 1991); Delaware (DEL. CODE ANN. tit. 10, § 3924 (1975)); Florida (FLA. STAT. ANN. § 771.01 (West 1997)); Georgia (GA. CODE ANN. § 51-1-17 (1982)); Indiana (IND. CODE ANN. § 34-12-2-1 (Michie 1998)); Massachusetts (MASS. GEN. LAWS ch. 207, § 47B (1997)); Michigan (MICH. COMP. LAWS ANN. § 600.2901 (West 1986)); Minnesota (MINN. STAT. ANN. §§ 553.01-.02 (West 1988); Nebraska (NEB. REV. STAT. § 25-21, 188 (1995)); Nevada (NEV. REV. STAT. § 41.380 (1997)); New Jersey (N.J. STAT. ANN. § 2A:23-1 (West 1987)); New York (N.Y. CIV. RIGHTS LAW § 80-a (West 1992)); North Dakota (N.D. CENT. CODE § 14-02-06 (1997)); Ohio (OHIO REV. CODE ANN. § 2305.29 (Anderson 1995)); Oklahoma (OKLA. STAT. ANN. tit. 76, § 8.1 (West 1995)); Oregon (OR. REV. STAT. §§ 30.840-.850 (1989)); Rhode Island (R.I. GEN. LAWS § 9-1-42 (1997)); Tennessee (Tenn. Code Ann. §§ 36-3-701, 39-13-508 (1997)); Vermont (VT. STAT. ANN. tit. 15, § 1001 (1989)); Wisconsin (WIS. STAT. ANN. § 768.01 (West 1997)); Wyoming (WYO. STAT. ANN. § 1-23-101 (Michie 1977)). Today, confusion exists as to precisely how many states recognize either alienation of affections or criminal conversation as viable causes of action because many states have judicially abolished the torts or have simply not recognized them in recent years. *See, e.g.*, Rolland Wrenn, *Women Waste Great Vegetables on Molester*, CHAPEL HILL HERALD, Sept. 21, 1997, at 7 (reporting that only Idaho, Utah, North Carolina, South Carolina, Missouri, and Mississippi still recognize a cause of action for alienation of affections); Susan English, *Don't Swear Off Handguns Until You've Run With Them*, SPOKESMAN REV., Dec. 14, 1997, at E10, *available in* 1997 WL 17224536 (noting that only Idaho, Mississippi, Missouri, North Carolina, South Carolina, and Utah retain alienation of affections as a cause of action).

81. *See* Clark W. Toole, Jr., Comment, *Domestic Relations–Constitutionality of "Heart Balm" Legislation (Illinois)*, 4 WASH. & LEE L. REV. 185, 189 (1947). The rationale frequently offered to support the constitutionality of these statutes is that the torts were "incident[al] to the marriage relationship" and that "since the legislature has always controlled the marriage relationship, it necessarily follows" that these incidental torts are also "subject to legislative control." *See id.* Additionally, courts have reasoned that states have the authority to abolish the heartbalm torts because marriage is neither a contract nor a property right within the meaning of the United States Constitution. *See* Thomas K. Leeper, Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585, 594 (1977). *But see,* Heck v. Schupp, 68 N.E.2d 464 (Ill. 1946) (holding that the Illinois heartbalm statute was unconstitutional because the Illinois constitution guaranteed that "[e]very person ought to find a certain remedy in the laws for all injuries and wrongs" suffered).

82. Feinsinger, *supra* note 23, at 992.

83. *See id.*

the heartbalm torts.[84] Courts' heavy reliance on Feinsinger's assertions reflect the belief that:

> The underlying explanation [of the abolition of the heartbalm torts] is probably a realization of the failure of these actions to accomplish their original social purposes, and their non-conformity with changed *mores* concerning sex morality [sic], the status of women, and the functions of the family. While the importance of the affectional relationships of husband and wife may still justify their legal protection, the social cost of such protection by means of an action for damages may exceed its worth.[85]

It is interesting to note that the Feinsinger article contains virtually no citations to support its conclusions on the inadequacies of the torts.[86] Examination of the basis of these and subsequent criticisms is thus crucial. State legislatures which, in the wake of the Hutelmyer verdict, may be considering either reenacting or retaining heartbalm statutes should not rely upon often repeated assertions, many of which have their genesis in little more than a largely unsupported law review article from 1935. Instead, state legislatures should conduct independent inquiries into the merits of these torts and their feasibility when balanced against the state's important interest in protecting the institution of marriage.

III. CRITICISMS OF ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION ADDRESSED

A. The Torts Are "Outdated"

One of the most frequently repeated, and yet curious criticisms of alienation of affections and criminal conversation, is that these torts have "outlived their usefulness."[87] This argument is curious for two reasons: first, it admits that these torts once had a certain usefulness; and second, it asserts that their usefulness is now outdated, even considering the absence of criminal and family court sanctions

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84. *See* Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History,* 38 HASTINGS L.J. 195, 223 n.204 (citing the Feinsinger article as a "leading article" in the national debate concerning the heartbalm torts). *See, e.g.,* Leonard, *supra* note 60, at 1321, 1323 n.56, 58, & 60 (citing Feinsinger's article as a support for a list of "cons" to alienation of affections actions).

85. Feinsinger, *supra* note 23, at 979.

86. *See generally* Feinsinger, *supra* note 23, at 992-1009.

87. *See, e.g.,* Garret E. Asher, *Family Law–Tennessee Courts–Retroactive Abolition of the Common Law Tort of Criminal Conversation* Hanover v. Ruch, *809 S.W.2d 893 (Tenn.),* cert. denied, *60 U.S.L.W. 3342 (1991) (No. 91-525),* 59 TENN. L. REV. 159, 165 (1991).

for adultery, an act these torts were intended to discourage.[88] The argument was perhaps more explicable in 1935, when Feinsinger reported that "proponents of the new [heartbalm] legislation contend that injunctive or criminal sanctions are more appropriate to accomplish [preservation of family solidarity]."[89] The most obvious rationale supporting the argument that these torts have outlived their usefulness is the belief that the growing acceptance of extramarital sexual relations renders imperfect protections against such activity "outdated."[90]

Reflective of this mind set is the 1984 New Hampshire decision abolishing criminal conversation because the tort "diminishes human dignity."[91] One commentator suggested that to allow recovery for sexual misconduct alone "without proof of resulting diminution of affections or similar loss would leave the door open to flagrant injustices."[92] Even more odd, given the early heartbalm critic's reliance on criminal laws to protect marriages, is the belief of some commentators and courts that the civil action is particularly anachronistic in jurisdictions which no longer recognize adultery as a crime.[93] Such determinations imply that any lip-service given to a balancing test, in which the abuses of the heartbalm actions outweigh their benefits, is merely that: lip-service. In reality, some courts have determined that society simply does not consider marriage worth the protection that the law once afforded it, as evidenced by the wink at adultery offered by our judicial system and laws.[94]

B. The Torts Will Clog the Courts

A second argument for the abolition of the torts relates to practical, rather than philosophical, difficulties with the torts. Opponents of the torts simply do not think

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88. *See supra* notes 38-53 and accompanying text.

89. *See* Feinsinger, *supra* note 78, at 418.

90. *See* William M. Kelly, Note, *The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship*, 48 NOTRE DAME REV. 426, 433 (1972).

91. *See* Feldman v. Feldman, 480 A.2d 34, 36 (N.H. 1984).

92. *See* Kelly, *supra* note 90, at 433.

93. *See* Leonard, *supra* note 60, at 1327.

> Because of the decreased role of fault in the dissolution of marriage and its attendant economic consequences, the maintenance of actions for alienation of affections and for criminal conversation seems incongruous. If the aggrieved spouse has few rights against the offending spouse arising from marital fault, clearly the aggrieved spouse should have fewer rights against a third party.

Id. See, e.g., Kavanaugh, *supra* note 57, at 334 (citing Fadgen v. Lenker, 365 A.2d 147, 151 n.7 (Pa. 1976)).

94. Some argue that because adultery laws are ignored, civil laws monitoring interference with family relationships should also be abolished. *See CNN Talkback Live* (CNN television broadcast, Aug. 11, 1997). These conclusions seem based upon a belief that the lack of enforcement of adultery laws is evidence that attempts to "legislate the human heart" are ineffective. *See id.* This argument, however, tends to ignore the fact that the state may not have the same incentive to prosecute errant spouses and their lovers as that of a spurned spouse. Arguably, civil laws are the most viable means of enforcing societal attitudes against adultery, if in fact those attitudes still exist.

that the nation's courts should be clogged up with these "vexatious" lawsuits.[95] Noting the prevalence of extramarital affairs, modern commentators argue that allowing "every spouse, male or female, who loses their spouse to a third party . . . to bring suit, will clog the judicial process."[96] The courts, however, in states that no longer recognize the heartbalm torts continue to be clogged with familial cases. In Wisconsin, for example, a husband tried to evade the heartbalm legislation by framing his complaint as an action for emotional distress against his wife's lover who had impregnated her.[97] The Wisconsin Supreme Court affirmed the lower courts' dismissal of the action, reasoning that the case was essentially one of criminal conversation and that the state was "well served by the abolition of the tort of criminal conversation."[98] One reason given by the court was that the tort is "often misused in a vindictive manner."[99] As discussed below, however, it is difficult to see just how heartbalm torts differ from any other type of tort regarding the potential for a plaintiff to bring a frivolous lawsuit.[100] It is also interesting to note that clogging the judicial process was *not* one of the reasons for the abolition of the torts cited by early proponents of heartbalm legislation.[101]

C. The Torts Are Fertile Ground for Blackmail and Extortion

Another argument against the heartbalm torts is that conniving plaintiffs will use these tort claims as a form of blackmail and extortion against innocent third parties.[102] These suits, however, are inherently subject to abuse: collusion between spouses to entrap a third party, followed by reconciliation after either a judgment or a settlement, is always possible. Although persuasive, this argument is unsupported.[103] Even the Feinsinger article admitted that while few will mourn the abolition of the tort breach of promise to marry, "there is room for an honest difference of opinion as to the actions of alienation of affections and possibly of criminal conversation."[104] Feinsinger refers to "newspaper emphasis [that] has created an illusion of universality as to the evils of unfounded actions, coercive

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95. *See Equal Time* (CNBC television broadcast, Aug. 8, 1997).
96. *See id.*
97. *See* Koestler v. Pollard, 471 N.W.2d 7, 8, 11 (Wis. 1991).
98. *See* Asher, *supra* note 87, at 164 (citing Koestler, 471 N.W.2d at 12).
99. *See id.* (citing Koestler, 471 N.W.2d at 11).
100. *See infra* notes 170-73 and accompanying text.
101. *See generally* Feinsinger, *supra* note 23 and accompanying text.
102. *See* Feinsinger, *supra* note 23, at 992; Hanover v. Ruch, 809 S.W.2d 893, 898 (Tenn. 1991) (abolishing criminal conversation due, in part, to the blackmail and vindictive suits the tort inspires); *see also* O'Neil v. Schuckardt, 733 P.2d 693 (Idaho 1986) (abolishing alienation of affections).
103. *See* Kelly, *supra* note 90, at 430.
104. *See* Feinsinger, *supra* note 23, at 1008.

settlements, or excessive verdicts which concededly exist in particular cases."[105] Due to the absence of cases in which collusion has actually been proven after a judgment for the plaintiff, critics focus on the high incidence of settlement due to extortion forces inherent in these torts.[106] These critics note that the publicity surrounding these actions lead potential defendants, concerned about their reputations, to settle, even if innocent.[107] While plausible, such cases are impossible to document, because they never enter the court system. In rejecting an argument for the abolition of an action for alienation of affections, one Pennsylvania court commented that:

> [I]f the courts are to be closed against actions for . . . alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions.[108]

One commentator suggested that at most, the extortion argument might support some limitation on the tort, but not complete abolition of the entire cause of action.[109] A possible procedural limitation on collusion and blackmail is to combine the torts of alienation of affections and criminal conversation. While this is discussed in detail below, it is sufficient to posit here that incorporating the requirement of proof or admission of sexual infidelity in an alienation of affections action might dissuade would-be extortioners from threatening third parties anytime potential plaintiffs were jilted by their spouses. Similarly, requiring proof that affections were actually alienated in an action for criminal conversation would make it more difficult for a husband and wife to collude and have a one-night-stand followed by the other promptly bringing a suit for damages.

Finally, and perhaps a bit more callously, many believe that those victimized by blackmail "have often willingly put themselves between Scylla and Charybdid by an illicit act of their own."[110] In a society which often regards extramarital sex as permissible, extending the requirement that the defendant knew that the errant spouse was married to actions for criminal conversation is, indeed, more palatable for those who still believe that affairs with married persons are wrong. Finally, the modern notions that arguably constitute a reason to abolish the heartbalm torts may actually diminish the force of the extortion argument.[111] In reaffirming a cause of action for alienation of affections, the Utah Supreme Court asserted that because

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105. *See id.* at 1008-09.
106. *See* Thompson, *supra* note 51, at 253.
107. *See id.*
108. Wilder v. Reno, 43 F. Supp. 727, 729 (M.D. Pa. 1942).
109. *See* Kelly, *supra* note 90, at 430.
110. *See id.* at 434.
111. *See infra* notes 122-37 and accompanying text.

allegations of sexual misconduct "no longer carry a significant stigma," alienation of affections is not "unduly prone to extortion and collusion."[112]

D. The Torts Are Based upon Outdated Philosophical Notions

Another key argument for the abolition of the heartbalm torts asserts their outdated philosophical underpinnings.

1. The Torts Are Grounded in Property Notions

As noted above, both alienation of affections and criminal conversation were historically grounded in the property notions that wives were chattel.[113] Even allowing wives to bring similar actions against their husbands did not change the underlying property notions inherent in these torts.[114] Of course, by the early Twentieth Century, much of society had rejected the idea that either spouse had a property interest in the other.[115] One court expressed this argument most saliently:

> In the last analysis we think the action [alienation of affections] should be abolished because spousal love is not property which is subject to theft. We do not abolish the action because defendants in such suits need or deserve our protection. We certainly do not do so because of any changing views on promiscuous sexual conduct. It is merely and simply because plaintiffs in such suits do not deserve to recover for the loss of injury to "property" which they do not, and cannot, own.[116]

While one may readily concede that love for a spouse does not carry with it a property interest, the interest protected by heartbalm actions is *consortium*, not love.[117] While true that loss of consortium was a property notion historically, that fact has not kept it from being a viable measure of damages in other types of cases,

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112. *See* Clark W. Sabey, *Availability of Alienation of Affections and Criminal Conversation as Causes of Action,* 1993 UTAH L. REV. 305, 312 (1993) (citing Norton v. Macfarlane, 818 P.2d 8, 12 (Utah 1991)).

113. *See supra* notes 46-47 and accompanying text.

114. *See supra* note 75 and accompanying text.

115. *See* Thompson, *supra* note 51, at 248 (citing Hanfgarn v. Mark, 8 N.E.2d 47, 48 (N.Y. 1937)).

116. Fundermann v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981).

117. Some commentators have made a distinction between the interest protected by alienation of affections actions and that protected by actions for criminal conversation. *See* Kavanaugh, *supra* note 57, at 327. Alienation of affections is said to protect consortium, including "the right of one spouse to the conjugal fellowship of the other, to the other's company, cooperation, and aid in the conjugal relation;" damages for criminal conversation include "injury to the plaintiff's social position, disgrace in the community, and dishonor to the plaintiff and the plaintiff's family." *See id.*

most notably personal injury cases.[118] In fact, recognition of the value of relational interests has expanded in the last few decades to include a great variety of less formal relationships, specifically, business relationships.[119] Rather than throwing out loss of consortium claims based upon their initial classification as property interests, courts have redefined the interest, anchoring the modern consortium claim on "emotional loss suffered by the spouse."[120] If such redefining is permissible regarding other claims, it is difficult to understand why the same would not be true in heartbalm actions. At least one court recognized this absurdity, and held that "obsolete procedural and property theories that once attended [alienation of affections] . . . have long been abandoned."[121]

2. The Torts Are Inconsistent With Modern Notions of the Nature of the Marital State

Following similar lines, some opponents of the heartbalm torts argue that changing notions of marriage render the actions inconsistent with modern thought. This argument most often arises in discussions of alienation of affections claims and its requirement that affections actually be alienated. In *Wyman v. Wallace*,[122] a Washington court abolished an alienation of affections claim, stating that "a viable marriage is not one where the 'mental attitude' of one spouse towards the other is susceptible to interference by an outsider."[123] Where a marriage is viable, assert many, no outside force can interfere.[124] This argument reflects a broader

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118. *See* Nancy Levit, *Ethereal Torts,* 61 GEO. WASH. L. REV. 136, 146 (1992).

119. *See id.*

120. *See id.*

121. *See* Norton v. Macfarlane, 818 P.2d 8, 12 (Utah 1991). Two justices, however, dissented, arguing that by abandoning a tort's foundation, the court is really creating a completely new cause of action. *See id.*

122. 549 P.2d 71 (Wash. 1976), *aff'd en banc*, 615 P.2d 452 (Wash. 1980).

123. *See id.* at 74.

124. This contention is entirely dependant upon one's fundamental view of marriage. What constitutes "viable?" The suit for alienation of affections is premised on the belief that marriage is a commitment that should be kept regardless of one's feelings of "affection." This view reflects the traditional emphasis upon the *status* of the participants regardless of their feelings. *See* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct,* 61 S. CAL. L. REV. 777, 780 (1988). This view of marriage contradicts the philosophy espoused by the court in *Wyman v. Wallace.* In *Wyman*, the court reasoned that these suits may result in injustice to a defendant where "[t]he straying spouse may well have chanced upon the defendant as a refuge from an empty marriage." *See Wyman,* 549 P.2d at 73. This sort of reasoning was expressed clearly by "the other woman" and the errant spouse in the recent Hutelmyer case. *See generally supra* notes 1-19 and accompanying text. In the *Hutelmyer* case, the husband attempted to downplay the affection that had existed in his marriage by insisting that "affection [existed], yes–but the *romance* was gone." *See Dateline NBC, supra* note 5. Similarly, the "other woman in the *Hutelmyer* case," proclaimed that, "the last thing [she] would want to do is come between a husband and wife who truly are in a relationship that's working," but further asserted that there is a "difference between being *legally* married and having a good, solid relationship." *See id.*

belief "that the notion of [spouses] as autonomous individuals is incompatible with the continued recognition of the tort actions."[125] Some scholars argue that Supreme Court decisions in the last twenty-five years have struck blows to the idea that individual autonomy may be infringed upon for the sake of "marital harmony."[126] In *Planned Parenthood of Central Missouri v. Danforth,*[127] the Supreme Court held that marital harmony could not justify requiring a woman to get her husband's consent before obtaining a first trimester abortion.[128] In *Trammel v. United States,*[129] the Court held that the marital privilege against "adverse spousal testimony" could be defeated if the "witness spouse chose voluntarily to testify against the other spouse."[130] Again, the Court rejected arguments that such a ruling would disrupt marital harmony, reasoning that where one spouse was willing to testify against the other, it is doubtful that much marital harmony existed in the first place.[131]

The problem with extending this reasoning to cases for alienation of affections, and particularly criminal conversation, is that both *Danforth* and *Trammel* dealt with *legal* activities. Adultery, on the other hand, has a long history of illegality.[132] Even if most jurisdictions do not enforce their criminal adultery statutes, few would accept the proposition that laws should sanction or protect an act considered punishable, even by death, for so many centuries.[133] Equating one spouse's choice to engage in an adulterous affair with "rights" and "privileges" should strike even the most liberal thinkers as somewhat bold. The right to privacy, however, has been used by some courts to justify abolition of criminal conversation actions on the grounds that such actions violate an individual spouse's

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The idea that "good" marriages are not susceptible to outside influences has been questioned by marriage and family experts. *See, e.g.,* WILLARD F. HARLEY, JR., HIS NEEDS, HER NEEDS 14 (1997). Affairs may not just be an attempt to escape a bad marriage; rather, extra-marital relationships often begin as friendships where participants offer one another encouragement, oftentimes in an area of some "unmet need" in the marital relationship. *See id.* This is not to say that the marriage is bad, but simply that no relationship can ever meet all of a person's needs. *See id.* Because these relationships involve true emotional, and not just physical attraction, they almost always shatter the marriage. *See id.* at 14-15.

125. Kavanaugh, *supra* note 57, at 335.
126. *See id.* at 336.
127. 428 U.S. 52 (1976).
128. *See id.* at 67-72.
129. 445 U.S. 40 (1980).
130. *See* Kavanaugh, *supra* note 57, at 336 (citing Trammel, 445 U.S. at 41-42).
131. *See id.* at 336-37 (citing Trammel, 445 U.S. at 52).
132. *See supra* notes 29-42 and accompanying text.
133. *See supra* notes 29-37 and accompanying text.

right to "engage in natural consensual sexual relations."[134] Courts embracing this and similar philosophies argue that as people think of marriage less and less in terms of duty but instead in terms of romantic love, it is questionable that there are even any marital interests to protect with a damages action.[135] In a society characterized by common instances of divorce and remarriage without significant social stigma, these commentators and courts argue that it seems unrealistic to attempt to control these behaviors through law.[136] Once again, this reasoning cannot be supported without rejecting the notions of marriage, sex, and the family that underlie it. On the other hand, some judges and legislatures refuse to disregard millenniums of jurisprudence and custom which assert that marriages should be protected from adultery.[137]

Despite such decisions subordinating the marital relationship to freedom of sexual expression, there is an indication that Americans, if not their legislators, are ready to revert back to some of the nation's original views of marriage and the family. Law professor Linda Elrod told the ABA Journal in October 1997, that the Hutelmyer jury was "trying to put fault back into divorce."[138] Elrod asserted that this is "already being done in other ways," citing to states where spouses can sue spouses for torts such as intentional infliction of emotional distress and to the new Louisiana law providing that couples who elect a covenant marriage must allege fault to get a divorce.[139] The new Louisiana law referred to provides strong evidence that much of the pro-privacy, pro-autonomy sentiment of the 1970s and 1980s is being replaced with a more pro-marriage philosophy. The Louisiana law provides that a couple may divorce only if they have been separated for two years, one spouse has either committed adultery, been sentenced to prison for a felony, abandoned the home for one year, abused the other spouse or a child, or the couple has been legally separated for one year or for eighteen months and they have a minor child.[140] Couples do, however, retain the option of entering a marriage that permits a no-fault divorce.[141] The Louisiana law has been heralded as "a big step in the nationwide march against no-fault divorce law."[142] Thus, America may be starting to return to what has been called the "old marriage" concept, in which marriage was viewed as an enforceable contract in which the ideas of fault, with

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134. *See, e.g.*, Leeper, *supra* note 81, at 597 (citing Kyle v. Albert, No. 75-10871-05-02 (Ct. C.P. Bucks County, Pa., Mar. 16, 1976), slip op. at 13).

135. *See supra* notes 17-19 and accompanying text.

136. *See id.*

137. *See supra* notes 29-39 and accompanying text.

138. *See* Carter, *supra* note 1, at 24. Other commentators agree, describing the Hutelmyer verdict as "a sign of the times–times when America is entertaining second thoughts over no fault divorce." *See CNN Crossfire* (CNN television broadcast, Aug. 7, 1997).

139. *See CNN Crossfire* (CNN television broadcast, Aug. 7, 1997).

140. *See Covenant Marriage: La. Takes a Step Against 'No Fault,'* 15 MATRIM. STRATEGIST 9 (1997).

141. *See id.*

142. *See id.*

alimony as damages for the breach of contract terms, was central.[143]

From 1969 to 1985, every state in the nation abandoned over 200 years of adherence to this old view of marriage and adopted no-fault divorce.[144] In several states, however, fault is still available as a consideration in the allocation of alimony or in property distribution.[145] Thus, a return to some concept of fault in divorce actions would not be an unimaginable leap. Given this increasingly real possibility, the philosophical arguments for abandoning the heartbalm torts lose much of their strength.

3. The Torts Unfairly Blame Third Parties for Harm Inflicted by the Errant Spouse

Another common philosophical objection to the heartbalm torts is the simple realization that it "takes two."[146] It is just not fair to place all of the liability for adultery on the third party defendant without forcing the errant spouse to shoulder some of the responsibility. Proponents of this argument believe that because the real injury to the plaintiff has resulted from their spouse's behavior, not the third party's, "it is only reasonable that the plaintiff look to the spouse, and not the third party, for a remedy."[147] It is argued that the voluntariness of the spouse's conduct should completely bar any tort action against a third party.[148] Of course, this argument would completely lose force if fault was in fact infused back into the divorce laws. Indeed, it seems strange that the same critics who say that we should not allow the straying spouse to pass the blame for his or her infidelity onto a third party would presumably applaud the era of no-fault divorce.[149] Additionally, in several of the jurisdictions that have retained these torts, fault still is a consideration in alimony determinations, thus rendering this argument less forceful.[150]

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143. *See* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism,* 23 J. LEGAL STUD. 869, 874 (1994).

144. *See id.* at 876-82 (noting that the trend to adopt no fault divorce began in 1969).

145. *See id.* at 892.

146. Kavanaugh, *supra* note 57, at 339.

147. *See id.*

148. *See id.* at 340.

149. This contention is "presumable" because most critics of the heartbalm torts attack them on philosophical and moral grounds that the torts are outdated. *See supra* notes 122-50 and accompanying text.

150. *See* Endy v. Endy, 603 A.2d 641 (Pa. Super. Ct. 1992) (holding that fault was a valid consideration in determining the amount of alimony awarded); Wilbur v. Wilbur, 498 N.Y.S.2d 525 (A.D. 1986) (upholding the use of fault as factor in alimony decisions); Schnitker v. Schnitker, 646 S.W.2d 123 (Mo. App. 1983) (noting that statutes expressly allow the use of fault as a factor in alimony determinations); *see also* Peter Nash Swisher, *Reassessing Fault Factors,* 31 FAM L.Q. 269 (1997).

E. Actions for Alienation of Affections Have the Potential to Divide Families

Focusing specifically upon alienation of affections, this tort continues to receive vehement criticism for its potential to divide families because a sexual encounter is not a necessary element of the tort, and therefore, family members are sometimes named as defendants.[151] Courts have attempted to overcome the problems inherent in such actions by heightening the standard of proof required for finding the defendant liable. In Mississippi, for example, one court held that there is a rebuttable presumption that a spouse's parents acted in the best interests of grandchildren by trying to convince one spouse to leave the other.[152] If a defendant was motivated by true concern for the child's welfare, he or she is not liable for damages.[153] Another solution to this problem is to abolish these types of actions completely by requiring adultery as an element of an action for alienation of affections.[154]

F. Actions for Alienation of Affections Are Riddled With Procedural Problems

Actions for alienation of affections are also criticized because such claims are riddled with procedural problems.

1. The Causation Standard Is Too Malleable

First, critics assert that the causation standard is too malleable. In most jurisdictions that retain the tort (and in the majority of jurisdictions that once recognized the tort), the plaintiff has to prove either by a preponderance of the evidence or by clear and convincing evidence that the defendant was the controlling, not sole, cause of the loss of affections.[155] This tort concept of causation is criticized as too simplistic to "reflect the dynamics of the usual marital

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> [A]t a time when fault-based factors on divorce . . . are being seriously reassessed by a number of commentators, courts, and legislators, it makes no sense at all to totally abolish these fault factors, largely based on questionable arguments and unsubstantiated anecdotal evidence, without a clear and compelling reason to do so, especially in the absence of any viable alternative remedy for serious marital misconduct.

Id.

151. *See supra* note 70 and accompanying text.

152. *See* Sykes, *supra* note 54, at 254.

153. *See id.* (citing McRae v. Robinson, 110 So. 504 (Miss. 1926)).

154. *See infra* notes 193-202 and accompanying text.

155. *See* Leonard, *supra* note 60, at 1324; *see also* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 124, at 920 n.57 (5th ed. 1984).

breakup."[156] Because there are typically many factors which contribute to a failure of marriage, it is virtually impossible to identify one "controlling cause."[157] Compounding the problem is the difficulty the jury faces in distinguishing between the pursuer and the pursued.[158] As a result, liability determinations are often made on the basis of "passion and prejudice" by a sympathetic jury incited by an "inflammatory plea" by a spurned plaintiff against a "conniving" defendant.[159]

2. Damages Guidelines Are an Inadequate Protection for Defendants

Similar concerns are raised regarding determination of damages. What damages, for instance, exist where a plaintiff has lived in a rather "unfulfilling" marriage for years before a spouse commits adultery? Because an action for alienation of affections seeks to protect the plaintiff spouse's consortium interests, juries must seek to place some monetary value on those interests.[160] Is there really any value to the "mental affections" of a spouse who had only remained in the marriage out of a sense of duty before finally leaving for the defendant? Again, this raises the issue of one's view of the nature of marriage.

Juries, however, do not have to resort to valuing ephemeral concepts like love and romance to arrive at rather astonishingly large awards. The prime example is the Hutelmyer verdict. There, the jury based its $500,000 award of compensatory damages on the plaintiff's loss of her husband's life insurance policy, medical benefits, and mortgage payments.[161] The jury was of the opinion that the $4,000 per month alimony payments awarded to the plaintiff in the divorce proceeding did not adequately compensate her for her loss.[162] Also, there are concerns about the potential for excessive punitive damages in the calculation of damages. Since their inception, the heartbalm torts have derived most of their strength from the possibility of large exemplary damage awards.[163] Very early on, however, this

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156. *See* Leonard, *supra* note 60, at 1324
157. *See id.*
158. *See* Thompson, *supra* note 51, at 252.
159. *See id.* at 253.
160. *See supra* notes 116-19 and accompanying text.
161. *See Dateline NBC, supra* note 5.
162. *See id.*
163. Blackstone expressly stated that the damages recovered in such an action are generally "very large and exemplary." *See* Feinsinger, *supra* note 23, at 990. Blackstone further asserted that:

> But these are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he can not but suspect to be spurious.

tendency to award large damage awards to plaintiffs was criticized as being in excess of usual punitive damage awards. In his often quoted article delineating reasons for the abolishment of the heartbalm torts, Feinsinger asserted that:

> While trial and appellate courts have frequently reduced verdicts on the ground that the amounts thereof indicated "passion and prejudice," they have more often encouraged juries to express their emotional sentiment and moral indignation by instructions and decisions that compensatory damages may be "substantial," and that vindictive damages may be assessed to punish "malice" or to serve as an example to the community. Once the foundation is laid, plaintiff may receive "compensation" for mental suffering and disgrace . . . punitive damages theoretically depend on proof of "malice," which appears to be found almost as a matter of course in an action against a stranger . . . .[164]

To describe such damages as "excessive" depends upon one's view of the purpose of these torts. If they are truly intended to deter other community members from engaging in similar behavior, then it is difficult to say that a verdict of any size is "excessive." In addition, other torts exist that raise concerns about excessive damages.[165] Most often, however, arguments are made to limit the availability of those damages, not to abolish the tort itself, such as the claims with the heartbalm torts.[166] Not surprisingly, some jurisdictions that retain the heartbalm torts expressly limit exemplary damage awards, as discussed below.

G. The Torts Have No Positive Effects

1. The Torts Are Just Another Weapon Divorcing Couples May Hurl at One Another

In addition to the more technical, procedural objections to the torts, many argue that absent a demonstrable deterrent effect, the torts are really just additional weapons that divorcing couples may add to their arsenals.[167] In decisions abolishing the torts, several courts refer to the distasteful and vindictive motives of many plaintiffs.[168] As discussed above, those motives may sometimes lead to unfounded extortion.[169] When, however, motives fall short of vindictiveness, it is

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Id.

164. Feinsinger, *supra* note 23, at 994-95.

165. *See, e.g.*, BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (holding $2,000,000 punitive damage award in fraud case "grossly excessive" compared to the $4,000 compensatory damage award).

166. *See generally id.* at 559-61 (discussing standards that should guide review of punitive damage awards).

167. *See, e.g.*, Wyman v. Wallace, 549 P.2d 71 (Wash. 1976), *aff'd en banc*, 615 P.2d 452 (Wash. 1980); O'Neil v. Schuckardt, 733 P.2d 693 (Idaho 1986).

168. *See generally id.*

169. *See supra* notes 102-12 and accompanying text.

difficult to distinguish how a plaintiff's suit for alienation of affections differs from a plaintiff's suit in any other matter.[170] If lawmakers consider loss of a spousal consortium to be a redressable injury, then suits to recover for that injury are theoretically just as legitimate as suits to recover for slip and fall injuries.[171] Critics' arguments are bolstered, however, by an underlying belief that plaintiffs who sue under these causes of action have not actually suffered a tangible injury by the defendant.[172] Rather, as discussed above, they argue that, "a viable marriage is not one where the 'mental attitude' of one spouse towards the other is susceptible to interference by an outsider."[173] If we reject this argument and instead conclude that a third party really may lure away one's spouse, abolishing the tort based upon fears of vindictive plaintiffs would be equal to abolishing any other tort designed to redress an injury based upon that fear.

When critics speak of the torts as yet another weapon for divorcing couples to hurl at one another (albeit indirectly), some mention the possibility that children will be exposed to the extramarital affairs of their parents and that they may even be forced to testify against their parents.[174] The most obvious cure to this admittedly troubling concern is that courts simply forbid the testimony of children in these cases. That, of course, would not shield the children from rumors stemming from any attendant publicity of the case or household discussions. Common sense, however, tells one that a child old enough to be aware of the implications of a lawsuit for alienation of affections or criminal conversation is also old enough to have already realized why mom and dad are divorcing. Further, if plaintiffs really are as vindictive as critics claim, forbidding them from suing a third party is not going to stop them from criticizing that third party and the child's father or mother in front of the child.

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170. Even critics of these torts concede that, "[i]t is a basic tort law tenet that this personal injury deserves to be redressed." *See* Thompson, *supra* note 51, at 252. Thompson continues to criticize the torts, however, as vehicles for a plaintiff's "personal recompense," stating that "equity to the plaintiff is not the only consideration," and that "[w]hether the action itself causes unfair and adverse results to defendants and third parties must also be examined." *See id.*

171. *See generally* Kelly, *supra* note 90, at 431 (concluding that a quick answer to arguments that the plaintiffs in these cases are merely acting out of vindictive and mercenary motives is that, "if a plaintiff has a right to the continued harmony of . . . marriage there is no reason why [one] should not have an opportunity to vindicate an intrusion upon it").

172. *See supra* notes 113-21 and accompanying text.

173. *Wyman*, 549 P.2d at 74; *see also supra* text accompanying notes 120-29.

174. *See* O'Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986).

2. The Torts Have No Deterrent Effect

Finally, the most sweeping criticism of the two causes of action is simply that they do not work. Alienation of affections and criminal conversation have no deterrent effect, critics assert.[175] Remarkably, this proposition cannot be documented.[176] The basis for this assertion is that people become enmeshed in affairs, not intentionally, but as a result of passion before their better judgment can take control.[177] In support of this proposition, commentators and courts cite not to sociologists and psychologists, but to other commentators and courts, typically including a cite to the previously discussed Feinsinger article.[178]

In considering this criticism, this Comment does not attempt to analyze all the different factors that may contribute to an affair.[179] It may be instructive to note, however, the reaction to the Hutelmyer verdict that sparked the current debate on the subject.[180] In an interview with *Dateline NBC,* the jurors who decided the case stated that they wished to "send a message" about marriage and morality, and a message to future "home- wreckers" that, "you don't do it."[181] While it is impossible to say whether the jurors succeeded in their mission to "scare fellow county members," the disciplined mistress's own statement to *Dateline* is telling.[182] When asked whether, in hindsight, she would have dated Joe Hutelmyer while he was still married to Dorothy, she replied that, "he would probably have to be divorced before I'd see him."[183]

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175. *See Wyman*, 549 P.2d at 74 (noting that "the action does not prevent human misconduct"); *O'Neil*, 733 P.2d at 698 (concluding that the "threat of any damages suit [is] unlikely to deter the culpable conduct"); Thompson, *supra* note 51, at 252 (arguing that it is unrealistic to believe that threat of such a suit will thwart any scheming potential defendants).

176. Of course, the converse may also be true. How many people would admit to a pollster that the only reason that they did not have an affair was the fear of a lawsuit?

177. *See* Thompson, *supra* note 51, at 252. This contention has been criticized:

> The focal point of [some] arguments is, broadly, the personalities of the parties involved. Thus it is said that such interferences ordinarily do not arise as the result of any conscious plan; rather, they "just happen." It is not altogether clear what this argument is supposed to demonstrate. To say that one who meddles in another's marriage does not do so by design is not to say that he does not know what he is doing at all. It can be argued in fact that the tendency of casual acquaintances to blossom into marital disruptions of one form or another is a very good reason for retaining the causes of action as warnings of the magnitude of the possible consequences.

Kelly, *supra* note 90, at 431 (citations omitted).

178. *See* Kelly, *supra* note 90 and accompanying text; *see also* Thompson, *supra* note 51, at 252 (citing Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 995 (1935)).

179. *See supra* note 124 and accompanying text for a brief discussion of some factors.

180. *See supra* notes 1-19 and accompanying text.

181. *See Dateline NBC, supra* note 5.

182. *See id.*

183. *See id.*

IV. ARGUMENTS IN FAVOR OF CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS

A. The Torts Do Strengthen Marriages

While the most obvious argument for retention of the heartbalm torts is that these torts have a deterrent effect on extramarital affairs and thus help keep families together, this too is impossible to prove.[184] The possibility remains, however, that these torts, if widely recognized, could have a deterrent effect on extramarital affairs.[185] That possibility may merit greater deference now than it did in the 1930's when the movement to abolish the torts first gained momentum. Written in 1935, the Feinsinger article asserted that:

> Courts have traditionally assumed in the case of each of the actions under consideration, certain broad social purposes which are served by the damage remedy. These purposes include the preservation of family solidarity, the prevention of evils resulting from sexual promiscuity and the protection of women from male aggression. The proponents of the new legislation [to abolish these actions] contend that *injunctive or criminal sanctions are more appropriate to accomplish these purposes,* and that in any event the damage remedy has proved its ineffectiveness as an inhibiting instrumentality.[186]

Now that criminal sanctions are rarely imposed for adultery[187] and with the advent of no-fault divorce,[188] the abolition of alienation of affections and criminal conversation would mean that there are virtually no legal deterrents to adultery whatsoever. While policy-makers and philosophers may argue about whether this is a good thing or not, anyone who concedes that the social policies behind the torts are desirable and that marriages merit some sort of legal protection should consider possible alternatives to total abolition of two of the last legal impediments to extramarital relationships.[189]

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184. , *See supra* notes 179-83 and accompanying text.
185. *See id.*
186. Feinsinger, *supra* note 78, at 418 (emphasis added).
187. *See* Vetter, *supra* note 38, at 88-89.
188. *See supra* notes 138-45 and accompanying text.
189. At least one commentator has reached an entirely different conclusion, asserting that "[b]ecause of the decreased role of fault in the dissolution of marriage and its attendant economic consequences, the maintenance of actions for alienation of affections and for criminal conversation seems incongruous." *See* Leonard, *supra* note 60, at 1327. This commentator further asserted that, "[i]f the

B. *The Torts Merit More Consideration by Proponents of Family Values*

The number of opponents to the torts who actually acknowledge the desirable social policies behind them is surprising. One author has argued that, "[f]ew [commentators] would contend that [devices to maintain family harmony and deter wrongful outside interference] . . . are unworthy goals."[190] Yet many of these commentators are quick to conclude that "on balance, the social harm engendered by the existence of these torts . . . outweigh[s] the meritorious goals purportedly served by the actions."[191] Given the amount of lip-service paid to these torts by ardent critics, it seems reasonable that some effort should be made by policy makers to shift the balance in favor of retention of these torts, which many critics concede is geared toward a laudable goal. While a few states have attempted to address the problems with these torts, more might be done to reduce the torts' negatives and thus strengthen the argument for their retention.[192]

C. *Some Modifications That May Improve the Torts*

One possible solution to the continued debate surrounding the heartbalm torts is to combine the two torts. Writing in 1977, one commentator proposed a statutory combination with the following elements: "(1) existence of a valid marriage with genuine love and affection between spouses; (2) alienation and destruction of the love and affection; (3) adultery between defendant and plaintiff's spouse as the cause of the loss of such love and affection; (4) prohibition of punitive damages with only actual damages recoverable."[193] This is not to suggest that such a combination is ideal or the only viable arrangement of elements.[194] In fact, such a tort would fail to address the root criticisms of the torts. First, what does "true love and affection" mean? Is it even necessary for a viable marriage?

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aggrieved spouse has few rights against the offending spouse arising from the marital fault, clearly the aggrieved spouse should have fewer rights against a third party." *See id.*

190. *See* Leonard, *supra* note 60, at 1322.

191. *See id.* (quoting Cannon v. Miller, 322 S.E.2d 780, 800 (N.C. App. Ct. 1984)), *vacated*, 327 S.E.2d 888 (N.C. 1985). Other courts have reached similar conclusions. The Supreme Court of Tennessee held that criminal conversation must be abolished because "the social harm it causes far outweighs any justification for its existence." *See* Hanover v. Ruch, 809 S.W. 2d 893, 894 (Tenn. 1991). *See, e.g.*, Leeper, *supra* note 80, at 585 (noting that "[a]lthough the basic purpose of [alienation of affections] is highly commendable, the cure has frequently been worse than the ailment because of a history of abuse").

192. *See infra* notes 196-202 and accompanying text.

193. *See* Leeper, *supra* note 81, at 599, n.104. Leeper points out that the proposed statute differs from the common law torts in that "criminal conversation does not require the existence of 'love and affection' between spouses, alienation of affections does not require adultery, and neither tort bars recovery of punitive or liberal compensatory damages." *See id.*

194. In fact, the originator of the proposed statute has since rejected it. *See* Leeper, *supra* note 81, at 601.

Again, policy makers will be heavily influenced by their own philosophical views of the institution of marriage. Then, how do we determine whether that affection has been destroyed? One possibility is to simply consider proof of a sexual relationship both necessary and sufficient. Such a requirement, of course, is a clear infusion of fault, and all of its accompanying methods of proof, back into the divorce equation.[195]

Utah has taken a completely different approach to the problem of combining the two torts. In 1991, the Utah Supreme Court reaffirmed the cause of action for alienation of affections and abolished the action for criminal conversation.[196] In upholding a cause of action for alienation of affections, the Utah Supreme Court held that the plaintiff must now show that the defendant's acts were the controlling cause of damage to the marriage relationship and that the defendant's conduct outweighed all other causes combined, including strife engendered by the "personalities and inadequacies of the spouses."[197] The *Norton* court expressly rejected the notion that sexual misconduct alone was sufficient to prove alienation of affections by the defendant, asserting that a right to exclusive sexual intercourse in marriage is not a protected interest except to the extent that it affects marital harmony.[198] The abolition of criminal conversation was a natural consequence of this reasoning.[199] The approach taken by the Utah Supreme Court reflects one of the more pervasive philosophical beliefs underlying criticism of the heartbalm torts: changing social mores.[200] Those who consider extramarital sexual activity acceptable, even if only by virtue of its prevalence, necessarily view an action for criminal conversation as outdated.[201] Yet again, philosophical, and indeed moral

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195. *See supra* note 145 and accompanying text.

196. *See* Norton v. Macfarlane, 818 P.2d 812 (Utah 1991) (upholding the cause of action for alienation of affections but holding that the plaintiff must now meet a standard of clear and convincing proof in these suits); Sharp v. Roskelley, 818 P.2d 4 (Utah 1991) (abolishing the tort of criminal conversation).

197. *See Norton*, 818 P.2d at 14.

198. *See id.* at 16-18.

199. *See id; see also* Sabey, *supra* note 112, at 305 (discussing the history of the two torts in Utah).

200. *See supra* notes 122-45 and accompanying text.

201. *See generally* Kelly, *supra* note 90, at 433.

> A more fundamental reform measure that appears to be necessary is in the nature of a concession to society's changing moral attitudes. There is growing evidence that extramarital sexual activity is becoming not only more common but more acceptable, apparently even to the partners to the marriage. In this state of affairs the action for criminal conversation as it now stands is largely outdated .... In other words, the rights of the spouse flowing from the marital relationship should no longer be conclusively presumed to include a monopoly interest in his or her partner's sexual intercourse.

Id. It should be noted that Kelly wrote the article in 1972, and as previously discussed, *see supra* notes 138-43 and accompanying text, society may have begun to tire of this kind of blatant sexual

and spiritual, views of marriage and sexual intercourse must shape opinions on whether legal deterrents to extramarital sexual conduct have any place in modern society. Some policy makers, however, have abolished criminal conversation without resorting to quite such liberal views on sexual conduct. In Tennessee, for example, one court ruled that the fundamental problem with the tort of criminal conversation is that damages may be recovered even where the marriage remains unaffected.[202] Of course, combining the two torts and requiring evidence of sexual misconduct, as well as alienation of the adulterous spouse's affections would eliminate this objection to the tort but simultaneously take policy makers back to the earlier question of just what constitutes disrupted affections.

V. CONCLUSION

The purpose of this Comment is not to propose the ideal combination of elements for a piece of heartbalm legislation designed to protect marriages. Rather, it is to underscore the point that the majority of objections to both alienation of affections and criminal conversation rest upon moral and philosophical viewpoints that are not common to all citizens. These philosophical viewpoints are impossible to counter because they are based upon subjective views concerning the institution of marriage. While law makers may try to justify abolition of the heartbalm torts without mentioning their philosophical underpinnings, careful analysis of their rationales reveals their philosophical premises. Those who profess to hold the marital state in high esteem should consider these underlying premises before relying upon often repeated but largely unsubstantiated criticisms of these torts, calling for the abolition of what may constitute the last bulwark of protection for aggrieved spouses. Such considerations are particularly timely in the current political climate where notions of fault and accountability in the divorce process are being revisited. While criminal conversation and alienation of affections may not be the ideal defensive weapons for aggrieved spouses, they should at least be considered as potentially viable legal protections for marriages before advocates of family values concede that no viable legal protections can exist.

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promiscuity and arguments to abolish the heartbalm torts, based upon a 1960's, free-love view of the world, may themselves be outdated.

202. *See* Hanover v. Ruch, 809 S.W.2d 893 (Tenn. 1990).