2001

A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career

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A SOMEWHAT MODEST PROPOSAL TO PREVENT ADULTERY AND SAVE FAMILIES: Two Old Torts Looking For a New Career

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> *If [one] freeman lies with the wife of [another] freeman, let him pay recompense [with] her wergeld [man-price] and obtain another wife [for the husband] [with] his own money and bring her to the other man at home.*
>
> Laws of Aethelberht (597x614) No. 31

> *A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.*
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> Oliver Wendell Holmes, Jr., The Common Law (1881)

> *The history of man indicates that as soon as he created the relationship of marriage, "adultery was not far behind."*
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> Daniel E. Murray, Ancient Laws on Adultery—A Synopsis, 1 J. Fam. L. 89, 89 (1961)

I. INTRODUCTION

A. An Immodest Hypothetical

You have been married for ten years, and you have two children. You would describe life in your marriage neither as being tethered to a rock and having your liver consumed on a daily basis nor as Elysian bliss every moment of every day. On average, your married life has been something in between, and it sometimes drifts near one extreme or the other. You sometimes find your spouse relatively boring and other people more exciting.[1] Nonetheless, you have remained sexually faithful to your spouse since exchanging wedding vows, which you vaguely remember included

1. Being both a sensitive and perceptive person, you realize that other people may seem more exciting in comparison with your spouse, because you do not have to interact with them on paying bills, changing diapers, buying groceries, and many of the other sometimes mundane duties that accompany marriage.

something about loving and honoring your spouse, and even forsaking all others and keeping only unto your spouse.[2]

One day, after you take the kids to school, you pay a surprise visit to your spouse at work. You walk into your spouse's office to find your spouse and a co-employee on the floor engaged in sexual intercourse. What do you want to do?

A. Kill your spouse.
B. Kill your spouse's partner.
C. Kill your spouse and your spouse's partner.
D. Sue your spouse's partner.
E. Divorce your spouse.
F. All of the above, except E.[3]

In most states in this nation, you will not be implementing choice D because the law does not permit such lawsuits. Furthermore, the law will not permit you to perform the executions in choices A through C and F without visiting some consequences upon you.[4] Thus, under the current law in most jurisdictions, you probably will be limited to choice E.

B. The Strange Case of the Disappearing Torts

Why do the laws of most states not permit you to sue your spouse's partner? If you are willing to forego killing her or him (which past civilizations assumed you would do) why can you not sue the marital interloper? If instead of engaging in sex with your spouse, the other person had walked up to you and taken a swing at you and hit you, you would have had a tort action for battery (and probably assault). If the person had taken a swing at you and missed, you probably would have had a tort action for assault. The person has sex with your spouse, and you have no tort action against that person.[5] What does it say about contemporary American tort

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2. Traditional Wedding Vow.

3. Choice E is excluded if you exercise all other options. If you kill your spouse, the marriage ends, and it is not necessary (and probably would be unseemly in any event) to divorce her or him. If you kill your spouse's partner, however, choice D still would be possible. You might still assert a claim against the deceased partner's estate, although this option, too, seems unseemly.

4. It has not always been so. *See infra* note 62 and accompanying text.

5. My point here is to focus on the interest of the plaintiff that is invaded and the magnitude of the harms suffered by the plaintiff in each of these situations. I realize that there are significant differences, other than the magnitude of the harm suffered, between battery and assault, on the one hand, and alienation of affections and criminal conversation on the other. One may insist, for example, that the sexual autonomy of a third party, the participating spouse, is an interest at stake in alienation of affections and criminal conversation, but third-party autonomy is not at issue in the hypothetical battery and assault. Consideration of that point will

law[6] and society that you cannot sue one who interferes in, and perhaps destroys, your marriage by engaging in sexual relations with your spouse?

Alienation of affections and criminal conversation have been disappearing from American tort law for sixty-five years. Very few states still recognize either tort theory or both.[7] As once recognized by almost all states, criminal conversation was a simple tort. It was the tort theory a plaintiff could pursue against a third party who had sexual relations with the plaintiff's spouse.[8] There was no defense other than the nonparticipating

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take us quickly into a vilification of the plaintiff's interest in exclusive sexual relations with her or his spouse as an archaic and discredited property interest. I appreciate that argument, and I will address that issue presently. *See infra* notes 138–156 and accompanying text. For now, focus on the magnitude of the harm to the plaintiff. Even critics of alienation of affections and criminal conversation recognize that the nonparticipating spouse suffers an emotionally painful, and perhaps debilitating, injury. *See, e.g.*, Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 339-41 (1998) (acknowledging that adultery "may give rise to serious relational harms, whether or not accompanied by deceit," and describing the wound to "manly pride" in some cases as "a kind of emasculation"). For discussion of the emotional harm caused by adultery, see generally JANIS ABRAHMS SPRING, AFTER THE AFFAIR: HEALING THE PAIN AND REBUILDING TRUST WHEN A PARTNER HAS BEEN UNFAITHFUL (1996).

6. These issues are at the intersection of tort law and family law. *See* Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 451 (2000) (discussing the conflict inherent in domestic torts being at the intersection of family law and tort law). The view that one takes of these interferences with family relationships, whether primarily from the perspective of tort law or primarily from the perspective of family law, can make a difference in whether one favors recognition or abolition of a tort cause of action. Consider, for example, the position of Professor Jane Murphy who, in discussing the morality of family law, identifies the goal of protecting children as the central moral goal of family law. Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1116-17 (1999). Viewing adultery from the perspective of tort law, I would not identify protection of children as the central goal. I think, however, it is an important goal, and I do contend that it is a goal that may be promoted by recognizing a right to a remedy against a marital interloper.

7. DAN B. DOBBS, 2 THE LAW OF TORTS 1247 (2001) [hereinafter DOBBS]. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 124 (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER]. In a recent case, the South Dakota Supreme Court, refusing to abolish the tort of alienation of affections, surveyed the current state of the law: thirty-four states had abolished the tort by legislation; five had abolished it judicially; Louisiana had never recognized it (to be qualified later); and Alaska had no statute or case law on the issue. Veeder v. Kennedy, 589 N.W.2d 610, 614 nn.3-4 (S.D. 1999) (citing cases from each jurisdiction). That leaves only nine states that definitely recognize alienation of affections: Hawaii, Illinois, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, South Dakota, and Utah. *Id.* at 614 n.6. Criminal conversation may be recognized in fewer jurisdictions. For example, the Mississippi and Utah Supreme Courts preserved alienation of affections but abolished criminal conversation. Saunders v. Alford, 607 So. 2d 1214, 1214 (Miss. 1992); Norton v. MacFarlane, 818 P.2d 8, 15-17 (Utah 1991).

8. RESTATEMENT (SECOND) OF TORTS § 685 (1977) [hereinafter RESTATEMENT]; DOBBS, *supra* note 7, at 1246; *see also* 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS, at 506 n.6

spouse's consent.[9] The third party's knowledge of the marital relationship was not part of the plaintiff's prima facie case, and lack of such knowledge did not provide an affirmative defense.[10]

Alienation of affections was not as simple. The name suggests that the recovery is for the defendant's destroying the affection of one spouse for the other. In reality, however, the recovery was for loss of consortium, meaning rights to monopolistic sexual relations, society, and companionship.[11] The plaintiff had to establish the existence of the marriage with some accompanying affection, that the love and affection were destroyed, and that the acts of the defendant caused the destruction.[12] Plaintiffs could recover without proof of adultery, without proving that the spouse had left the home, and without proving pecuniary loss.[13] Some authorities say that an absence of affection between the spouses defeats the action, but most courts presume some affection, holding that even a bad marriage has some hope of reconciliation.[14] Bad relations and lack of affection between the spouses were often treated as mitigating damages.[15] The defendant must have engaged in some affirmative conduct intended to divert the attentions of plaintiff's spouse, although that conduct need not

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(2nd ed. 1986) ("The basis of the action is the loss of sexual monopoly alone and loss of consortium in other respects is unnecessary.").

9. RESTATEMENT, *supra* note 8, § 687; DOBBS, *supra* note 7, at 1246.

10. RESTATEMENT, *supra* note 8, § 685 cmt. f; DOBBS, *supra* note 7, at 1246.

11. Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 472 (1934) ("Despite the name which is universally given to this action, it is almost unanimously agreed that the gist of it is not the loss of affection but rather the loss of consortium—a concept of very much broader content.") (footnote omitted); Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 994 (1935) ("Despite the name given to the action, in law the injury includes not merely loss of affection but also services, society, and sexual intercourse, as denoted by the term 'consortium.' ").

12. RESTATEMENT, *supra* note 8, § 683 & cmts. f, g, l; Hutelmyer v. Cox, 514 S.E.2d 554, 559 (N.C. Ct. App. 1999), *review denied*, 514 S.E.2d 146 (N.C. 1999), *appeal dismissed*, 542 S.E.2d 211 (N.C. 2000).

13. Feinsinger, *supra* note 11, at 994.

14. "A marriage teetering on the brink of domestic disaster should nevertheless be spared a shove over the precipice." Creason v. Myers, 350 N.W.2d 526, 528 (Neb. 1984); *see also* Brown, *supra* note 11, at 488 ("The weight of authority seems to be . . . that total lack of affection between the spouses is not a bar to liability . . . . [P]laintiff should not be deprived of the chance, whatever it may be worth, of subsequently effecting a reconciliation with his spouse."); RESTATEMENT, *supra* note 8, § 683 cmt. f (while maintaining that loss of affection must be proven by objective indicators, comment also states that "[i]f any affection remained, its destruction or diminution may be the basis of an action."); HARPER ET AL., *supra* note 8, at 508-09 ("[O]thers have taken the position that there may have been a chance for a reconciliation even between estranged spouses and the plaintiff ought not to be deprived of that chance or have it made more remote.").

15. Brown, *supra* note 11, at 488; HARPER ET AL., *supra* note 8, at 508.

have been sexual relations.[16] Indeed, in many cases, the action was brought not against a lover who had committed adultery with the spouse, but against parents or other close relatives of the spouse who sought to persuade the spouse to leave the plaintiff or otherwise interfered in the marriage.[17] As with other torts, the causation standard did not require that the wrongful conduct of the defendant be the sole cause of the alienation; rather, it was stated in terms such as "substantial factor,"[18] or "controlling or effective cause."[19] For a defendant to be liable for alienation of affections, it was required that the defendant know or believe that the person whose affections were alienated was married.[20]

The two tort theories thus are separate theories with distinct elements[21] and distinguishable historical pedigrees.[22] Criminal conversation is "the more definite action,"[23] in that the conduct of the defendant that must be proven is adultery, and the damages are recoverable without establishing a causal link between any damages and the defendant's wrongful conduct. Alienation of affections, on the other hand, is the more amorphous action, in that various types of conduct, including "mere" persuasion,[24] are actionable, and the fact finder must contemplate the chimerical causal link.

There are similarities between criminal conversation and alienation of affections, however. One seldom sees a theoretical discussion of one tort without the other. It has been argued that they are alike in both their private function of providing compensation for an injury to a plaintiff and their public function of "prevent[ing] and punish[ing] intentional interference with the husband-wife relationship and the violation of accepted canons of social conduct."[25] Moreover, in most cases in which the alleged wrongful conduct is adultery, both theories are asserted.[26]

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16. HARPER ET AL., *supra* note 8, at 509.

17. Brown, *supra* note 11, at 483.

18. RESTATEMENT, *supra* note 8, § 683 cmt. k; DOBBS, *supra* note 7, at 1246.

19. Hutelmyer v. Cox, 514 S.E.2d 554, 559 (N.C. Ct. App. 1999), *review denied*, 514 S.E.2d 146 (N.C. 1999), *appeal dismissed*, 542 S.E.2d 211 (N.C. 2000).

20. RESTATEMENT, *supra* note 8, § 683 cmt. i; DOBBS, *supra* note 7, at 1246.

21. RESTATEMENT, *supra* note 8, § 683 cmt. e; HARPER ET AL., *supra* note 8, at 513.

22. Feinsinger, *supra* note 11, at 987; *see also infra* notes 61-91 and accompanying text (discussing historical roots of the torts).

23. Brown, *supra* note 11, at 474.

24. *See, e.g.*, Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 344-46 (1980).

25. Feinsinger, *supra* note 11, at 988-89 (footnote omitted).

26. *See, e.g.*, Hutelmyer v. Cox, 514 S.E.2d 554, 559 (N.C. Ct. App. 1999), *review denied*, 514 S.E.2d 146 (N.C. 1999), *appeal dismissed*, 542 S.E.2d 211 (N.C. 2000); RESTATEMENT, *supra* note 8, § 683 cmt. e; Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 323 (1981).

Most people in the legal profession have taken little note of the passing of these obscure tort theories, derisively referred to as two of the "heart balm" torts.[27] Since 1935, legislatures and, less frequently, courts have discarded these tort theories. Reasons articulated for the abolition of these torts usually are selected from a "cookie cutter" list. Most of the reasons articulated by legislatures, courts, and commentators are superficial and lack rigorous analysis.[28] This is a singular event. Who in her right mind would throw away a perfectly good tort theory of recovery? It seems almost un-American.

C. An Immodest Hypothetical Revisited: Some Hyperbolic Thoughts About the Torts

1. Point

Because your spouse committed adultery, you probably did not live in one of the minority of states that continue to recognize the tort theories of recovery for alienation of affections or criminal conversation. If you had, odds are your spouse would not have committed adultery because there would have been few partners who would have risked ruinous financial liability as the price for enjoying sexual relations with your otherwise irresistible spouse. Your marriage and family would have been preserved. That would have been good for you because you would have had a faithful and devoted spouse. With the market closed for extramarital escapades,

27. The other two heart balm torts are breach of a promise to marry and seduction. Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH L. REV. 1770, 1771 n.4 (1985) (describing the term as a "sardonic reference to the broken heart" that justified a lawsuit); *see also id.* at 1778 ("The derisive term 'heartbalm' attached to the breach of promise action is an indication that public policy no longer considers money damages appropriate for what is perceived as only an ordinary broken heart.").

28. There are courts and commentators, however, that have concluded, after careful and well-reasoned analyses, that the torts should not be retained. Professor Dan Dobbs, for example, rendered a thorough and thought-provoking challenge of the "interference torts" generally, including alienation of affections and criminal conversation. Dobbs, *supra* note 24. Dobbs offers "a modest expression of doubt, in effect notes toward a sceptical [sic] reconception of the interference torts." *Id.* at 337. Professor Dobbs' expressions of doubt are directed more to interference with business or contractual relations than to alienation of affections and criminal conversation, but many of his concerns also apply to these two tort theories as specific types of interference torts. *See id.* at 355 ("To the extent that these problems are merely special versions of the interference with contract rules, they furnish no basis for supporting those rules—they reflect the rules under attack here but do not justify them."). Professor Martha Chamallas has leveled a thoughtful attack against alienation of affections and criminal conversation that emphasizes feminist concerns. *See* Chamallas, *supra* note 5, at 333-42.

your spouse either would have to be faithful to you or divorce you, and there are substantial costs (financial, emotional, etc.) associated with divorce. It would have been good for your children, who may suffer from growing up with divorced parents.[29] Finally, it would have been good for contemporary American society which, with almost half of all marriages ending in divorce (one of the world's superpowers in divorces),[30] is suffering all the ill effects that accompany the decline and fall of the traditional nuclear family. But, alas, you were not fortunate enough to live in a state that protects the marital relationship through tort law.

2. Counterpoint

But suppose that you lived in one of the few states that does recognize alienation of affections or criminal conversation. Your spouse simply happened to be determined and, against all odds,[31] found one of the few reckless, sex-crazed persons who would throw caution to the wind and risk liability. Having come upon your spouse and partner *in flagrante delicto*, you realize that it would be inappropriate to sue your spouse's partner. You realize that you and your spouse are autonomous human beings, not each other's property, who, notwithstanding your wedding vows and children, are free to divorce if you choose to do so. Accordingly, you reason that since your spouse could divorce you, you have no right to sue anyone who has sex with your spouse while you are still married. Indeed, you may want to remain married, notwithstanding your spouse's adultery. Therefore, it simply would not be fair to sue the person who interfered with your marriage. Moreover, on reflection, you realize that your spouse's adultery may not be the fault of the potential defendant. It is likely that you have driven your spouse to this end and thus made your spouse available to the partner. Had you been a better marriage companion, this might not have

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29. *See, e.g.*, JUDITH WALLERSTEIN ET AL, THE UNEXPECTED LEGACY OF DIVORCE (2000).

30. Joan Lowy, *U.S. Divorce, Marriage Rates on the Decline*, DETROIT NEWS, Aug. 3, 2000, at 8. *See generally* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 190 (1991) (concluding that family will "survive and adapt" in America, but "*Americans will divorce*"). The United States does not have the highest divorce rate in the world. Walter Kirn, *Divorce/The Debate: Should You Stay Together for the Kids?* TIME, Sept. 25, 2000, at 74. Russia (65%), Sweden (64%), Finland (56%), and Britain (53%) have higher rates than the United States' 49%. *Id.* But the United States ranks just behind the countries with a rate of 50% or more. *Id.*

31. *See* AGAINST ALL ODDS (Columbia TriStar 1984) (bad movie with a lot of sex and a lust triangle, but a great title song by Phil Collins). Although this footnote seems superfluous, I do wish to make a point later about movies, television, and other media, and adultery and society's values.

happened. This realization moves you and causes you to apologize to your spouse and the partner who seem somewhat unreceptive during their frantic efforts to make themselves more presentable. As you further dispassionately consider the matter, you realize that many people have affairs in contemporary American society, and if you sue and the idea catches on, you may make adultery less fashionable and less available. Who knows, you may want to engage in adultery yourself some day! Finally, although your sexual ego has suffered a not insignificant blow, you decide to be assertive and self-affirming, and you refuse to be viewed as a pathetic victim who blames your sad state on your spouse and your spouse's paramour. Having considered all this, you walk away, chuckling to yourself about how archaic are laws that permit one to sue a person for having sex with one's spouse. For many good reasons, you have decided that you will not avail yourself of those laws. When it comes to sex, it is a jungle out there. Or, come to think of it, in modern terms, it is like a free market. Although you are hurt, you know that less government regulation of the market is always better. Competition is always the best policy choice.

D. With a Bang or a Whimper?

Although alienation of affections and criminal conversation are fading from American tort law, a case in North Carolina a few years ago temporarily brought these old, odd torts to the nation's collective attention;[32] that is to say, the case attracted extensive media attention and generated tantalizing headlines and sound bytes, including coverage in "The

32. Hutelmyer v. Cox, 514 S.E.2d 554, 559 (N.C. Ct. App. 1999), *review denied*, 514 S.E.2d 146 (N.C. 1999), *appeal dismissed*, 542 S.E.2d 211 (N.C. 2000). The *Hutelmyer* case was the most high-profile case, but there were three North Carolina jury verdicts awarding substantial damages for alienation of affections and criminal conversation in 1997. Jennifer E. McDougal, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163, 177 (1998). In January of 1997, a North Carolina jury awarded a wife $1.2 million against her husband's secretary. *Id.* at 177 n.109. The jury viewed videotape footage of the husband of seventeen years and his secretary having intercourse on the office floor. *Id.* The tape was produced by a camera placed in the conference room by a detective hired by the plaintiff-wife. *Id.* at 177 n.109 (citing Foon Rhee, *Jury: Husband-Stealing Secretary Owes $1 Million to Man's Ex-Wife*, CHARLOTTE OBSERVER, Aug. 9, 1997, at 1A). In the third case, the jury applied a formula of $100 for each day of the defendant's affair with the plaintiff's wife, plus $50,000 in damages for criminal conversation and $100,000 in punitive damages to arrive at a damages award of $243,000 for the aggrieved husband. *Id.* at 177-78. *See also $1.4 Million Awarded in Alienation Lawsuit*, NEWS & OBSERVER (Raleigh), May 24, 2001, A4 (reporting on an alienation of affection verdict which is thought to be the largest in the state).

Nation's Newspaper,"[33] on television news magazine shows,[34] and a made-for-television movie.[35] Dorothy Hutelmyer sued her husband's secretary (and next wife), Margie Cox, for having an affair with her husband and allegedly thereby taking him away from her after eighteen years of marriage.[36] Mrs. Hutelmyer (Dorothy) won a jury verdict awarding her a million dollars—half a million in compensatory damages and half a million in punitive damages. My suspicion is that the media embraced the case not because it presented fascinating legal issues, but because it was about primal human drives and emotions—sex, passion, infidelity, and revenge. The North Carolina Court of Appeals appeared to be sympathetic to the defendant's argument that the tort theories of alienation of affections and criminal conversation should be abolished, but the majority declared that it was not its prerogative to overrule or ignore clear decisions of the state supreme court.[37] Moreover, as one opinion in the case noted, the North Carolina legislature had recently defeated a bill that would have abolished the cause of action for alienation of affections.[38]

The typical responses to the anomaly of North Carolina's retention of these two torts have been polarized. One position, only somewhat hyperbolically stated, is that, while the rest of the nation is "going to hell in a handbasket," North Carolina stands as the guardian of morality, the

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33. *See* Carrie Hedges, *North Carolina Taking Cheating Hearts to Task*, USA TODAY, Sept. 19, 1997, at 3A; Karen S. Peterson, *Million-Dollar Message from Ex-Wife, Jury*, USA TODAY, Aug. 8, 1997, at 1D.

34. *E.g., Dateline NBC: Three's Company; Woman Accused of Breaking Up Marriage Sued by Ex-Wife* (NBC television broadcast, Dec. 15, 1997). Co-anchor Jane Pauley's lead-in demonstrates why alienation of affections and criminal conversation are good grist for the popular media mill:

> If hell hath no fury like a woman scorned, wait till you see what happens when she gets a good lawyer and a sympathetic jury. Tonight, the story of a married man who left his wife for someone else. It happens all the time. But this story has a stunning twist, the woman left behind decided there should be a price for a marriage destroyed. But he won't have to pay it.

Id.

35. *The Price of a Broken Heart* (Lifetime television broadcast, Aug. 16, 1999).

36. The Hutelmyers were married on October 14, 1978. *Hutelmyer*, 514 S.E.2d at 557. During their marriage, they had three children. *Id.* Mr. Hutelmyer "left the marital home" on January 5, 1996. *Id.* A divorce followed. *Id.* On May 15, 1997, Mr. Hutelmyer married Ms. Cox. *Id.*

37. *Id.* at 562.

38. *Id.* at 563 (Hunter, J., concurring in part and dissenting in part); *see also Legislative Tally: Capital Correspondence—How Triangle Members of the General Assembly Voted on Bills of Note*, NEWS & OBSERVER (Raleigh), Apr. 19, 1999, at A3 (reporting that bill to abolish common law civil actions of alienation of affections and criminal conversation failed by vote of 55-58).

nemesis of adulterers, and the savior of families and marriages.[39] The diametrically opposed position is that old-fashioned and unenlightened North Carolina has perpetuated legal relics from an era when women were regarded as the property of husbands, and the torts serve no good purpose in contemporary society.[40] Very few in the legal community defend the continued existence of these torts.[41] Aside from the *Hutelmyer* cause celebre, the abrogation of these torts has attracted little attention, and they soon may be gone. Will they be missed?

E. Worth Considering From Perspectives of Tort Law and Society

From the perspective of American tort law as it evolved in the twentieth century, the abrogation of alienation of affections and criminal conversation, the near unanimity of that change, and the facile recitation of reasons are remarkable.[42] The reasons given in 1935 by Indiana, Illinois, and New York when these states abolished these torts were a smoke screen[43] and should be debunked once and for all.[44] Since that time, courts, legislators, and commentators have continued to recite those same unpersuasive reasons for abolishing or not recognizing the torts.

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39. Editorial, *Alienation of Affections: Unfashionable but Handy—North Carolina Shouldn't Worry About Being Old-Fashioned*, NEWS & REC. (Greensboro), Aug. 9, 1997, at A8; Cindi Andrews, *Love's Legal Loss*, NEWS & REC. (Greensboro), Aug. 16, 1997, at A81. The Andrews article quotes the Reverend Don Carter, Pastor of the Baptist Temple of Alamance County: "I certainly hope [the Hutelmyer verdict] sends out a strong signal to people that adultery is wrong . . . . I'm afraid today that through television and the film industry and books, we have glorified infidelity, almost made it a game." *Id.*

40. *See* Andrews, *supra* note 39. The article quotes University of North Carolina, Chapel Hill Law School Professor Sally Sharp: "It derives from the time when, if you took my wife, it was comparable to stealing my cow . . . . The continued existence of these medieval causes of action is a disgrace to the state of North Carolina." *Id.* *See also* Sally Kalson, *A Cheating Husband Is Hardly a Victim*, PITT. POST-GAZETTE, Sept. 22, 1997, at B1 ("It's a quaint notion, likening a spouse to a piece of private property that can be stolen from its rightful owner like a lawnmower."). *See also* Jill Jones, Comment, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61, 62-63 (1998) (quoting lawyers and law professors).

41. *See* Terry Carter, *'She Done Me Wrong,'* A.B.A. J., Oct. 1997, at 24.

42. Even as the abrogation bandwagon began to roll in 1935, there were some expressions of surprise. An article by a Fordham law professor published the year after heart balm legislation was enacted in Indiana, Illinois, and New York, questioned the wisdom of the legislation and termed it "almost unprecedented." Frederick L. Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63, 63 (1936). Another of the early articles discussing the "attack" on the torts referred to the "unusual legislative receptivity" to efforts to abolish the torts. Feinsinger, *supra* note 11, at 979.

43. Kane, *supra* note 42, at 71 ("having had one important change in our fundamental law foisted upon us under a smoke screen of false agitation").

44. For such a debunking, see *infra* notes 129-201 and accompanying text.

If the reasons originally given for abrogation of the torts are without merit, did better reasons exist at that time or have other reasons arisen since that time that justify nonrecognition? American tort law has changed in ways that seem inconsistent with the abrogation of these torts or the failure to reconsider them. Tort law has expanded substantially and recognized several new tort theories.[45] Thus, where victims of injuries have been identified, tort law generally has sought to provide remedies. During that same period of tort expansion, few established theories of recovery have been eliminated by most states.[46] Old tort theories of recovery have been expanded or revised to bring novel and contemporary fact patterns within their coverage.[47] Moreover, American tort law has shifted its virtually exclusive focus on protecting the "hard" interests of person and property, and increasingly protected "soft" interests in relationships and emotions.[48]

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45. Consider, for example, invasion of privacy, intentional infliction of emotional distress, and wrongful termination. Regarding these torts and the characteristics of proposed or emerging torts that indicate the likelihood of their success, see Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997).

46. Dobbs, *supra* note 24, at 355 ("[I]t is interesting to notice that one of the few tendencies to construct liability in tort has occurred in [interference with marriage]."); *see also* Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487, 489 (1986) ("[T]he best modern example of restricting tort liability deals with an action closely related to the interference torts: criminal conversation.").

47. *See, e.g.*, Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 651 (1995) ("During the past thirty years, the protections furnished by the law of torts have expanded, and with that expansion has come an augmentation of the duties owed to one's fellow citizens."); Dowling, *supra* note 46, at 488 ("The history of tort law in the twentieth century is one of expansion. Historically, those who have argued against the spread of liability have often done so in vain."). Mr. Dowling does note, however, that the interference torts, in which he includes interference with contract and interference with business relations do not fit the pattern of expansion, having grown no broader than in the mid-nineteenth century. *Id.* An example of a new duty is an emerging duty to rescue under some circumstances. *See generally* Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994). Another duty recognized only in recent years is the duty to protect against third-party criminal activity, even beyond the boundaries of business premises. *See, e.g.*, Banks v. Hyatt Corp., 722 F.2d 214 (5th Cir. 1984). Old tort theories, such as battery, have been applied to new fact situations such as sexual intercourse between spouses when one has engaged in an extramarital affair. Neal v. Neal, 873 P.2d 871 (Idaho 1994) (more about this case later). A different view of the recent history of tort law is offered by Professor David Robertson, whom I thank for pointing out that the last twenty years or so has been a period of contraction in tort law. Examples of such contraction include the recognition of new defenses to tort liability and limitations of products liability.

48. Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136 (1992); *cf.* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 489-502 (1998) (recognizing liberalization in tort law in recognition of recovery for emotional and relational injuries, but arguing that there is still an "implicit hierarchy of value" in which physical injury and property loss are considered more valuable).

Some of the types of relationships for which tort law provides redress for injuries include family, community, political, employment, and trade.[49] Given these trends in modern tort law, who would have predicted that most states would discard two tort theories with historical pedigrees that purport to protect against or redress injury to emotional well-being in the most sacrosanct of all relationships—the family?[50]

From the perspective of American society, from which tort law derives the values and interests for which it provides redress when injuries are sustained, it is not easy to explain why legislatures and courts have been willing to eradicate alienation of affections and criminal conversation. These torts are said to protect the interest people have against interference in their family relations.[51] Most Americans say that families[52] and marriage[53] are important to them. Moreover, in polls, most Americans say they consider adultery morally wrong.[54] For the last two decades, "family

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49. In a four-part series of articles, Professor Leon Green described the role of tort law in protecting relational interests. Leon Green, *Relational Interests*, 29 ILL. L. REV. 460, 462 (1934) (part one: discussing family relations); 29 ILL L. REV. 1041 (1935) (part two: discussing trade relations); 30 ILL. L. REV. 1 (1935) (part three: discussing commercial relations); 30 ILL. L. REV. 314 (1935) (part four: discussing professional and political relations).

50. Professor Feinsinger described the public and private functions of both tort theories as compensating for a loss of consortium injury and "prevent[ing] and punish[ing] intentional interference with the husband-wife relationship and the violation of accepted canons of social conduct." Feinsinger, *supra* note 11, at 988-89; *cf.* Brown, *supra* note 11, at 472 (describing purpose of alienation of affections as "protecting marital relations from unjustifiable interference by outsiders").

51. *See* DOBBS, *supra* note 7, at 1245-55 (discussing "interference with family relationships").

52. One need only listen to politicians' speeches to appreciate the importance of *talking* about family values. Indeed, most Americans say that family is more important to them than money and wealth. *See, e.g.*, Jeff Kunerth, *AARP Says Americans Value Family Over Riches at Orlando, Fla., Convention*, ORLANDO SENTINEL (May 17, 2000) (discussing AARP survey commissioned by *Modern Maturity* magazine in which eighty percent of those surveyed defined success as having a good family, marriage, and education, whereas only twenty-seven percent measured success in terms of wealth). Notwithstanding Americans' professed devotion to family and family values, the "traditional family" is diminishing as a reality.

53. Although it is safe to say that Americans today will say that they cherish family, American society seems equivocal on the matter of marriage. Michael A. Fletcher, *For Better or Worse, Marriage Rates Hit a Low; Study Reports New Lows for Marriage Rates and Wedded Bliss*, WASH. POST, July 2, 1999, at A1. Divorce rates soared until the mid-1980s, with the rate leveling off slightly below fifty percent. *See* James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 877-78 (2000). The cover of a recent issue of *Time* magazine had a photograph of the cast of the Home Box Office series *Sex and the City* and bore the caption, "Who Needs a Husband?" TIME, Aug. 28, 2000. The accompanying story discusses the phenomenon of women deciding not to marry. Tamala M. Edwards, *Flying Solo*, TIME, Aug. 28, 2000. According to the story, forty percent of adult females are single compared with thirty percent in 1960. *Id.*

54. *See, e.g.*, AllPolitics, *How Do Americans View Adultery?*, *at* http://www.cnn.com/ALLPOLITICS/1998/08/20/adultery.poll/ (last visited Jan. 2, 2001); Bruce Handy, *How We*

and family values" have been the rallying cries of a movement to restore traditional values in contemporary American society.[55] Why then, are legislators and state judges, many of whom are elected, willing to take actions that may be characterized as not supportive of family or marriage?[56]

What has changed in American law and American society that has caused the eradication of these torts? Is adultery no longer considered a devastating injury to a spouse?[57] Do social mores and public policy no longer support attempting to prevent people from interfering with exclusive sexual relations in marriage? Are the torts simply ineffective to redress the injury or effect the public policy?

This article has two objectives. One is to examine what forces in law and society brought about the demise of two well-established torts over a sixty-five year period.[58] Why did these old, established torts not embark on new careers? The other objective is to suggest that, for jurisdictions that have abrogated, or consider abrogating, criminal conversation and alienation of affections, a modified tort of intentional interference with

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Really Feel About Fidelity, TIME, Aug. 31, 1998. In a 1998 CNN/Time poll, eighty-six percent (86%) responded that adultery was morally wrong, compared with seventy-six percent (76%) in 1977. AllPolitics, *supra*.

55. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1497 (1983) (discussing "[a] new round of debate ... regarding the family and family values"); Murphy, *supra* note 6, at 1112-14 (discussing commentators' calls for "renewed attention to 'morality' in family law").

56. In the Idaho case abolishing criminal conversation, the Idaho Supreme Court took the opportunity to pledge its commitment to marriage: "While this Court does not condone adultery and continues to hold marriage in the highest esteem, we are persuaded, for the reasons given, that the action pursued by [plaintiff] does not serve to protect the institution of marriage." Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

57. 3 WILLIAM BLACKSTONE, COMMENTARIES *140 (1768). Referring to the civil injury aspect of adultery or criminal conversation, Blackstone said "[s]urely there can be no greater." *Id.*

58. In a more limited context, I attempt the inverse of what Professor Anita Bernstein did in her article, *How to Make a New Tort: Three Paradoxes*, *supra* note 45, at 1544-59. Professor Bernstein examined the characteristics of new torts that have succeeded in garnering general recognition. *Id.* I examine what legal and social forces brought about the demise of two well-established tort theories. It is interesting to note that the characteristics of successful tort wannabes, if applied to criminal conversation and alienation of affections, would tend to predict success. Bernstein posits that conservatism is the enemy of aspiring torts. *Id.* at 1543. Criminal conversation and alienation of affections seem to have a strong conservative base. The specific characteristics that Bernstein identifies which favor recognition are lacking novelty (being grounded in common law rules), being less tort-like and more firmly rooted in contract and property, and being portrayed as free of individual human creation or sponsorship. *Id.* at 1544-59. The old torts of criminal conversation and alienation of affections can claim all of those characteristics. Ironically, property and contract connections have proved detrimental to the torts, fueling the powerful spouse-as-property criticism.

marriage should be recognized.[59] The proposed modified tort is created from elements selected from criminal conversation and alienation of affections. It gives the old torts a new career.

In the final analysis, I am not sanguine about the longevity of criminal conversation or alienation of affections in the few jurisdictions that cling to them. Nor am I optimistic about a groundswell of support for the revised interference with marriage tort offered herein as an alternative to the old torts. First, the ideal of the marriage relationship with exclusive sexual relations is not desired or valued by Americans as much as it is politically expedient for policymakers to say it is. Society recognizes that the prevalent state of affairs is the existence and tolerance of competitive conduct (interference or attempted interference) by third parties that

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59. In this second objective, I must face the uphill battle that Professor Bernstein describes in *How To Make a New Tort: Three Paradoxes*. Bernstein, *supra* note 45. Note, that I try to avoid the damning characteristics (identified by Professor Bernstein) of novelty and individual sponsorship by styling this tort a "modified" tort. My proposal to reconsider the old heart balm torts is not, however, avant garde. Two scholars who are sympathetic to feminist issues have called for reconsideration of the other two heart balm torts. Professor Jane Larson called for recognition of a new tort of sexual fraud, drawing from the old tort of seduction. Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 379 (1993). Although not proposing a new tort, Professor Mary Coombs revisits the role of feminists in advocating abolition of the tort of breach of a promise to marry. Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1, 11-17 (1989).

I do not argue that the other heart balm torts, breach of a promise to marry and seduction, are worth preserving or resurrecting. Those torts pose greater problems than alienation of affections and criminal conversation, and they do not serve as great a public purpose. Feinsinger, *supra* note 11, at 1008-09. In one of the earliest articles applauding the legislative abrogations of the heart balm torts, Professor Feinsinger recognized that distinctions could be drawn:

> There will be little regret at the passing of the action for breach of promise to marry. But there is room for an honest difference of opinion as to the actions of alienation of affections and possibly of criminal conversation, which have long been sanctioned as indemnifying private injury, preserving the family unit and punishing public offenses.

Id. at 1008; *see also* HARPER ET AL., *supra* note 8, at 535 (questioning whether "all four actions should be lumped together," and noting that breach-of-promise to marry is more likely susceptible of improper use than is alienation of affections).

I think it is unfortunate that alienation of affections and criminal conversation became inextricably intertwined with breach of a promise to marry and seduction in the maligned category of "heart balm" torts. *See* Larson, *supra* note 59, at 394 n.85 (explaining that breach-of-promise to marry was the primary target of the anti-heart balm movement). The first legislation passed to abolish heart balm torts, the Indiana Act of 1935, eliminated all of the torts in one fell swoop, and that legislation served as the model for later legislation. *See* Feinsinger, *supra* note 11, at 998-1008. Professor Kane, writing in 1936, noted that the one common characteristic of these different causes of action was "sexual misbehavior." Kane, *supra* note 42, at 65.

challenges the exclusive intimacy of marriages. Second, the signature features of American society are its free-market, capitalist economy and its democratic government. The dominant aspects of this society have become competition, libertarianism, and individual autonomy and rights. Generally, we like our markets, whether commercial or sexual relations, open and competitive; in such a society, "interference torts" are not likely to be favored.[60] Third, the last century has seen an incremental shift in power from males to females, with females finding a voice to express themselves in society and law. Many women and female legal scholars have favored the abolition of these torts because they treat women as inferior and subordinate to men and as helpless victims of the power of men. It is not clear to me that abolition of criminal conversation and alienation of affections was in the best interest of women, or that continued nonrecognition of the torts is in the best interest of women. Nonetheless, I do not think that feminist scholars or politicians are likely to support retention of the old torts or adoption of a revised tort. Perhaps I will be surprised.

Part II of this article briefly discusses the historical roots of the torts of criminal conversation and alienation of affections, their general acceptance in the United States, and their eventual general rejection. Part III states the reasons commonly articulated for abrogation of the torts and explains why those reasons are generally unpersuasive. Part IV undertakes to explain the changes in the context of evolving tort law and social values and morality. The discussion in part IV provides a more cogent explanation for the abolition of the torts than the reasons usually articulated. Part V presents reasons for recognizing a revised tort theory of intentional interference with marriage. Part VI describes the revised tort theory.

60. *See* Dobbs, *supra* note 24, at 336; *see also* Paul D. Carrington, *A Senate of Five: An Essay on Sexuality and Law*, 23 GA. L. REV. 859, 869 (1989) (describing the positions on legal regulation of sex taken by his hypothetical "Sexual Libertarian Senator"—allowing individual selection and "free flow" with little regulation—as "congruent not only with capitalism, but also with the political traditions of democracy, embracing both individual freedom and equal rights to self-advancement").

II. CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS: AN ABRIDGED HISTORY

A. Pedigree

The laws of many societies throughout history have declared adultery to be illegal and punishable.[61] Some other generalizations can be made regarding ancient civilizations' laws regarding adultery. A man was permitted to kill the seducer of his wife with no legal repercussions for himself.[62] Also, married women who committed adultery were treated more harshly than married men who committed adultery.[63] Moreover, the punishments meted out were often gruesome and barbaric, such as the mutilation of the adulteress or the devouring of her by dogs.[64] Some punishments were intended publicly to disgrace the adulteress, such as the infamous "running of the gauntlet" in the nude or semi-nude.[65] The reasons

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61. *See generally* Daniel E. Murray, *Ancient Laws on Adultery—A Synopsis*, 1 J. FAM. L. 89 (1961).

62. In many societies throughout history, the law excused killings under such circumstances, although some required a discovery such as that described in the hypothetical at the beginning of this article—adulterers engaged *in flagrante delicto.* For example, in England in the ninth century, the laws of Alfred the Great provided that a man could fight without becoming liable to vendetta if he caught another man engaged in sexual relations with his wife, daughter, sister, or mother. Alfred 43 § 7 (cited in THE LAWS OF THE EARLIEST ENGLISH KINGS 85 (F.L. Attenborough ed., Russell & Russell, Inc. 1963) (1922)); Murray, *supra* note 61, at 99-100 (noting that under the laws of William I, although the state was prohibited from inflicting death for adultery, the husband (and father and son) were permitted to do so, apparently on the rationale that "[a]ggrieved husbands were going to kill the parties no matter what the law prohibited"); *see also* JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 139 (Augustus M. Kelley 1968) (1912) (noting that, "[i]n the latest stage of the law," a husband lost the right to kill his wife if he catches her in the act, although it was not too difficult to obtain a pardon if he carried out the execution).

63. BRISSAUD, *supra* note 62, at 139-40 ("Civil legislation never treated adultery of the husband as it did that of the wife."); Murray, *supra* note 61, at 89 ("The man paid a fine and the woman was burned alive.").

64. Murray, *supra* note 61, at 92-93, 95. The laws of Manu are particularly gruesome for both the adulterous spouse and the partner:

> If a woman made insolent by (the rank of) her family, or by (her own) parts (beauty, wealth, *etc.*,) should prove false to her husband, the king should have her devoured by dogs in some much-frequented place.
>
> He should cause the evil man to be burned on a glowing hot iron couch, and they shall place pieces of wood about it till the evil-doer is consumed.

Id. at 95-96 (citing HOPKINS, THE ORDINANCES OF MANU VII-XIVII, at 237 (1891)).

65. BRISSAUD, *supra* note 62, at 137-38 n.7; Murray, *supra* note 61, at 103; *see also* Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 654 n.19 (1930). Writing about the running of the gauntlet penalty for adultery, Brissaud notes that "it turned into the obscene and burlesque, so much so that the penalty was more scandalous than the offense itself." BRISSAUD, *supra* note 62, at 137-38.

for the illegality and the harsh punishments differ with different societies and periods of history, but several major reasons can be identified: sin, bastardization of family line, destruction of unity of the family, and violation of a man's property right.[66] One commentator suggests that common to all societies that declared adultery illegal was the notion that adultery is an affront to a man's pride, being forced to recognize that another man is sexually superior and thus is able to lure away the cuckold's wife.[67] The history of legal treatment of adultery has not been a proud one, but it does attest to the seriousness of the injury inflicted on the spouse and, perhaps, the society.

The immediate historical roots of the American torts of alienation of affections and criminal conversation are in seventeenth century English law. Although alienation of affections was not recognized in England, it is of the lineage of the tort of seduction or enticing away of a servant.[68] Blackstone enumerated three causes of action that a husband might bring for injuries relating to his interests in his wife: abduction or taking away of the wife, adultery or criminal conversation, and beating or otherwise abusing the wife.[69] The basis of the torts in England is traced to the rule, recognized at least by the thirteenth century, that a master could recover from a person who beat or otherwise injured his servant or apprentice.[70] There were three features of the action: 1) violence had to be used against the servant; 2) the action was for the loss of the service, and was distinct from the action given to the injured servant for his injury; and 3) there was not a requirement of a contract between a master and servant—the action was given because there was a state of service, and the service was lost due to injury.[71]

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66. Murray, *supra* note 61, at 89. One of the reasons, bastardization or uncertainty regarding paternity, explains in part why adultery by a wife was considered worse and was treated more harshly; uncertainty regarding paternity could result in family property passing to strangers. BRISSAUD, *supra* note 62, at 140; Lippman, *supra* note 65, at 655.

67. Murray, *supra* note 61, at 89.

68. HARPER ET AL., *supra* note 8, at 504 ("Today few would regard the 'abduction' or 'enticement' of a wife as a trespass against the husband on the theory that the wife is incapable of giving consent or on any theory that the husband has a 'property interest' in her body. The usual action in many jurisdictions is for alienation of affections of either spouse . . . ."); Gregory L. Thompson, Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?*, 56 N.D. L. REV. 239, 241 (1980) (explaining that the tort of abduction, based on the husband's proprietary interest in his wife, became unacceptable in America and was replaced by the tort of alienation of affections).

69. 3 BLACKSTONE, *supra* note 57, at *139; Quinn v. Walsh, 732 N.E.2d 330, 334 n.11 (Mass. App. Ct. 2000) (citing BLACKSTONE'S COMMENTARIES).

70. Dobbs, *supra* note 24, at 338; Lippman, *supra* note 65, at 653.

71. John H. Wigmore, *Interference With Social Relations*, 21 AM. L. REV. 764, 765-66 (1887).

In 1350, the Ordinance of Labourers was enacted in England in response to labor shortages resulting from a great plague. The ordinance bound laborers, free and bound, to remain in the service to which they were bound, and imposed a jail sentence on a laborer for a violation. The ordinance also created a remedy for the employer against any person who received and retained a servant. This statutory action, unlike the common law action, required an express contract to serve for a definite term.[72] Thereafter, the two actions, common law and statutory, became mixed.[73] The action for trespass on a wife developed separately from an action *de trespass facta feminæ*, which was brought jointly by husband and wife.[74] However, the loss of service doctrine, first recognized in the context of masters and servants, came to be applied to the husband-wife relationship so that a husband had an action for the loss, through violence, of his wife's consortium.[75] The next extension was to permit recovery when the loss of consortium was due to enticement rather than an act of violence perpetrated on the wife, although there was no supporting precedent for such recovery.[76] The English cases did not recognize an action for simple alienation of affections; rather, the injury was that the wife was enticed to leave her husband's home.[77]

Finally, with the different doctrines and statutes regarding recovery for loss of services by a servant mixing and merging, the requirement of violence was lost, and the term "servant" was enlarged from its original meaning. These developments led to the recognition of a broad new principle of contract law in 1853 in *Lumley v. Gye*[78] that interference by persuasion with any contractual relationship was actionable.[79]

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72. *Id.* at 766.

73. *Id.* at 766-67; *see also* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1515 n.22 (1980) (noting that statutory causes of action were incorporated into the common law by the end of the 18th century).

74. Wigmore, *supra* note 71, at 769.

75. *Id.* Modern characterizations of criminal conversation as having been based on recognition of a husband's property interest in his wife are correct. *See, e.g.*, 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 430 (1925) ("The husband's interest in his wife's consortium, unlike the parent's interest in the consortium of his children, was considered to be sufficiently proprietary to support an action of trespass."); *see also* Lippman, *supra* note 65, at 651-73 (discussing the property basis for the tort).

76. Wigmore, *supra* note 71, at 769 (citing Winsmore v. Greenbank, Willes 577, 125 Eng. Rep. 1330 (1745)); *see also* Feinsinger, *supra* note 11, at 992 (citing *Winsmore*).

77. Feinsinger, *supra* note 11, at 992 n.75.

78. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

79. Wigmore, *supra* note 71, at 770; *see also* Note, *supra* note 73, at 1522-24 (discussing the three ways in which *Lumley* "transformed" the pre-existing law of third-party interference).

B. Acceptance

The husband's right of action was recognized early in the United States[80] in all states except Louisiana, which did not recognize either criminal conversation or alienation of affections.[81] The Married Women's Property Acts were passed, giving women a number of rights, including rights to retain earnings, own property, and bring suit on their own behalf.[82] The

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80. New York was the first state to recognize the tort of alienation of affections in Heermance v. James, 47 Barb. 120 (N.Y. Gen. Term 1866). *See, e.g.*, PROSSER, *supra* note 7, § 124, at 918 n.29 (citing *Heermance* as first case in the United States to recognize alienation of affections); *see also* Kavanagh, *supra* note 26, at 328 (same).

81. This is only partially correct. The Louisiana Supreme Court definitively rejected the theory of alienation of affections in 1927. Moulin v. Monteleone, 115 So. 447 (La. 1927). However, a panel of the court had appeared to recognize such a right of recovery in 1924. Hennessey v. Wahlig, 99 So. 405 (La. 1924). In *Hennessey*, the plaintiff brought an action when his wife's parents allegedly abducted her, detained her, and alienated her affections toward her husband, and denied plaintiff access to his wife. The marriage occurred after plaintiff and his fiancee eloped. Citing Civil Code Article 2315 on delictual liability, the court stated as follows:

> [T]he husband is legally entitled to the possession and society of his wife, and to her aid and assistance, as long as he complies with the obligations arising from the contract of marriage.
>
> Any invasion of such marital rights, whether by the father or the mother of the wife, or by a third person, without just or reasonable cause, necessarily constitutes an act resulting in damages to him, and imposes upon the trespasser, by whose fault it happened, the obligation of repairing the injury.

Id. at 406 (citation omitted).

When the Louisiana Supreme Court decided *Moulin* about three years later, it rejected the idea that an action for alienation of affections ever had been recognized in the state. Regarding *Hennessey*, first, the court made the dubious distinction that the cause of action on which the *Hennessey* court allowed recovery was slander, not alienation of affections. Second, the court noted that, regardless of what *Hennessey* held, it was not binding on the *Moulin* court because it was decided during a brief period of time when the six-member Louisiana Supreme Court was divided into two sections of three justices each. Moreover, of the three justices who decided the case, one was serving temporarily, and another was no longer on the court at the time *Moulin* was decided.

The *Moulin* court gave four reasons for not recognizing an action for alienation of affections at a time when a majority of states did recognize it. First, damages for alienation of affections are punitive or exemplary, and Louisiana law does not authorize awarding punitive damages in civil actions. *Moulin*, 115 So. at 448. Second, Louisiana's Civil Code declared marriage to be a civil contract, and Louisiana law did not (and except in limited circumstances, still does not) recognize a cause of action for third-party interference with a contract. *Id.* at 449. Third, under Louisiana law, a husband had no property interest in the companionship, services, or affections of his wife. *Id.* at 451. Finally, Article 2294 of the Code of 1825, the precursor of Article 2315, would not support such an action because it was subject to the constructions and limitations of the jurisprudence of Rome and France, and, the court asserted, "[i]t is certain that, under the Roman and Spanish laws, there was no right of action for alienation of a wife's affections." *Id.*

82. Olsen, *supra* note 55, at 1531; Paul Davis Fancher, Note, *To Have and Not Hold: Applying the Discovery Rule to Loss of Consortium Claims Stemming from Premarital, Latent Injuries*, 53 VAND. L. REV. 685, 692 (2000). Professor Frances Olsen has characterized this

passage of the acts required courts to do one of three things regarding alienation of affections and criminal conversation: hold that the husband's right to his wife's services was obsolete; hold that a wife had an equal right to the services of her husband; or ignore the historical basis of the rights of action and extend them to women "on the theory of equality."[83] Most states recognized a wife's right of action.[84] The Indiana Supreme Court, for example, reasoned that the common law did give wives a cause of action for alienation of affections, but, due to the legal fiction that the husband and wife were one, the wife was procedurally prevented from asserting the cause.[85] The court insisted upon legal recognition of the cause of action of the wife:

> If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of a wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy.[86]

The reasoning of procedural incapacity was criticized by at least one commentator as being "incredible" because it ignored the fact that the basis for the incapacity was the woman's inferiority.[87] That commentator described the theoretical basis for the extension as follows: "The historical basis of these actions—loss of services—has collapsed and a new one, violation of inherent marital rights, has been substituted."[88] Thus, one could argue that, in Holmes' terms, alienation of affections and criminal conversation had embarked upon their new careers.[89]

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change in the law as an attempt to make the family more like the market. Although she evaluates the acts as undermining the male-dominated hierarchy of the family, she also sees them as "detrimental to women," because they also undermined the altruistic ethic of the family and thus left women open to the type of domination that prevails in the market. Olsen, *supra* note 55, at 1531-32.

83. Lippman, *supra* note 65, at 662.

84. Brown, *supra* note 11, at 476 (stating that "overwhelming weight of authority" recognized that Married Women's Property Acts removed a legal disability, thus giving women right to maintain a right of action for alienation of affection); Feinsinger, *supra* note 11, at 992-93. *See also* Lippman, *supra* note 65, at 662-66.

85. Haynes v. Nowlin, 29 N.E. 389, 389-90 (Ind. 1891); *see also* Gray v. Gee, 39 T.L.R. 429, 431 (K.B. 1923) (recognizing that wife always had substantive right to consortium, but was prevented from bringing action by procedural disability prior to the enactment of the Married Women's Property Act of 1882).

86. *Haynes*, 29 N.E. at 389.

87. Lippman, *supra* note 65, at 664.

88. *Id.*

89. *Id.* at 672 ("[O]ur marital law is the outcome of rules of contract combined with Christian ideology and modified by the historical process which Judge Holmes describes.").

Some states, however, were reluctant to recognize such an action for women. The Minnesota court, for example, reasoned that the action should not be extended for several reasons: the principal reason for recognizing an action for men, the possibility of illegitimate offspring was not present for a wife; a wife suffers no disgrace when her husband commits adultery; and a woman who would be a defendant in a wife's action probably would not be the seducer.[90] The Wisconsin court refused to extend the action because it feared a great increase in such lawsuits if wives were permitted to sue. Moreover, the court reasoned, men, being men, involved in daily social intercourse, can be expected to give in to temptation occasionally, whereas women, who are busy with household chores, do not face such temptations.[91]

C. Rejection

Indiana became the first state to abolish legislatively alienation of affections and criminal conversation.[92] The Indiana act, entitled "An Act to promote public morals,"[93] abolished all of the heart balm torts, including breach of a promise to marry and seduction of a female over the age of twenty-one. Notwithstanding the misogynistic rhetoric, such as references to "gold diggers," used to support anti-heart balm legislation,[94] many of the leaders of the efforts were women.[95] For example, the Indiana legislation was spearheaded by Roberta West Nicholson, the only female member of the Indiana legislature.[96] This period of time, the first "Sexual Revolution,"

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90. Kroessin v. Keller, 62 N.W. 438, 438-39 (Minn. 1895).

91. Duffies v. Duffies, 45 N.W. 522, 525 (Wis. 1890). For a nearly contemptuous treatment of the Wisconsin court's reasoning, see Brown, *supra* note 11, at 477 ("To comment upon this alleged reasoning would be impossible without approaching contempt of court.").

92. 1935 Ind. Acts, ch. 208 § 1 (codified at IND. CODE. ANN. § 2-508 (Burns 1946 replacement volume)).

93. *Id.*

94. Larson, *supra* note 59, at 397; *see also* Coombs, *supra* note 59, at 12-17 (discussing the desire of feminists and womens' groups to abolish heart balm legislation). For writing of that time by a female academician, see Harriet Spiller Daggett, *The Action for Breach of the Marriage Promise*, *in* LEGAL ESSAYS ON FAMILY LAW 39, 92 (1935) (describing plaintiffs in majority of breach of promise actions as "unscrupulous women fortune hunters").

95. Coombs, *supra* note 59, at 12 (recounting that women sponsored the anti-heart balm bills in Indiana, Massachusetts, Colorado, and Ohio); Larson, *supra* note 59, at 397 n.93 (discussing women's sponsorship of bills in Indiana, Maryland, and Nebraska).

96. *Aching Hearts Are Itching Palms, Says Woman Legislator as Men Gallantly Pass "Love Bill,"* INDIANAPOLIS NEWS, Feb. 1, 1935, at 1 [hereinafter *Aching Hearts*]. Mrs. Nicholson was a daughter-in-law of Meredith Nicholson, who was a famous Indiana writer and United States ambassador to Venezuela. *Time* magazine, reporting on Ms. Nicholson's legislative efforts in support of the legislation included a photograph of Ms. Nicholson reading

was marked by a reaction against the sexual repression of women and the stereotyping of the ideal woman as sexually passive and modest.[97] Laws and symbols that fit with the Victorian ideal of women had to go, as women struggled to assert their individuality and autonomy.[98] Thus, women argued against laws that gave them distinctive protections, asserting that they wanted no special rights and wanted to be treated in the same way as men. For example, speaking to the Indiana legislature in support of the first anti-heart balm bill, Roberta West Nicholson said, "Women do not demand rights, gentlemen, they earn them, and they ask no such privileges as these which are abolished in this bill."[99] Illinois[100] and New York[101] also enacted anti-heart balm legislation in 1935. Although the anti-heart balm campaign got off to a fast start with twenty-three states considering bills in 1935, only eight states passed such legislation before 1950.[102] In the 1970s, there was another wave of legislation and some court decisions abolishing criminal conversation and alienation of affections.[103]

Several points are worth mentioning about the first wave of the anti-heart balm movement. First, the withering academic criticism that set the stage for the legislative actions was directed at only one of the heart balm torts—that was breach of the promise to marry.[104] The battle cry[105] of the heart balm abolitionists in legislative halls and the media that fortune-seeking women were using heart balm torts to blackmail men was primarily about real or fictional breach of promise plaintiffs.[106] Second, a point which

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to her two children. *National Affairs: Women—Love v. Extortion*, TIME, Feb. 18, 1935, at 16. The *Time* article described her as, "Handsome young Mrs. Nicholson, ten years married and mother of two."

97. Larson, *supra* note 59, at 398-99.

98. *Id.*; Coombs, *supra* note 59, at 14 ("For feminist women, I suggest, the [breach of promise] cause of action was perceived as an ideological impediment to woman's social progress . . . ."); *see also* Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L. J. 2583, 2587 (1998) ("Feminists also expressed concern that the actions ensconced marriage as the epitome of a woman's existence and encouraged women to use men for economic benefits rather than to meet them on equal terms.").

99. *Aching Hearts*, *supra* note 96, at 1, 9.

100. 1935 Ill. Laws 716; ILL. COMP. STAT. 40/1901-07 (1935).

101. 1935 N.Y. Laws 263 (1935) (amending the Civil Practice Act by adding §§ 61-a to 61-i.)

102. Larson, *supra* note 59, at 396 n.92.

103. M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. J. 33, 96-97 (1987).

104. Larson, *supra* note 59, at 394 n.85 (citing articles).

105. Professor Kane articulated it as the slogan, "it's a racket." Kane, *supra* note 42, at 66.

106. *Id.*; Coombs, *supra* note 59, at 12-13. Professor Coombs traces the image of the fortune-hunting woman to two popular women writers of the time, Anita Loos, who wrote the best-seller *Gentlemen Prefer Blondes*, and Dorothy Dunbar Bromley. *Id.* Professor Larson describes the shift in public opinion as follows: "In the early twentieth century, the

intersects with the preceding point, the din about use of the heart balm torts for purposes of blackmail and extortion was not well substantiated.[107] Third, the academic writing of the time did not uniformly praise the legislative efforts to abolish criminal conversation and alienation of affections.[108]

After the first wave of the 1930s, there was little critical re-examination of the movement to abolish criminal conversation and alienation of affections. A second wave of legislative enactments began in the 1970s.[109] The movement again was buoyed by feminist successes and "the dramatic change in the conception of women" as autonomous, active individuals, who were not mere companions to men, and consequently easy victims.[110] The reasons for abolition of the torts cited in the 1930s were recited again. Writing in 1972, a commentator stated that a "numerical majority of states" still recognized the torts.[111] A commentator writing nine years later stated that thirty states and the District of Columbia had abolished or limited the action for alienation of affections, and twenty-two states and the District of Columbia had taken similar action regarding criminal conversation.[112] As discussed above, no more than nine states now recognize alienation of affections or criminal conversation.[113] In short, the movement to abolish criminal conversation and alienation of affections was not a great success in

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condemnation of male sexual aggression that had shaped earlier public opinion began to wane, and male defendants were increasingly perceived as innocent targets of scheming and hypocritical blackmailers." Larson, *supra* note 59, at 393.

107. Feinsinger, *supra* note 11, at 1008-09; Kane, *supra* note 42, at 66-67.

108. *E.g.*:

> There will be little regret at the passing of the action for breach of promise to marry. But there is room for an honest difference of opinion as to the actions of alienation of affections and possibly of criminal conversation, which have long been sanctioned as indemnifying private injury, preserving the family unit and punishing public offenses.

Feinsinger, *supra* note 11, at 1008;

> With all its faults, then, the action for alienation of affections is on the whole desirable, and while it should no doubt be somewhat limited, such limitations should not be permitted to diminish the desirable effect which the possibility of liability in this action now has in discouraging the intentional breaking up of homes.

Brown, *supra* note 11, at 506; *see also* Kane, *supra* note 42, at 65-72.

109. Sinclair, *supra* note 103, at 97.

110. *Id.*; Larson, *supra* note 59, at 400.

111. William M. Kelly, Note, *The Case for Retention of Causes of Action for Intentional Interference With The Marital Relationship*, 48 NOTRE DAME L. REV. 426, 429 (1972).

112. Kavanagh, *supra* note 26, at 330-31.

113. *See supra* note 7.

the first wave.[114] The sustained effort, over a sixty-five year period, however, has been quite successful.

D. After the Fall

They just will not go away quietly. The abrogation of criminal conversation and alienation of affections in most states has not spelled the end of civil lawsuits based on adultery. Now the claims are pursued under collateral tort theories—most commonly intentional infliction of emotional distress.[115] Some claims are pursued under the rubric of professional malpractice when the third-party paramour is a clergyman,[116] lawyer, doctor,[117] etc.

Another approach is that taken in *Neal v. Neal*.[118] The wife sued both her husband and his partner. The court announced that Idaho no longer recognized the theory of criminal conversation, but it struggled with the plaintiff's battery claim against her husband. The plaintiff's argument was that she had sexual relations with her husband not knowing that he had engaged in extramarital sex, and that had she known of his affair, she would not have consented to having sex with him.[119] Thus, the wife argued that sexual relations with her husband was an offensive contact, and her consent was ineffective because it was obtained by fraud—the husband's failure to disclose a material fact. The Idaho Supreme Court reversed the dismissal of the battery claim, holding that there was a genuine issue of material fact on the issue of consent.[120]

In South Carolina, which legislatively abolished both criminal conversation and alienation of affections, a husband joined his wife's paramour as a partner in his divorce action on the ground of adultery.[121] The family court held the wife's lover jointly and severally liable for the husband's attorney fees. The appellate court reversed, reasoning that the

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114. Larson, *supra* note 59, at 396 n.92 (describing the anti-heart balm movement as "by no means uniformly successful" before 1950).

115. *See, e.g.*, Osborne v. Payne, 31 S.W.3d 911 (Ky. 2000) (former husband bringing action against priest to whom husband and wife went for counseling); Scamardo v. Dunaway, 694 So. 2d 1041 (La. Ct. App. 1997) (husband suing doctor who was treating his wife); Quinn v. Walsh, 732 N.E.2d 330 (Mass. App. Ct. 2000) (alleging that defendant engaged in open and notorious affair with plaintiff's wife with intent to injure plaintiff).

116. *See, e.g.*, Cherepski v. Walker, S.W.2d 761 (Ark. 1996); Bivin v. Wright, 656 N.E.2d 1121 (Ill. App. Ct. 1995).

117. *See, e.g.*, Nicholson v. Han, 162 N.W.2d 313 (Mich. Ct. App. 1968).

118. 873 P.2d 871 (Idaho 1994).

119. *Id.* at 876.

120. *Id.* at 877.

121. Heape v. Heape, 517 S.E.2d 1, 1-3 (S.C. Ct. App. 1999).

family court's decision was tantamount to a "quasi-revival of the torts of criminal conversation and alienation of affection."[122]

Courts want the claims to go away, and they often dismiss them as repackaged versions of criminal conversation or alienation of affections, which have been legislatively abolished.[123] For example, a Massachusetts appellate court rejected a claim that a defendant's engaging in an adulterous affair with plaintiff's wife that allegedly became known to plaintiff, his son, and the community at large constituted intentional infliction of emotional distress.[124] The court stated as follows: "An affair of the sort alleged here would by most in our society be considered reprehensible and a cause for sadness, anger and distress; we do not condone the behavior which is alleged . . . ."[125] The court then went on to say, however, that such conduct is not outrageous and utterly intolerable in a civilized society.[126]

The obstinance and tenacity of plaintiffs in bringing these lawsuits, notwithstanding the general abrogation of criminal conversation and alienation of affections, is instructive in considering the role of tort law. Plaintiffs are being injured, and they want to pursue a legal remedy. If tort law does not provide a means of civil redress, it is incumbent on members of the legal profession to articulate cogent reasons for the decision. I do not think most of the reasons articulated thus far are adequate to deny relief for so great a harm and so great a wrong.[127]

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122. *Id.* at 3.

123. *See, e.g.*, Quinn v. Walsh, 732 N.E.2d 330, 333 (Mass. App. Ct. 2000); Nicholson v. Han, 162 N.W.2d 313, 317 (Mich. Ct. App. 1968). In a California case, a former husband sued his former wife for intentional infliction of emotional distress under the following facts: during marriage, wife had extramarital relationship out of which daughter was born, but wife did not tell husband that daughter was not his biological child until dissolution of marriage when husband sought custody of daughter. Steve H. v. Wendy S., 67 Cal. Rptr. 2d 90, 91-92 (Cal. Ct. App. 1997). The appellate court held that permitting an intentional infliction of emotional distress claim on these facts would contravene the policy underlying California's abolition of the heart balm torts. *Id.* at 95-96.

124. *Quinn*, 732 N.E.2d at 330.

125. *Id.* at 339.

126. *Id.*

127. One of the most eloquent statements of this concern is in a leading treatise on tort law by Professors Harper, James, and Gray, in which they question the wisdom of complete abrogation of the torts:

> Undoubtedly the actions in question have been subjected to abuses. What is doubtful, however, is the wisdom of meeting such abuses by complete abolition of all remedies. . . . It may well be that limitation on damages and certain procedural reforms would have met the problem more satisfactorily than complete abolition. Particularly in the case of alienation, grievous wrongs are suffered and some of life's most important interests ruthlessly invaded. To abolish all remedy in such cases is certainly subject to serious question.

III. CRITIQUE OF REASONS GIVEN FOR ABOLISHING CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS

It is possible, and perhaps even to be expected, that the reasons given for abrogating these two tort theories would change over a sixty-five year period. Yet, the reasons given by commentators, courts, and legislators have remained largely the same.[128]

A. The Great Potential for Abuse/Extortion

These torts are particularly susceptible to the abuse of extortion and blackmail. This is the grandparent of all the reasons—the one that was given in support of the initial legislative efforts.[129] First, as discussed above, the theory of recovery for which abolitionists cited this reason was breach of a promise to marry, not criminal conversation or alienation of affections.[130] Notwithstanding that fact, it was and, remarkably, still is given as a reason for abrogating alienation and criminal conversation.[131] There were in the early 1900s newspaper accounts and a few cases mentioning breach of promise actions that were described as blackmail.[132] One writer, however, characterized those depictions as being driven by "misogynistic backlash" to the Sexual Revolution, based on a fear of women's newfound assertiveness.[133] Regardless of the reason for the "blackmail" scare, modern commentators[134] as well as commentators in the 1930s[135] have observed that there was no effort to substantiate the disproportionate use of the heart balm torts, in comparison with other tort theories, for purposes of extortion. One commentator writing in the 1930s argued that there were other rights of action which were at least as

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HARPER ET AL., *supra* note 8, at 534-35.

128. For other critiques of the reasons, see Kelly, *supra* note 111, at 429-33, and Jones, *supra* note 40, at 71-84. Some of my critique repeats some of theirs.

129. *See supra* note 106 and accompanying text.

130. *See supra* notes 104-108 and accompanying text.

131. *See, e.g.*, Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

132. Coombs, *supra* note 59, at 15-16.

133. Larson, *supra* note 59, at 398-99.

134. Larson, *supra* note 59, at 395 n.91; Jones, *supra* note 40, at 73-74; Kelly, *supra* note 111, at 430.

135. Feinsinger, *supra* note 11, at 1008-09 (stating that "newspaper emphasis has created an illusion of universality as to the evils of unfounded actions, coercive settlements or excessive verdicts"); Kane, *supra* note 42, at 66 ("[T]here was some justification for the resentment over the abuse of . . . breach of promise to marry, but we may seriously doubt whether these abuses were as universal or as ineradicable as to necessitate the wholesale abolition of established rights and remedies.").

susceptible of abuse as the heart balm torts.[136] In the end, the most that can be said in support of this reason is that one may intuitively think that it is true because of the great embarrassment that may be associated with sexual misconduct and the publicity that such conduct will generate.[137] Given the prevalence of adultery in contemporary society, however, it is fair to question whether a potential defendant would fear the stigma and ostracization that may have resulted during an earlier period. In summary, this is a reason for not recognizing alienation of affections and criminal conversation that was dubious when given in the 1930s and is wholly incredible now.

B. Archaic Torts Because They Treat Married Women As Property of Their Husbands

Criminal conversation and alienation of affections should be abandoned because they are based on the archaic notion that a husband has a property interest in his wife. This reason is often articulated by courts[138] and commentators.[139] It certainly has a basis in history.[140] The dramatic expansion of the third-party interference torts in 1853 in *Lumley v. Gye* has been explained as the creation of a new type of property—contract rights.[141] Before that general recognition of interference torts, the property interest of the plaintiff was grounded in the status relationship rather than the contractual rights.[142] One response to this is to argue that although the historical basis of the torts was the proprietary interest of the husband in his wife's body and services, this basis was purged when the rights of action were extended to women. Professor Chamallas notes that when loss of consortium claims were extended to women, they lost their property-like features, and in their new sentimental and nonproprietary form, they lost their favored status among torts.[143] It is tempting to argue that, like loss of consortium claims, criminal conversation and alienation of affections lost their property basis when the rights of action were extended to women. But, the argument goes too far. There is still a property element to the

136. Kane, *supra* note 42, at 67.

137. Larson, *supra* note 59, at 395 n.91.

138. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

139. Chamallas, *supra* note 5, at 341 (rejecting the torts in which "the wife is treated as the property of the husband and the marriage is organized primarily to serve the husband's sexual and emotional needs"); McDougal, *supra* note 32, at 181.

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

141. Note, *supra* note 73, at 1520.

142. *Id.*

143. Chamallas, *supra* note 48, at 528.

torts.[144] Indeed, one commentator argued that criminal conversation and alienation of affections are property-based because changes in the relationship do not alter the rights; thus, he argued, the result of the Married Women's Property Acts should have been extinction of the torts rather than their extension to women.[145] There are property aspects of the torts even in their current gender-neutral iterations: they do tend to infringe on the autonomy of a spouse who chooses to commit adultery, and they require third parties to respect the right to exclusive sexual relations—part of the rights that "run" with the relationship.

It must be admitted that there still are property characteristics of the torts. Nonetheless, it is not clear why the mutual property interests in relationships are as offensive as the former unilateral property interest in body and services. Property in the feudal sense of ownership of tangibles is not acceptable to describe relationships between people; property in that sense is far too limited for modern society.[146] Such "new property" rights based on relationships have not been considered as odious when applied to people as the old property rights based on absolute ownership.[147] For example, the plaintiff in a recent case sought to replace the property-based rationale for criminal conversation with a marital obligation of fidelity that was recognized by the domestic relations title of the Idaho Code.[148] Indeed, at least one commentator has called for a reconception of autonomy, so valued by feminists, that rejects individualism and property and stresses the importance of collectivism and relationships.[149]

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144. Dobbs, *supra* note 24, at 354-55 (describing legal status which the whole world must recognize as a form of property).

145. Lippman, *supra* note 65, at 659.

146. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see also* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

147. *See, e.g.*, Jack M. Beerman & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 947 (1989).

> A more communitarian social vision of property rights would start from the assumption that property rights are almost always shared, rather than unitary, and that they ordinarily are created in the context of relationships. This is true in the most important areas of social life, including the family, the workplace, and housing.

Id.; *see also* Green, *Relational Interests, supra* note 49, 29 ILL. L. REV. 460, 462 (distinguishing relational interests from property).

148. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994) (citing IDAHO CODE § 32-901). The Idaho Supreme Court rejected plaintiff's argument, reasoning that divorce is the exclusive remedy for the breach of any duty imposed by that code section. *Id.*

149. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989).

To state the argument as a call for abolition of the torts based on their historical roots is not to give it its full force. One of the commentators writing about the torts at the time of the first abolition movement effectively refuted that version of the argument:

> It is also urged that a consideration of the history of the action shows that it has no proper place in our modern law . . . . It is . . . argued that the wife's emancipation, which takes away the original basis for both of these actions, should have resulted in their total abolition. But this is an obvious *non sequitur* since the abolition of the original basis for the action does not necessarily prove that it has not still justification under modern conditions.[150]

Professor Brown, after rejecting the archaic basis argument, went on to conclude that alienation of affections, despite faults and the need for limitations, was still "on the whole desirable" for its effect of "discouraging the intentional breaking up of homes."[151]

Like Professor Brown, I reject the historical basis as an argument for abolishing criminal conversation and alienation of affections. I do, however, recognize that there is still a property basis inherent in the torts, and this merits examination. There are reciprocal property interests arising out of the marital relationship. Some will consider this "new" property a good thing. Others, including many feminists, will consider it bad and argue that it still poses greater dangers to women than men. Women's autonomy regarding their bodies, including sexual and reproductive rights, historically has been precarious, and remains controversial. Consequently, I think it is more threatening for the law to say to a woman that she is limited in a decision regarding sexual relations.[152] Much of this was probably embodied in the words of Roberta West Nicholson when she said, "Women do not demand rights, gentlemen, they earn them, and they ask no such privileges as these which are abolished in this bill."[153] Although reasonable people can disagree about how harmful to women are these property rights, I argue that, on balance, the good for women and society outweighs the

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150. Brown, *supra* note 11, at 505; *see also* Norton v. MacFarlane, 818 P.2d 8, 12 (Utah 1991) (stating that obsolete procedural and property theories once associated with alienation of affections are uniformly rejected, but that does not mean tort is no longer useful).

151. Brown, *supra* note 11, at 506; *see also* Kelly, *supra* note 111, at 431 ("Even though the actions were originally designed to protect a fictive right and reflected a now-antiquated view of the relation between the sexes, they have in the modern era taken on a very different and worthwhile function—that of providing a remedy for injuries of a highly sensitive nature while discouraging intentional disruptions of families.").

152. For an excellent discussion of feminist criticism of commodification of sex, see MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 230-36 (1999).

153. *Aching Hearts*, *supra* note 96.

harm to women from restricting their autonomy. First, although significant progress has been made toward economic equality between men and women, it is still true that many married women are, to a large extent, financially dependent on their husbands.[154] Moreover, marital instability and divorce in many cases have a "more pronounced social and emotional impact on women than on men";[155] that is, middle-aged divorced men are regarded more positively than are middle-aged divorced women, and the market for sexual liaisons is better for the men. Thus, I think women may derive substantial benefit from a relational interest in marriage that carries duties that must be respected by everyone. Second, I think that society benefits from marriages that have duties of exclusive sexual relations, and a communitarian perspective might require men and women to make some sacrifices of individual autonomy for the good of society.[156]

C. Potential Tort Liability's Nondeterrence of Extramarital Relations

A classic statement of this reason for abolishing the torts was given by the Idaho Supreme Court: "Deterrence is not achieved; the nature of the activities . . . that is sexual activity, are not such that the risk of damages would likely be a deterrent."[157] This is a matter of opinion, and there is no empirical evidence to support it. Indeed, it is difficult to imagine the survey instrument and the polling techniques that would substantiate or refute this speculation.[158] While I join Professor Carrington in claiming no expertise on the subject of sex,[159] I think it is an equally plausible hypothesis that the

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154. Lenore J. Weitzman, *The Economics of Divorce: Social & Economic Consequences of Property, Alimony & Child Support Awards*, 28 UCLA L. REV. 1181, 1241-63 (1981).

155. Olsen, *supra* note 55, at 1535.

156. "Communitarians believe that even . . . in a rights-conscious society, rights have limits, and involve concomitant responsibilities . . . . [They] suggested an agenda to advance commonly held social values without unduly compromising individual rights." Ackerman, *supra* note 47, at 650. Like Professor Ackerman, I am not a card-carrying communitarian, if there is such a card. *Id.* at 652 n.11, 654 n.29. I do think, however, that an approach that recognizes some limitations on individual rights and autonomy for the good of society is, or should be, an integral part of relational tort theory. *See generally* William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103 (1996) (discussing the communitarian approach to the relational tort of interference with contract). Some feminist writers also have embraced a communitarian approach. *See generally* Nedelsky, *supra* note 149 (discussing communitarian reconceptualization of autonomy and contrasting that with liberalism's concept of autonomy).

157. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994); *see also* Newton v. Hardy, 149 L.T.R. 165 (K.B. 1933) (stating that people merely "drift into a situation" without considering the legal implications).

158. *See* Jones, *supra* note 40, at 84 n.176.

159. Carrington, *supra* note 60, at 859.

prospect of tort liability could dampen the fires of sexual passion.[160] Because the financial liability will be placed on the outsider, the deterrent effect would be achieved by making the outsider less interested in the married person, not vice versa. Given that the outsider is likely to have other options that do not carry all the risks associated with the married person, the additional risk of financial liability may deter the outsider. Explaining another interference with relation tort, interference with contractual relations in the context of employment contracts, Professor Wonnell states that the objective of the tort is not to prevent the employees from breaching their contracts, but instead to deter third parties from interfering; that is, the potential tort liability decreases the value to the prospective employer (potential interfering third party) of the employee under contract.[161] Thus, the tort of intentional interference with marriage would help narrow the market for the spouse considering extramarital relations.

While I do not argue that deterrence of interference is a sufficient ground for the torts, that speculative effect seems to me as likely as the converse.

D. The Law Should Not Attempt to "Legislate" Morality

Occasionally, a critic will say that the law should not attempt to legislate morality.[162] This reason merits little attention. As one commentator has stated, "[I]t is absurd to suggest that the law bears no relationship to morality."[163] Law will deal with issues of morality, but not every moral standard or judgment will be translated into law.[164]

The criticism about legislating morality may harbor a narrower objection that the law seldom should restrict the consensual sexual activities of adults.[165] Perhaps that was the view of the attorney who disdainfully reacted to the *Hutelmyer* case on a television show: "Family values, this is

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160. *Id.* at 887 ("How sexually attractive, the Tory wonders, would be an available partner whose embrace was accompanied by a wage and bank account garnishment?").

161. Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 96 (1993).

162. McDougal, *supra* note 32, at 163.

163. Ackerman, *supra* note 47, at 661.

164. The classic example is whether law should impose a duty to rescue. *See generally* Heyman, *supra* note 47.

165. Michael E. Malamut, *Proposal for Revision of Archaic Statutes Implicating Private Consensual Noncommercial Adult Sexual Conduct*, 3 LAW & SEXUALITY 45, 66 (1993) (discussing criminal law, says "laws against fornication and adultery are primarily aimed at preserving a moral order in which marriage is the only appropriate relationship for sexual expression").

really absurd, I mean, if it was the law of New York, could you imagine? This whole city would be, like, at the courthouse all the time."[166]

Law, throughout history, has regulated sexual conduct.[167] This should not be surprising in view of the fact that sexual mores are pivotal to our society and community.[168] Moreover, as Professor Carrington points out, sexual conduct has as much effect on nonparticipants, often including children, and society as do employment relations.[169] Given that sexual conduct has often pronounced effects on others and on society, it is not surprising that the law will regulate it. The law also will leave some aspects of sexual conduct unregulated. Thus, the issue to be debated is not whether law will regulate sexual conduct, but how law will regulate it.

E. Intangible and Speculative Damages that are Subject to Prejudice/ Unseemliness of Trying to Assuage Lost Love With Money

While this argument may have had some appeal in the 1930s, the development and expansion of tort law make this argument anachronistic.[170] Damages for emotional distress are recognized both as parasitic damages and as stand-alone damages.[171] Recovery is permitted for intentional infliction of emotional distress as well as negligent infliction of emotional distress.[172] The concerns with the special problems presented by emotional injuries, principally spurious claims, ultimately have not been found by courts an adequate reason to refuse to recognize the injuries and a right of recovery.[173]

The argument that it denigrates the lofty emotions of love and affection to award monetary remedies for loss of those emotions is again an argument

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166. Jones, *supra* note 40, at 63 (quoting attorney who appeared on *Rivera Live* (CNBC television broadcast, Aug. 11, 1997)).

167. *See generally* RICHARD A. POSNER, SEX AND REASON (1992). Judge Posner describes public policy since the beginning of the Christian era as efforts to restrict sexual activity to marriage, and he notes that most Americans subscribe to that ideal. *Id.* at 243. *See also* CHAMALLAS, *supra* note 152, at 218 ("Despite its intimate character, sexual conduct is highly regulated activity, and the laws governing sex have been an especially active site of struggle over the boundary between acceptable and legally sanctionable conduct.").

168. Carrington, *supra* note 60, at 903.

169. *Id.*

170. Kelly, *supra* note 111, at 432.

171. Levit, *supra* note 48, at 140-46.

172. *Id.*

173. Chamallas, *supra* note 48, at 496 (observing that even opponents of permitting recovery for emotional injuries recognize weakness of old arguments regarding ease of presenting fake claims and difficulty of causation); Levit, *supra* note 48, at 184-88 (discussing studies substantiating the reality and severity of emotional injuries).

whose time has passed.[174] The argument of feminists and other reformers was that love and marriage are not like market relations in which commodities are bought and sold; instead, the selfless emotion of love obviates the protections provided by legal regulations, which are needed in the commercial marketplace.[175] The label "heart balm" was used during the first wave of legislative abrogation to satirize the notion that money damages could make the heart feel better.[176] Today, it is common practice to award money damages when a plaintiff has suffered loss of love and affection. Indeed, Professor Chamallas has observed that a failure to award monetary damages for emotional harm disadvantages women and devalues the injuries that they suffer.[177]

F. Attempt to Place Blame on A Third-Party When One or Both Spouses Often Are Primarily to Blame / Marriage Was Worth Very Little If It Could Be Broken Up

These related arguments are encapsulated in a statement from an early critic: "[T]he action for alienation of affections, and to a considerable extent the action for criminal conversation proceed on the hypothesis of a perfectly harmonious husband-wife relationship destroyed or impaired by a malicious, scheming and seductive intruder."[178] I see nothing about the tort theories that is based on such a presumption. Quite to the contrary, I think these torts are based on the presumption that marriages are delicate relationships, which often teeter in the balance. It is often said that marriage is hard work. That belief recognizes that spouses have to deal with many matters that are not always fun, including balancing budgets, making decisions about children, caring for aging parents and in-laws, and so forth. A third person, who offers the fun and excitement of sexual relations unencumbered by these other weighty matters, might be an attractive diversion, or more. Or, as one commentator said, "even a relatively 'good' marriage may be susceptible to . . . a Don Juan."[179] The torts of criminal conversation and alienation of affections declare providing such sexual relations out of bounds.

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174. Chamallas, *supra* note 48, at 497 ("[I]t is too late to complain about such a basic feature of the torts system, unless one is prepared to do away with large areas of tort liability.").

175. Tushnet, *supra* note 98, at 2590.

176. Note, *supra* note 27, at 1771 n.4.

177. Chamallas, *supra* note 48, at 497; *see also* Larson, *supra* note 59, at 448.

178. Feinsinger, *supra* note 11, at 995.

179. Kelly, *supra* note 111, at 431.

Why, this argument queries, should a duty be imposed on a third person not to interfere if the spouse, who wishes to engage, consents?[180] I think the answer should be that society values the relationship of marriage; society recognizes that because marriage is not always a blissful relationship, it is susceptible to outside interference; and finally, that because of these considerations, society imposes a duty on everyone to avoid interfering with marriages, at least by means of engaging in sexual relations with a married person.[181] This is the reason that I would recognize fault on the part of the third party who has sexual relations with a married person.[182] In a society that purports to value relationships, particularly marriages and family relationships, and a tort law regime that has recognized expansive and expanding duties to avoid injuring others, I think a duty should be recognized not to interfere in an existing marriage. In my view, such conduct is blameworthy.

This argument against the torts also is based on the idea that there are difficult causation and allocation of fault issues that the law should not address. The causation argument usually suggests that the participating spouse has a free will that is not overborne by the acts of the third party.[183] In tort terminology and theory, this is an argument about superseding cause.[184] Superseding cause has fallen into some disfavor among some modern torts scholars under the rationale that it is inconsistent with a comparative fault regime.[185] Superseding cause analysis is particularly

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180. *See, e.g.*, DOBBS, *supra* note 7, at 1248 ("These torts could also operate unjustly by punishing the defendant for conduct to which both participants consent.").

181. Kelly, *supra* note 111, at 431 (stating that this argument against the torts focuses on personality of plaintiff spouse and de-emphasizes maliciousness of interloper's "assault upon the marriage").

182. I thank Professor Anita Bernstein for her challenging argument that, although the unfaithful spouse may have engaged in blameworthy conduct, the third party has not. I disagree with that argument, but I appreciate the fact that one who accepts it will disagree with recognition of a tort of intentional interference with marriage.

183. *See* Note, *supra* note 73, at 1518-20. In the English action to recover damages for third-party enticement of a servant, it was unnecessary to prove that the servant's will had been overcome by the acts of the third-party interferer. *Id.* at 1520. The rationale was that the servant had no free will. *Id.* at 1526.

184. The problem was addressed in English law in 1881 in Bowen v. Hall, 6 Q.B.D. 333 (1881). The court severed the interference with contract tort from its mixed historical roots, which included the action of enticement (that included the rule of intervening will). The court limited enticement actions to menial servants, and it announced that other interferences were actionable if effected by a "malicious act." Note, *supra* note 73, at 1527; *see also* Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1204 (1996) (discussing *Bowen*).

185. *See* Terry Christlieb, Note, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161 (1993); *see also* DOBBS, *supra* note 7, at 461 (explaining that statements about intervening and superseding causes express conclusions, but they add a layer of confusion

objectionable when the harm that occurs was within the scope of foreseeable risks created by the defendant's conduct.[186] In human behavioral terms, this is an argument about free will and autonomy.[187] Again, this is a situation in which it is too late in the day for tort law to refuse to redress injuries because of such difficulties. Consider, for example the various causation standards that have been developed in tort law and beyond, including the lost chance of survival theory in wrongful death cases.[188] Furthermore, comparative fault has become prevalent in modern tort law, often crossing the chimerical boundary between negligence and intentional torts. That said, however, I do not see difficult causation questions necessarily arising in all criminal conversation and alienation of affections cases. The blameworthy conduct does cause damages, whether it breaks up a marriage or not.[189] A spouse's expectation of sexual fidelity within marriage has been destroyed, and regardless of whether the marriage is destroyed, that is an emotional harm directly traceable to the acts of the interloper. In cases in which the plaintiff claims that the interloper destroyed the marriage, the causation and degree of fault issues are no more difficult than many other types of tort cases, and they can be addressed through various causation standards (perhaps including lost chance of survival), and if a court so chooses, allocation of fault.

In the end, this argument strikes me as specious. In the difficult causation and allocation of fault issues they may present, these torts are no different from many others that modern tort law does recognize. The solicitude regarding the tortfeasor being blamed for breaking up a marriage that may already have been troubled is enigmatic.[190] Of course adultery damages most marriages; indeed, some unknowable percentage of

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rather than providing guidance regarding liability); RICHARD A. EPSTEIN, TORTS, § 10.12, at 269 (1999) (recognizing that limitations of liability based on "causal intervention" have been "widely criticized"); *cf.* Kelsey L. Joyce Hooke, Note, *Collision at Sea: The Irreconcilability of the Superseding Cause and Pure Comparative Fault Doctrines in Admiralty*, 74 WASH. L. REV. 159 (1999) (arguing that maintenance of superseding cause analysis is inconsistent with the adoption of a pure comparative fault regime in admiralty law).

186. *See, e.g.*, DOBBS, *supra* note 7, § 192; RESTATEMENT, *supra* note 8, § 281 cmt. h.

187. Woodward, *supra* note 156, at 1120-22, 1122 n.68 (explaining that the causation issue is also an issue about autonomy).

188. *See, e.g.*, Joseph H. King Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

189. *Cf.* Woodward, *supra* note 156, at 1122-23 (discussing, both from individualist and relational perspectives, the damage that an interferer causes in an interference with contract claim).

190. As the Nebraska Supreme Court observed, "[a] marriage teetering on the brink of domestic disaster should nevertheless be spared a shove over the precipice." Creason v. Myers, 350 N.W.2d 526, 528 (Neb. 1984).

marriages do not survive discovered adultery. Why are we worried about the interloper being unfairly punished?

G. Improper Motivation of Revenge as Impetus for Bringing the Action

Some courts and commentators have stated that vindictiveness or a desire to exact revenge are often strong motivations for suing for criminal conversation or alienation of affections, and such motivations have no place in tort law.[191] The Idaho Supreme Court said, "Revenge, which may be a motive for bringing the cause of action, has no place in determining the legal rights between two parties."[192] I disagree. I think that one of the principal reasons I sue someone for hitting me on the nose is that I want revenge for his violation of a right of mine. That motivation is not a good reason to abolish the tort of battery. Indeed, some theorize that the revenge motivation is a basis on which all of tort law rests.[193] So, I am willing to concede that revenge is a powerful, and indeed usually the most powerful, motivation for most criminal conversation and alienation of affections actions. If the right of action is denied, then the revenge may find some other outlet. One possibility is a "blood feud."[194] There are, of course, other, more civilized, avenues for exacting revenge, such as going on a television show and discussing how one was wronged by an adulterous spouse and partner, and perhaps even fighting on that show.[195] My guess is that most readers who place themselves in the hypothetical at the beginning

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191. DOBBS, *supra* note 7, at 1247 (stating that some courts and legislatures that have abolished the torts have been moved in part by the conclusion that plaintiffs are motivated by vindictiveness and a desire to inflict harm).

192. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

193. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 100 (1998) (positing a civil recourse theory of tort law under which tort law is about what the state gives to those whose rights have been violated in place of the right to get even). *Cf.* Walter H. Beckham, Jr. et al., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, REPORT TO THE AMERICAN BAR ASS'N 4-170 to 4-173 (1984) (hereinafter TOWARDS A JURISPRUDENCE). The committee discussed the appropriateness of punishment and retribution and concluded that punishment plays a useful outlet for the community sense of justice. *Id.* at 4-172.

194. Zipursky, *supra* note 193, at 83.

195. A more creative and effective response may be that of the wife of a politician who became the campaign chairperson of her estranged husband's opponent and offered details of her husband's unfaithfulness in campaign messages. *Reportedly Unfaithful Lawmaker's Greatest Foe is Wife*, ADVOCATE (Baton Rouge), Aug. 31, 2000, at 11A. A more atavistic response is illustrated by *Wood v. Cowart Enters., Inc.*, in which the husband confronted the paramour and beat him with a pipe. In the battery claim, the court rejected the defenses of assumption of the risk and unclean hands. No. 2000441, 2001 Ala. Civ. App. LEXIS 498, at *1, (Ala. Civ. App. Aug. 17, 2001).

of this article wanted revenge on the unfaithful spouse's partner. That seems to me a good reason for tort law to provide recourse rather than a good reason to deny a right of action. Moreover, the loss of a sense of retribution may lead to a loss of a sense of wrong.[196]

H. Interference Torts' Deterrence of a Variety of Types of Conduct, Including Mere Persuasion

Professor Dobbs identifies one of the most disturbing characteristics of all of the interference torts: they punish a broad range of conduct which can be the means of accomplishing the interference, including mere persuasion by speech.[197] This is what I consider the most effective criticism of interference torts generally, and alienation of affections and criminal conversation specifically. It is not, however, a concern that is unique to these tort theories.[198] Defamation and invasion of privacy are two well-established tort theories that often limit speech and other expression. First amendment concerns have added constitutional modifications to those tort theories.

As Professor Dobbs points out, alienation of affections covers family members who use speech to try to persuade another family member to leave a spouse. It also could cover a friend who tries to persuade one spouse to leave an abusive relationship. It could cover a potential paramour who encourages one to leave a spouse so that they could have a sexual relationship. It could cover use of "telephone sex," "chat rooms," and "cybersex" to interfere in a marriage.[199] I think Professor Dobbs is right that this tort potentially goes too far in punishing too much conduct. As with other interference torts, it becomes necessary to define what constitutes an improper means to accomplish the interference. As I discuss further below,[200] I favor a narrower intentional interference with marriage tort that

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196. Speaking of the role of retribution in criminal law, an English legal scholar expressed this view well: "Without a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition the disapproval may also disappear." TOWARDS A JURISPRUDENCE, *supra* note 193, § 4-175 (quoting A. GOODHART, ENGLISH LAW AND THE MORAL LAW 92-93 (1953)).

197. Dobbs, *supra* note 24, at 361-63.

198. I thank Professor David Robertson for assuaging my concerns regarding this criticism of criminal conversation and alienation of affections.

199. *See* Barrie Lancaster, *Latest Trend in Marital Problems: Internet Adultery*, at http://www.nandotimes.com (last visited Oct. 29, 2001); Jennifer Harper, *Sin Exists in Cyberspace, Priest Declares On-Line Adultery Virtually as Immoral?*, WASH. TIMES, June 8, 2000, at A3; Sandy Lawrence Edry, *A Virtual State of Affairs: A Better Way to Cheat: One Kiss Leads to the Next and She Finds Herself at the Hilton*, NAT'L POST, Dec. 9, 2000, at B01.

200. *See infra* notes 359-65 and accompanying text.

limits the improper means to engaging in sexual activity with a married person. As we have been reminded in recent times, what constitutes engaging in sex may vary from one person's definition to another's.[201] Most cases will not raise that issue, and those that do can be addressed, perhaps by leaving what constitutes having sex to the jury.

IV. LEGAL AND CULTURAL CONDITIONS CONTRIBUTING TO THE DEMISE OF CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS

A. Evolving Tort Law: Some Torts Are More Equal Than Others

The twentieth century was a period of rapid expansion in American tort law with recognition of new torts, new elements of damages, and new duties. New torts have included invasion of privacy, intentional infliction of emotional distress, and wrongful termination in violation of public policy.[202] New damages have been recognized in many contexts, including emotional distress, loss of enjoyment of life, and lost chance of survival.[203] Duties recognized under the theory of negligence have expanded substantially, including duties to rescue and to protect against third-party criminal activity. Indeed, the history of tort law over the last century can be summarized in a word—expansion.[204] Of course there have been periods of time and areas of tort law in which contraction rather than expansion occurred. In the midst of the general expansion, the heart balm torts stand out as a rare instance of contraction.[205] Although candidates for new torthood often do have to be pushed hard for recognition, and some fail,[206] it

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201. Consider, for example, President Clinton's speech in which he proclaimed that he "did not have sexual relations with that woman[], Miss Lewinsky." Jennifer G. Hickey, *Nation: The Lewinsky Scandal*, INSIGHT MAGAZINE, Jan. 4, 1999, at 14. Also, recent reports indicate that teenagers do not consider engaging in oral sex as "having sex." Karen S. Peterson, *Teenagers Define "Having Sex" Differently*, CHICAGO SUN-TIMES, Nov. 19, 2000, at 31; *see also* Pamela Johnson, *Are You Cheating?*, ESSENCE, Jan. 1, 2001, at 103 (discussing whether emotional attachments to nonspouses constitute marital infidelity).

202. *See generally* Bernstein, *supra* note 45 (discussing characteristics of successful new torts).

203. *See, e.g.*, Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 19-20 (1995) (discussing twentieth century expansion of tort law to recognize emotional, dignitary, and relational harms).

204. Dowling, *supra* note 46, at 488 (discussing general expansion of tort law in twentieth century).

205. *Id.* at 489 (calling heart balm legislation "probably the best modern example of restricting tort liability").

206. Bernstein, *supra* note 45, at 1544.

is a bizarre occurrence for established torts with pedigrees to be abrogated. What aspects of tort law help explain this demise?

1. The Less Than Spectacular Rise of the Ethereal Torts

Since the early twentieth century, there has been a movement in American tort law to loosen it from its moorings in recognizing recovery for only injury to physical person and property. One strand of this development has been recognition of emotional or mental injuries. Although mental distress could be recovered as an element of parasitic damages before this movement,[207] the courts were reluctant to permit recovery when the only injury suffered was emotional.[208] The other strand was recognition of injuries to relationships. Until Professor Leon Green began championing the cause of relational injuries in the 1930s,[209] American tort law paid little attention to such injuries as a distinct type of tort recovery. Professor Levit combined these two strands of development in the term "ethereal torts."[210]

The evolution of tort law in this century has seen the growing recognition of tort recovery for both emotional injuries and relational injuries. In the area of emotional injuries, for example, all or almost all jurisdictions now recognize intentional infliction of emotional distress or the tort of outrage,[211] which debuted in a 1948 Supplement to the *Restatement (First) of Torts*.[212] Relational torts have not made a similar widely chronicled march toward acceptance for a couple of reasons. The first reason is that the category of relational torts does not have boundaries that are as distinct as those of the emotional distress torts: some torts are full-fledged members of the relational torts club while others have partial memberships. Second, most of the relational torts are not new; rather, they have existed for centuries, but it is only in the last century that they have come to be considered as redressing injuries to relationships.

The category of relational torts is amorphous, consisting of a few pure relational tort theories and many occasional relational tort theories. Defamation,[213] malicious prosecution, and invasion of privacy, for example,

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207. DOBBS, *supra* note 7, at 822; Levit, *supra* note 48, at 142.

208. DOBBS, *supra* note 7, at 822; Levit, *supra* note 48, at 142.

209. *See, e.g.*, Green, *supra* note 49; LEON GREEN, CASES ON INJURIES TO RELATIONS (1940).

210. Levit, *supra* note 48.

211. DOBBS, *supra* note 7, at 826; Carl Tobias, *Intentional Infliction of Mental Distress in Montana*, 57 MONT. L. REV. 99 (1996).

212. DOBBS, *supra* note 7, at 825; Levit *supra* note 48, at 142-43.

213. Defamation comes close to being a pure relational tort. Professor Green observed that "the defamatory harm is by its very nature most apposite to relational interests." Green, *supra*

are not "pure" relational torts, but instead occasional relational torts; that is to say, these tort theories do not redress only injuries to relationships, although they may be employed in that context in an appropriate case. Perhaps the only pure relational tort of recent vintage is wrongful discharge in violation of public policy.[214] Moreover, two of the emotional injury torts, intentional infliction of emotional distress and negligent infliction of emotional distress are occasionally relational torts, often invoked in the context of relational injuries, but not applying exclusively in that context.

The second reason for the quiet march of relational torts is that most of them have existed for a long time, but they were not, until the twentieth century, thought of as redressing relational injuries. Loss of consortium, a derivative tort claim, was recognized at common law in England. It was considered, however, as redressing an injury to property—injury to the bundle of consortium interests that a husband had in his wife.[215] Loosed from its property basis,[216] loss of consortium has survived and even expanded, recognized in all jurisdictions for spouses, and recognized in some jurisdictions for loss of consortium of other family members, such as parents, children, siblings, and grandparents.[217] Alienation of affections and criminal conversation, like loss of consortium, were recognized as relational torts once the old property basis for the torts was undermined by the Married Women's Property Acts.[218] There is still some debate regarding whether interference with business interests is a property or relational tort.[219]

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note 49, at 474. The injury on which the tort focuses is damage to reputation. Because reputation exists among communities and groups of people, defamation indirectly addresses relational injury.

214. Although interference with business or contractual relations is a pure relational tort, it is not new. The seminal case recognizing the tort is Lumley v. Gye, 2 E&B 216, 22 L.J.Q.B. 463 (1853). But it arguably traces back to fourteenth century England. Dobbs, *supra* note 24, at 336. *But see* Gergen, *supra* note 184, at 1200 (discussing three theories regarding roots of the tort). According to Professor Gergen, the pre-history of the tort depends on which of the three roots one selects. *Id.* at 1200-01 n.138. *See also* Note, *supra* note 73, at 1510 (discussing the pre-*Lumley* antecedents of the tort).

215. *See supra* notes 11-13 and accompanying text.

216. Lippman, *supra* note 65, at 653-54; Chamallas, *supra* note 48, at 528.

217. DOBBS, *supra* note 7, § 310; Chamallas, *supra* note 48, at 502 & n.151, 514.

218. O'Neil v. Schuckardt, 733 P.2d 693, 696 (Idaho 1986) ("The action for alienation of affections evolved from an action protecting property interests to one protecting relational interests."). For criticism of the extension of the torts to women once the property basis was eradicated, see Lippman, *supra* note 65, at 659.

219. Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085, 1100 (2000) (contrasting the property characterization of Epstein with the relational characterization of other commentators).

The expansion of the emotional and relational injury torts has not, despite much writing about them in scholarly journals, been an unqualified success story.[220] As recent commentators have noted, the torts redressing emotional and relational injuries are second-class citizens in the torts hierarchy.[221] Courts remain skeptical about many issues, including proof of the harm and the causal connection between the defendant's act and the harm. Consider for example, the tort of negligent infliction of emotional distress for injury to a third party--bystander recovery. In the prototypical case, a parent sues a defendant who, in the parent's presence, negligently physically injures the parent's child—defendant negligently drives a vehicle and strikes the child as the parent watches.[222] Most jurisdictions have recognized a right to recovery for bystander emotional distress,[223] but they have struggled with the restrictions that should be placed on such recovery.[224] The uneasiness of courts and some legislatures with bystander recovery should not be surprising. It has weaknesses from both strands of ethereal torts: it provides recovery for an injury that is both purely emotional and it is, in a sense, a relational injury, in that some relationship (usually family) is required for recovery. The injury is not actually an injury to the relationship, but the emotional distress that results is a product of the relationship. Thus, proof of the relationship serves to corroborate that extreme emotional distress likely would result from observing injury to the person.

The demise of criminal conversation and alienation of affections began in the 1930s as the ethereal torts were beginning their arduous ascent. Criminal conversation and alienation of affections have been, since the

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220. Levit, *supra* note 48, at 163-74 (discussing "significant institutional barriers" that have limited development of ethereal torts).

221. Chamallas, *supra* note 48, at 500 ("Like emotional harms, relational injuries continue to rank at the bottom of the legal hierarchy of injuries."); Levit, *supra* note 48, at 163-74.

222. Dillon v. Legg, 441 P.2d 912, 915 (Cal. 1968).

223. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 534 n.3 (1994).

224. California was the first state to recognize such a tort recovery with distinct elements that should be considered in *Dillon*. 441 P.2d at 912-28. Because of concerns that the tort was too ill-defined and perhaps that liability was being expanded too much, the California Supreme Court tightened the tort and transformed the *Dillon* considerations into elements that must be proven in *Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989).

The Louisiana Supreme Court first recognized bystander recovery in *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990). The court articulated four elements that had to be satisfied for recovery. *Id.* at 570. The legislature responded by enacting Civil Code article 2315.6, in which it adopted the elements from *Lejeune*, but restricted the family relationship to specified relationships--spouse, child, parent, sibling, grandparent, or grandchild. LA. CIVIL CODE ANN. art. 2315.6, n.15 (West 1997). The Louisiana Supreme Court arguably restricted recovery beyond the language of the article in *Trahan v. McManus*, 728 So. 2d 1273, 1278-80 (La. 1999).

demise of the property underpinning, pure relational torts, and the recovery is solely for emotional injuries. On the relational torts side, criminal conversation and alienation of affections are like loss of consortium in their recognition of remedy for injuries to family relationships. They are, however, more susceptible to criticism than loss of consortium on two grounds. First, in loss of consortium claims, the relative has been the victim of some freestanding tort, usually of the well-established variety, and the relative has suffered some injury, usually physical. Thus, the derivative nature of the loss of consortium claim distinguishes it from criminal conversation and alienation of affections. This point will be discussed more fully below. Second, in loss of consortium claims the relative has been the unwilling victim of a distinct tort; in contrast, in criminal conversation and alienation of affections, the spouse may be a willing participant in conduct that does not constitute a separate tort.

2. Special Problems of Relational Torts

a. The Favored Derivative Relational Torts

Setting aside the occasional relational torts, there are tort theories that redress only injuries to relationships. Included among these are torts and elements of damages that address family relationships (wrongful death, loss of consortium, criminal conversation, and alienation of affections), business relationships (interference with business or contractual relations), and employment relationships (wrongful discharge).[225] Among these, wrongful death and loss of consortium are different from the others in that they are derivative, anchored to some independent tort to the relative of the consortium plaintiff, and usually[226] a tort that caused death or physical injury. In this way, wrongful death and loss of consortium, are similar to bystander negligent infliction of emotional distress. Tethered to "hard" injuries to person, these torts do not cause the courts as much concern about permitting recovery. [227] Accordingly, it is wrongful death and loss of consortium that are the most widely accepted and least controversial among

225. There are other relationships, such as political and community or social. *See* Green, *supra* note 49.

226. I qualify this because there are loss of consortium cases in which the relative of the plaintiff suffered reputational or emotional injury rather than physical injury. *See, e.g.*, Minion v. Gaylord's Int'l Corp., 541 So. 2d 209, 209 (La. Ct. App. 1989) (children of victim of malicious prosecution brought loss of consortium claims).

227. Chamallas, *supra* note 48, at 502 ("Tort law . . . generally treats relational injuries merely as supplemental to 'primary' claims for physical harm . . . .").

the pure relational torts.[228] Witness the troubled careers of the other pure but freestanding relational torts. First, the successful assault on criminal conversation and alienation of affections is discussed above. Second, although many jurisdictions recognize some form of intentional interference with business or contractual relations,[229] it is also one of the most controversial torts, provoking considerable scholarly criticism.[230] Finally, some jurisdictions recognize the tort of wrongful termination, while others do not, and the scope of the tort in those jurisdictions that recognize it varies.[231] Thus, being freestanding relational torts puts alienation of affections and criminal conversation in the camp of the weaker relational torts.

It is a significant characteristic of the relational torts that the freestanding relational torts are so suspect and controversial. In a world of "new property," where relationships are more important than ownership of tangible property,[232] it is remarkable that tort law does not provide more protection against conduct that directly interferes with relationships.[233] It is indicative of the fact, however, that tort law has recognized emotional and relational harms, but it has not provided protection against such harms at the same level as it has to harms to physical property and person. Some commentators, noting this imbalance, have described this as a residual historical bias and one that has a disparate impact on women, who suffer more emotional and relational injuries and suffer more from such injuries

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228. *Id.* at 501 (labeling wrongful death and loss of consortium as the most important bases for compensation for negligent interference with relationships).

229. *See generally* DOBBS, *supra* note 7, ch. 32; Gergen, *supra* note 184, at 1180-81.

230. *See, e.g.*, Dobbs, *supra* note 24; Dowling, *supra* note 46; Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982).

231. *See generally* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW ch. 8 (2d ed. 1999). I limit the discussion here to the tort of wrongful discharge in violation of public policy. I recognize, however, that some jurisdictions treat breach of the covenant of good faith and fair dealing as a tort theory.

232. *See supra* notes 48-50, 146-149 and accompanying text.

233. *See* Levit, *supra* note 48, at 150 ("The development of protection for relational interests evidences a communitarian view of the role of tort law. . . . The vision being promoted is one of responsible social interaction: a commitment to the value of the permanency of relationships and to appropriate treatment within those relationships.").

than do men.[234] Tort law evolves to recognize new conditions in changed society, but old biases and priorities do not give way quickly or easily.[235]

b. The Disfavored Freestanding Relational Torts

Even within the weaker subset of pure and freestanding relational torts, there are characteristics that suggest additional sources of concern with criminal conversation and alienation of affections. All of the freestanding relational torts are interference torts[236]—that is, someone interferes with the relationship, and that interloper is the tortfeasor and defendant.

i. The Marriage Interference Torts Compared With the Business Interference Torts

The business interference torts are among the most controversial theories in tort law, and yet they are more widely accepted than criminal conversation and alienation of affections.[237] All states in the United States now recognize some version of interference with business or contractual relations.[238] They provide a logical point of comparison with criminal conversation and alienation of affections because of similarities: they have

234. Chamallas, *supra* note 48; *see also* Koenig & Rustad, *supra* note 203, at 19-20, 24-29 (discussing the evolution in tort law to recognize emotional and relational injuries to women, but also noting that gendered nature of tort remedies is obscured, and tort reform movement will restrict rights won by feminists).

235. Chamallas, *supra* note 48. Professor Bernstein has described the paradoxes that are most helpful to tort wannabes. Bernstein, *supra* note 45, at 1544-52. Lack of novelty and less "tortness" (being tied to contract or property law) are two of the paradoxes that facilitate recognition. *Id.*

236. DOBBS, *supra* note 7, at ch. 31-32. Chapter 31 of Professor Dobbs' treatise is entitled "Interference with Family Relationships," and it includes discussion of criminal conversation and alienation of affections. Chapter 32 is entitled "Interference with Contract and Economic Opportunity Generally," and it includes discussion of intentional and negligent interference with business and contractual relations and wrongful discharge from employment. *See also* MARSHALL S. SHAPO, TORT AND INJURY LAW, 965-91 (2d ed. 2000).

237. *See* ERIC RASMUSEN, AN ECONOMIC APPROACH TO ADULTERY 17 (Center for Law, Economics, and Business, Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 322, 2001) (noting that while alienation of affections has gone out of style, "[o]ddly enough, the similar action of tortious interference with contract is alive and well."), *available at* http://www.law.harvard.edu/programs/olin_center.html.

238. Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 292 (1994). Louisiana was the last state to recognize the tort in 1989 in *9 to 5 Fashions, Inc. v. Spurney*, 538 So. 2d 228 (La. 1989). Louisiana recognized a very limited version of the tort and has adhered to that version. Healthcare Mgmt. Servs., Inc. v. Vantage Healthplan, Inc., 748 So. 2d 580 (La. Ct. App. 1999) (recognizing limitation of *Spurney*).

common historical roots;[239] they are freestanding relational torts; and they are third-party interference torts. Moreover, the debate over the appropriate theory and scope of the business interference torts was being waged around the time of the first wave of legislative abrogation of the heart balm torts.[240] While I do think the comparison is informative in considering the role of relational tort law, I do not mean to suggest that every aspect of law and regulation that is appropriate for business and commerce is appropriate for marriage and family.[241]

Critics of the business interference torts argue that they undermine the doctrine of efficient breach.[242] The efficient breach doctrine is traced to Oliver Wendell Holmes' statement: "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."[243] Proponents of efficient breach theory thus argue that there is nothing wrongful about a breach, and that by permitting efficient breaches, the law facilitates movement of resources to their most valuable use.[244] The critics thus point out that the business interference torts discourage efficient breaches by discouraging third parties from offering better deals as alternatives to existing business relationships. "If a person is free to breach a contract and pay damages, why should it be tortious for a third party to induce the contract party to do what she is free to do?"[245]

In some cases, the business interference torts would impose liability on a third-party interferer when contract law would not impose breach of contract liability on the party terminating the relationship. This situation is analogous to criminal conversation and alienation of affections because one of the partners to a marriage can terminate it on the basis of irreconcilable differences. Consider, for example, an employee who has an employment-

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239. Dobbs, *supra* note 24, at 341; Gergen, *supra* note 184, at 1200-01. Professor Gergen describes three theories regarding the historical roots of the tort.

240. Gergen, *supra* note 184, at 1211-18.

241. *Cf.*, DiFonzo, *supra* note 53, at 958-59 ("To insist on the business nature of marriage vows not only demeans their importance, but emphasizes enforcement at the cost of the very trust most beneficial to the fulfillment of those vows."). Indeed, I think some feminists who decry the commodification of sex will object to the comparisons and the use of commercial and business language to draw some parallels. For discussion of feminist opposition to the commodification of sexual relations, see CHAMALLAS, *supra* note 152, at 230-36.

242. *See, e.g.*, EPSTEIN, *supra* note 185, § 21.3 (1999); Perillo, *supra* note 230, at 78-91; Dowling, *supra* note 46, at 506-10.

243. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). It has been argued, however, that the efficient breach theory results from a misreading of Holmes. Perillo, *supra* note 219.

244. Woodward, *supra* note 156, at 1139.

245. Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 674 (1999).

at-will contract with her employer, and she is induced by another employer to leave that employment and accept employment with him. According to the Restatement (Second), the interference would be actionable.[246] Why, critics ask, should a third party be liable for inducing the employee to do what she had a right to without incurring any liability for breach of contract?[247]

The comparison to interference with marriage is particularly apt.[248] Given that divorce is available now without proof of fault,[249] marriage is in ways like an at-will employment relationship: it can be terminated for good reason, bad reason, or no reason at all. If a spouse is free to end a marriage at will, why then should a third party be liable for contributing to the end of the marriage?[250] Although a comparison between interference torts in the context of terminable at-will business relations and in the context of marriages that can be terminated without proof of fault is instructive, I will preface that comparison by recognizing that marriages are not exactly like terminable at-will business relationships. The state and the law do become involved in the dissolution of marriages, but not in the termination of at-will contracts. The state involvement suggests that the state recognizes the implication of third-party interests in a way that it does not with privately handled at-will contracts. Thus, even if efficient breach doctrine might call for limitations on the business interference torts, such limitations might not necessarily be appropriate for interference with marriage torts.

One response applicable to both the business interference torts and the marriage interference torts is that the focus on whether the party to the

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246. RESTATEMENT, *supra* note 8, § 766 cmt. g; *see also* E.D. Lacey Mills, Inc. v. Keith, 359 S.E.2d 148, 155-56 (Ga. Ct. App. 1987) (stating "malicious and wrongful interference with such employment by another is actionable although the employment be at will").

247. *See, e.g.*, Perlman, *supra* note 230, at 90-91 ("If the efficiency principles of contract law suggest that a third party using lawful means should not be liable for inducing breach of enforceable promises, then a fortiori, the same rule should apply to unenforceable expectancies."); EPSTEIN, *supra* note 185, at 584.

248. I thank Professor Bernstein for challenging me on this point. She argues that the business interference torts, for whatever problems they have, continue to require intent to harm the relationship, and in this criminal conversation and alienation of affections differ from the business interference torts because intent to harm the relationship usually is not the purpose of the third party. While I agree that most third parties do not have the subjective purpose of damaging a marriage, I think if knowledge of the existence of the marriage is established (as I would require under my proposed modified tort of intentional interference with marriage), then the objective definition of tortious intent, knowledge to a substantial certainty, is satisfied. *See, e.g.*, Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955).

249. *See generally* DiFonzo, *supra* note 53.

250. DOBBS, *supra* note 7, at 1247; Ira M. Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1297 (1996); McDougal, *supra* note 32, at 182-83.

contract could be liable for breach at the time of termination does not consider the full range of potential liability. An at-will employee, for example, may be free to leave his employer, but there is conduct that she can engage in while employed that may give rise to a claim for breach of fiduciary duty, trade secrets violation, or unfair trade practices.[251] Similarly, a spouse may be free to terminate a marriage, but adultery is conduct that occurs while married, and many states still treat it as illegal, even if they do not impose civil liability.[252]

A second response is given by a defender of the business interference torts. Professor Woodward argues that the contractarian view—if no breach of contract damages could be awarded against the party, then no tort liability should be imposed on the third-party interferer—ignores the bigger picture of relationships and the benefits that they bestow on those who are not parties to the relationship.[253] According to Professor Woodward's argument, because contract law does not cover all the interests implicated in relationships, there is room for tort law, and contract law should not provide the boundaries for recovery.[254]

Professor Woodward's defense applies with at least equal force to criminal conversation and alienation of affections. Third parties, most significantly children[255] in some cases, and society at large have interests in the stability of marriages. Just as contract law does not occupy the whole

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251. ROTHSTEIN, *supra* note 231, §§ 7.11, 7.12.

252. The plaintiff in an Idaho case sought, unsuccessfully, to expand the action for criminal conversation to her husband. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

253. Woodward, *supra* note 156, at 1170-76.

254. *Id.* at 1179. *Contra* Perlman, *supra* note 230, at 90 ("Rules regulating third-party interference should advance whatever policy contract law pursues in withholding enforcement of an agreement.").

255. Recently, the controversy of whether children suffer lifelong harms from divorces was rekindled by Dr. Judith Wallerstein's controversial book, *The Unexpected Legacy of Divorce*. WALLERSTEIN ET AL., *supra* note 29. *See* Kim, *supra* note 30 (discussing the controversy over the effects of divorce on children). Polls indicate that Americans do believe that divorces harm children. In a poll conducted for Time/CNN in September 2000, 64% of those responding to the survey said that children are "almost always" or "frequently" harmed by divorce. *Id.* The concern over the effects of divorce on children also is indicated by a bill recently introduced in Colorado, the Children of Divorce Protection Act, that would have required married couples with dependent children, after filing for divorce, to undergo a year of counseling, focusing on "current and future potential harm to children" before the divorce would become final. H.R. 01-1342, 63rd Gen. Assem., 1st Reg. Sess. (Colo. 2001); *see* Trent Seibert, *Women: Divorce Bill Scary*, DENVER POST, Feb. 27, 2001 at A-13. The bill provided some exceptions to the counseling requirement, including cases of physically or psychologically abusive spouses. *Id.* The bill failed in a legislative committee. Kyle Henley, *Irreconcilable Differences Kill Divorce Bill*, GAZETTE (Boulder), March 9, 2001, at A1. After the bill's defeat, the sponsor of the bill, state representative Dave Schultheis, said, "This bill, I consider, is a shot across the bow of the culture of divorce. It is a battle against the status quo, and it is a battle for our children." *Id.*

field of business and protect all of the interests implicated by contracts, family law, which addresses the termination of marriages, may not occupy the whole field of marriages and protect all of the interests implicated.

Third, differences between criminal conversation and alienation of affections on the one hand and the business torts on the other make the at-will argument less forceful in the marriage context. The harm redressed by criminal conversation, at least, is not necessarily the termination of the relationship. Stated differently, a plaintiff is suing for economic damage resulting from the destruction of the business relationship in the business interference torts. In contrast, a plaintiff in a criminal conversation action is suing for the emotional distress caused by the adultery, regardless of whether the marriage is terminated.

Another argument against the business interference torts, based on the efficient breach doctrine, is that the business interference torts deter efficient breaches, and this thwarts movement of resources to their most valuable use. This is often framed as a criticism of the business interference torts for thwarting competition.[256] Indeed, the privilege or justification of competition is an issue that often arises in the business interference cases.[257] I have never read an argument that criminal conversation and alienation of affection should be abolished because they stifle competition in the market for sexual relations. Nonetheless, society's attitudes toward adultery and the incidence of adultery[258] indicate that this may be one of the reasons for opposition to the torts. Indeed, the argument regarding personal autonomy is a version of this argument: a married person is still an autonomous human being and may choose to have extramarital sexual relations. Is this not a competition, open markets, and efficient breach argument?

Professor Epstein forcefully articulates one aspect of the competition argument when he says, "[i]t clogs competition even to hint that T might quit his job with P before he is allowed to entertain offers from D."[259] Does the same competition and efficient breach argument apply to marriages? That is, should a spouse be able to sample the market for better offers before deciding whether to terminate the marriage? Although the question may sound icily economic as applied to marriages, one could argue that making that option available may save marriages because one may go out on the sexual relations market, entertain competitive offers, and decide to

256. *See, e.g.*, Woodward, *supra* note 156, at 1171; EPSTEIN, *supra* note 185, at 576.

257. Woodward, *supra* note 156, at 11 18-19; EPSTEIN, *supra* note 185, at 576.

258. *See infra* notes 335-38 and accompanying text.

259. EPSTEIN, *supra* note 185, at 584.

remain in the marriage.[260] Under a more restrictive regime, one may so strongly wish to test one's market power that one is willing to end the marriage, if necessary, to do so. This is not an easy issue. Even if we choose to adopt a regime that attempts to control competition in the extramarital sexual relations market, we must admit that such a regime will not be completely successful.[261] Moreover, that failure to deter some extramarital sexual competition may save some marriages.

One final point of comparison between the business interference torts and the marriage interference torts is in order. One commentator, in comparing the torts, wrote as follows: "In one sense, liability for interference with contract is less justified than even the alienation of affections action. In the business realm the injured party may still sue under the contract, but under the heart balm statutes the rejected lover has no remedy at all."[262] At first blush, this sounds like a weak justification for the marriage interference torts vis-a-vis the business interference torts. Does it amount to nothing more than, when a person gets hurt, there must be someone to sue? In part, that is the argument. But, the purpose of tort law is, in part, to provide civil redress so that "[t]he *law* reigns, not fits of private vengeance."[263] Interference with family is an area where emotions are particularly hot, and the potential for blood feuds is the highest. If tort law will not provide a remedy against the spouse, leaving that area of regulation to divorce law, and the interference is considered wrongful, then tort law's providing a remedy against the third-party interferer might serve a well-recognized objective of the civil law—providing recourse for a wrongfully inflicted injury. Maybe that is one reason why, even after the abolition of criminal conversation and alienation of affections in most jurisdictions, plaintiffs continue trying to find tort theories that can be made to apply to adultery.[264]

ii. The Marriage Interference Torts Compared with the Employment Torts

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260. Notwithstanding the pain that is caused by disclosed or discovered extramarital affairs, some marriages survive. *See, e.g.*, SPRING, *supra* note 5; Kay Miller, *After an Affair*, STAR TRIBUNE (Minneapolis-St. Paul), Jan. 23, 2000, at 1E.

261. As already discussed, courts, legislators, and commentators who have favored abolition of criminal conversation and alienation of affections have argued that extramarital sexual activity is not deterred by law. I am not willing to concede that it has no deterrent effect whatsoever, but I do concede that, like most tort law, it will not deter all misconduct.

262. Dowling, *supra* note 46, at 489.

263. Zipursky, *supra* note 193, at 84.

264. For a discussion of alternative theories pursued by plaintiffs, see *supra* notes 115-27 and accompanying text.

The employment tort that is most analogous to the marriage interference torts is third-party interference with an employment relationship. That tort already has been covered above as an interference with business tort. There is an additional employment relational tort that merits comparison with the marriage interference torts. Wrongful termination in violation of public policy[265] is different from the other freestanding relational torts in that it involves only two parties. It is the one type of interference tort in which the interference is perpetrated by a party to the contract or relationship.[266] It also is one of the newest tort theories, tracing its origins to Professor Lawrence Blades' article, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power.*[267]

There are three interesting parallels between wrongful termination and the marriage interference torts that are worth noting. First, this is a context in which, under contract law, the parties to the relationship usually are free to terminate the relationship without liability. Employment at will is the starting point for virtually all American labor and employment law.[268] Under this doctrine, employers have almost unfettered freedom to terminate employees. In the absence of an agreement to the contrary, either party to an employment relationship may terminate the relationship for a good reason, a bad reason, or no reason at all.[269] When Professor Blades proposed the tort of abusive discharge, he recognized that his proposal represented a significant impingement of tort law in an area theretofore

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265. Most of the theories of recovery for employment termination are breach of contract theories, such as breach of express contract terms, promissory estoppel, and breach of the covenant of good faith. In contrast, wrongful discharge in violation of public policy is a relational tort theory. *See* DOBBS, *supra* note 7, at § 454; ROTHSTEIN, *supra* note 231, ch. 8.

266. Professor Dobbs states that breach of a contract to which the breacher is a party technically is not an interference. DOBBS, *supra* note 7, at 1287. Nonetheless, Dobbs recognizes that, since one can view such torts as interference with one's own contract, they belong in the same chapter of the treatise with the business interference torts. *Id.*

267. Lawrence Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). The tort actually can be traced to as early as 1959. *See* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 865 (1994) (citing California case). It did not take hold, however, until the publication of Professor Blades' groundbreaking article. Professor Blades actually argued for a broader abusive discharge tort than the current versions of wrongful discharge in violation of public policy, but his article fueled the debate over tort law's impingement on employment at will. Blades, *supra*.

268. Montana is the exception, having enacted the Montana Wrongful Discharge from Employment Act of 1987, which imposes a good cause termination requirement on most jobs beyond a probationary period. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (2001).

269. Blades, *supra* note 267, at 1405 (quoting Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915)). The source of the "rule" is generally said to be American legal writer Horace Gay Wood in A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). ROTHSTEIN, *supra* note 231, at 671.

governed by contract law. Nonetheless, given the importance of employees' interest in the employment relationship, he argued that it was appropriate to circumvent the "unyielding" contract principles in favor of "the more elastic principles of tort law."[270] Thus, where the interest of the individual and society is significant and contract law provides no remedy, it is appropriate to fashion a relational tort.

Marriage is governed largely by family law. There is a principle of family law regarding marriages that is analogous to employment at will—no-fault divorces.[271] Under the no-fault divorce regime, parties to a marriage essentially can terminate the relationship for "irreconcilable differences"[272]—good reason, bad reason, or no reason at all. The absence of a family law or contract remedy, however, should not be a reason to refuse to recognize a relational tort if that is appropriate in consideration of the interests of the injured individual, third parties, and society.[273] I think the societal and individual interests are sufficiently important to justify the incursion of tort law into family law. Note, however, that the remedy for a marriage interference tort is not against the other party to the relationship, as in wrongful discharge, but instead it is against a third-party interferer. Should a tort recovery be recognized against the unfaithful spouse?[274] That issue is beyond the scope of this article, and it involves creating greater tension between tort law and family law, which generally permits no-fault

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270. Blades, *supra* note 269, at 1422.

271. I am not fighting the battle of fault-based versus no-fault divorces or regular marriages versus covenant marriages. *See generally* DiFonzo, *supra* note 53. Louisiana and Arizona have legislatively adopted covenant marriage, which makes divorce less accessible. LA. REV. STAT. ANN. §§ 9:272 to 9:275.1 (West 1998); ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (West 2000). Regarding the Louisiana act, see Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998). Covenant marriage bills have been proposed in several other states. Lynn Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31 (1999); *see also* Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1 (2000). The Colorado legislature recently considered a highly publicized bill that generally would have required spouses with children to undergo a year of counseling before divorcing. *See* H.R. 01-1342, 63rd Gen. Assem., 1st Reg. Sess. (Colo. 2001). The bill ultimately was defeated in committee. *See* Henley, *supra* note 255, at A1.

272. DiFonzo, *supra* note 53, at 884-88.

273. *See* Victor E. Schwartz, *The Serious Marital Offender: Tort Law as a Solution*, 6 FAM. L.Q. 219, 225 (1972). Professor Schwartz argues for recognizing a tort action against a serious marital offender—that is a spouse. A tort action against a divorcing spouse does not undermine the no-fault divorce regime, he argues, because fault is not being used as the basis for the divorce, and the conduct that is actionable is beyond the "normal hostile acts" of divorcing spouses. *Id.* at 225.

274. This is what the plaintiff argued in Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

divorces.[275] Although I am not prepared to argue for a tort theory against a spouse who commits adultery, leaving the matter for now to divorce law, I think there are some good arguments for such a theory.[276]

A second parallel between the marriage interference torts and wrongful discharge is that courts are reluctant to get involved in second guessing decision makers in divorces and employment terminations. Although both involve among the most gut-wrenching of emotional injuries, courts do not like to deal with the difficult issues of determining whether wrongful conduct has occurred, allocating fault, and determining causation. One judge, dicussing employment at-will, recognized the courts' reluctance in both areas as follows: "Our law chooses not to involve itself with the unfair and subjective treatment leading to these broken at-will relationships in a

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275. Schwartz, *supra* note 273. Professor Schwartz did not take issue with the no-fault divorce regime, but he argued for the need for tort-based liability for "serious marital offenders." He contended that an act of adultery would not satisfy the requirements of the tort, but he did say that if a spouse committed adultery and "brag[ged] about it with the intent to cause his spouse resultant serious emotional harm," whether that act satisfied the tort should be a jury question. *Id.* at 225. Ironically, in light of Schwartz's point, it was the unfaithful spouse's nondisclosure of his extramarital affair that made viable the wife's battery claim against him in *Neal v. Neal*, 873 P.2d at 875. For discussion of the *Neal* case, see *supra* notes 118-120 and accompanying text. One researcher concluded, on the basis of a survey, that talking about all the details of an affair is more likely to save a marriage than is trying not to focus on the affair and avoiding talk about it. Francine Russo, *Will He Cheat? Will You?*, REDBOOK, June 1, 2000, at 132 (discussing survey by San Diego-based psychological consultant Peggy Vaughan). Regarding tort theories against a spouse, see also Ellman & Sugarman, *supra* note 250, at 1268 (considering arguments for and against recognition of a tort of spousal emotional abuse under the rubric of intentional infliction of emotional distress; concluding that such recognition probably would be a mistake).

276. *See* LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 283-86 (1998) (arguing for a tort theory of adultery). I thank Professor Chamallas for her insight that my failure to take a position on the tort theory against the unfaithful spouse weakens the analogy to wrongful termination. Although I am not prepared to argue for that tort in this article, I think the arguments for such a theory of recovery are persuasive.

Professor Larson has argued for a tort theory of sexual fraud. Larson, *supra* note 59. Professor Dan Subotnik, in response to Larson, has argued that if an obligation were imposed on nonmarried sexual partners to tell the truth, then such a tort should be recognized for spouses. Dan Subotnik, *"Sue Me, Sue Me, What Can You Do Me? I Love You" A Disquisition on Law, Sex, and Talk*, 47 FLA. L. REV. 311, 358 (1995). Subotnik suggests that we are not ready to recognize such a tort between spouses. *Id.* Of course, this is precisely the set of circumstances under which the plaintiff in *Neal v. Neal* stated a viable battery claim against her ex-husband. 873 P.2d at 875. She argued that, had she known of her ex-husband's adultery, she would have found sexual relations with him offensive, thus constituting a battery. *Id.* at 876. Moreover, she argued that her consent was negated by her husband's misrepresentation through nondisclosure. *Id.* at 876-77. Thus, the Idaho Supreme Court recognized a viable battery claim without creating a new tort of sexual fraud. *Id.*

manner which is somewhat analogous to no-fault divorce."[277] One commentator has posited that a reason that American jurisdictions unanimously adopted employment at will was that it enabled the courts to dismiss cases in which they did not think they were competent to evaluate the termination decisions of employers.[278]

A third parallel between the marriage interference torts and wrongful discharge is that employment is one of the major relationships that people have, not only providing a livelihood, but also contributing much to a person's identity.[279] The relationship is deemed so important that it is necessary for tort law to be invoked to protect the relationship. The same thing might be said of marriage.

B. Feminism, Liberalism, Sexual Libertarianism, and Communitarianism

Feminists led the campaign to abolish the heart balm torts.[280] Male legislators in Indiana "gallantly" yielded their support, and even playfully voted token opposition before becoming serious and supporting the feminists.[281] Feminists of the early 1900s through the 1980s, rebelling against the image of the powerless, economically dependent, and sexually repressed woman, embraced the liberal ideals of individualism and autonomy, which called for government to keep its hands out of regulation of sex through law. Some feminists in the 1990s began questioning whether a sexual free market adequately protects and advances the interests of women, while libertarians have continued to support nonintervention by government and a free market of sexual choice and activity. At the same time, communitarian ideals of collectivity and responsibility have attracted some feminists to reconceptualize their views of legal regulation of sexual activity. Moreover, some torts theorists have embraced communitarianism and seen its precepts as supporting a larger role for relational torts.

Feminists, liberals, libertarians, and communitarians—what do they have to do with criminal conversation and alienation of affections? What role

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277. Nicholas v. Allstate Ins. Co., 739 So. 2d 830, 850 (La. Ct. App. 1999) (Caraway, J., dissenting), *rev'd*, 765 So. 2d 1017 (La. 2000).

278. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

279. Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 719 (1991) ("The identification of personality with employment elevates employment to a very high ranking among the non-economic interests valued by Americans.").

280. *See supra* notes 92-114 and accompanying text.

281. *Aching Hearts*, *supra* note 96 (reporting that five men voted "no" "in a spirit of fun" before changing their votes).

have various ideologies played in the demise of the heart balm torts? In short, feminists, fueled by liberal views of autonomy and individualism, spearheaded the assault on the heart balm torts.

Recently, some feminist scholars have called for re-examination of two of the heart balm torts. Professor Mary Coombs, in describing the role of feminists in abolishing the breach-of-promise tort, recognized that feminists took the position they did to help women break out of the subservient and dependent role they played in traditional marriages.[282] She observes that they perceived it to be in women's best interest in the long run, and to do otherwise would have had ideological costs.[283] She observes, however, that although the breach-of-promise tort was "imperfect," it did provide a remedy for women who had suffered real injuries.[284] Her thesis, then, is that feminists today should not be as dismissive of the actions of "traditional" and "activist right-wing" women as were the feminists who fought against the breach-of-promise tort.[285]

Professor Larson, in an article that has attracted considerable attention, advocated revisiting the tort of seduction and, from its ashes, resurrecting a new tort of sexual fraud.[286] She recounts the role of the earlier feminists, and like Professor Coombs, she concludes that feminists took such active roles in the anti-heart balm movement because the success was a symbolic victory, replacing the Victorian concept of economically dependent and sexually passive women who were no more than men's property, with a new conception of emancipated women.[287] She notes the tension between the rhetoric of women being depicted as golddiggers and men as victims on the one hand, and the feminist goal of advancing a new vision of women on the other hand.[288]

When the second wave of anti-heart balm legislation came in the 1970s, it occurred at the same time that many other laws governing sexual relations were in a state of change, including rape laws and sexual harassment law.[289] It also occurred at a time when feminism had become a major force in American society.[290] Professor Larson, in proposing the new tort of sexual fraud, argues that feminist adherence to the liberal value of autonomy will

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282. Coombs, *supra* note 59, at 14.
283. *Id.* at 17.
284. *Id.*
285. *Id.* at 21-23.
286. Larson, *supra* note 59.
287. *Id.* at 397-99.
288. *Id.* at 394-401.
289. *Id.* at 400.
290. Sinclair, *supra* note 103, at 96-97 (discussing the societal and legal changes of the 1960s and 1970s wrought by feminists).

not better the position of women. She argues that many women remain economically dependent on men in traditional relationships.[291] In view of that reality, the libertarian rhetoric which opposes legal regulation of sexual activity does not serve women well.[292] Thus, she urges feminists to re-examine their allegiance to the libertarian "sexual free market"[293] and to support "a sexually nonrepressive, yet interventionist, regime of sexual regulation in the interests of women."[294] This view leads her to propose the tort of sexual fraud.

Professor Larson is not alone in her view that the liberal ideals of autonomy and individualism and the libertarian mantra of nonregulation are not adequate to advance the best interests of women. Professor Nedelsky has argued that feminists need to redefine the liberal ideal of autonomy in a way that includes communitarian ideals.[295]

Another commentator has urged a re-examination of law governing the premarital relationship.[296] She posits that the argument from the anti-heart balm movement that love should not be commodified led to mandatory rules regarding return of engagement rings and a refusal on the part of courts to consider the claims of women for the investments they make in preparation for marriage.[297]

Libertarians, for their part, call for abstinence on the part of government—leaving sexual conduct to the free market. Professor Carrington's prototype of the Sexual Libertarian Senator is characterized by a belief that individuals should make their own choices.[298] It is obvious that libertarian ideology has been helpful to feminists in many battles, such as reproductive self-determination. It is not clear, however, that libertarian principles serve women equally well in other contexts.

Communitarian thinking has had an impact on tort law. For example, Professor Levit wrote that relational torts "evidence a communitarian view of the role of tort law. . . . [in which] [t]he vision being promoted is one of responsible social interaction."[299] Professor Chamalias has argued that deep biases embedded in tort law continue to relegate emotional and relational torts, and concomitantly women's injuries, to a lower status in the hierarchy

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291. Larson, *supra* note 59, at 427-28.

292. *Id.* at 432-33.

293. *Id.*

294. *Id.* at 381.

295. Nedelsky, *supra* note 149. For a discussion of communitarian ideology applied to relational torts, see *supra* note 156 and accompanying text.

296. Tushnet, *supra* note 98, at 2587-91.

297. *Id.* at 2618.

298. Carrington, *supra* note 60, at 864-69.

299. Levit, *supra* note 48, at 150.

of torts, which favors the male-oriented physical and property injuries.[300] Although communitarian ideology seems consistent with, and supportive of, tort law's protection of relational and emotional interests, that does not mean that all proponents of communitarian ideology believe tort law should expand its coverage of emotional and relational injuries. For example, Professor Robert Ackerman has argued for limitations on emotional distress and relational injury recoveries as a way of controlling the "tort lottery."[301] He is particularly critical of the heart balm torts, writing that determining the cause of the breakup of a marriage requires "judicial involvement in intimate and complex human relationships to a disturbing degree."[302] Sounding more libertarian than communitarian,[303] Ackerman argues that the abolition of the heart balm torts was a move in the right direction--keeping courts out of people's bedrooms.[304]

What happens then, when feminism, which had aligned with liberalism, and at times libertarianism, but now questions the marriage, looks wistfully at communitarianism? Do criminal conversation and alienation of affections look better? The answer is not clear. Professor Chamallas, who writes so powerfully about the subordination of the emotional and relational torts which disadvantages women, does not like the heart balm torts. She writes that, although adultery is harmful conduct, it is no longer useful as a legal category.[305] She contends that the harm resulting from adultery is "not the sort of injury that the law ought to redress."[306] She bases this primarily on the historical roots of the tort in which women were treated as their husband's property and her fear that recognizing the torts would replicate the sexist ideology of an earlier era.[307]

In this melange, it is difficult to say which movements or ideologies or combinations thereof, would favor or oppose an interference with marriage tort. It is not far-fetched to suggest, however, that feminism, tinged with communitarianism, should favor such a tort.

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300. Chamallas, *supra* note 48 *passim*.

301. Ackerman, *supra* note 47, at 667-68.

302. *Id.* at 669-701 (citation omitted).

303. As he certainly has a right to sound. Professor Ackerman states that, although he is sympathetic with communitarianism, he is not a "True Believer." *Id.* at 652 n.11 and accompanying text.

304. *Id.* at 670.

305. Chamallas, *supra* note 5, at 338.

306. *Id.* at 341.

307. *Id.*

C. Regulation of the Market and Regulation of the Family: A Comparative Historical Perspective

A comparison of the history of legal regulation of the commercial market and regulation of the family in the United States yields some insights that may be relevant to the demise of the marriage interference torts. Professor Frances Olsen describes market and family as two spheres of social activity which have been viewed as constituting a dichotomy.[308] The family sphere has been characterized as female, private, and altruistic, and structuring people's affective lives, whereas the market has been envisioned as male, public, and individualistic, and structuring people's productive lives.[309] Olsen describes the three stages of the historical evolution of legal regulation of the market and the family. For the market the stages are as follows: first, the feudal period of hierarchical organization and laws that maintained the hierarchy; second, the rise of the free (laissez-faire) market in which the state largely withdrew from regulation of the marketplace; and third, the welfare state with significant regulation of economic activity.[310] Olsen describes the similar historical stages of regulation of the family: first, the feudal family with a hierarchy that was fortified by heavy regulation by law; second, liberalization of the family in which government withdrew and changed the laws that ossified the hierarchical relations, thus moving family relations toward equal juridical rights between men and women; and third, the stage of the regulated family in which government, through courts, legislatures, and agencies, has stepped back in to address, through regulation, issues of inequality and abuse.[311] The movement in the market to a welfare regime has moved the market toward reduced individualism and a new hierarchy, whereas increased regulation of the family has moved it away from hierarchy and toward individualism.[312]

Feminists, in seeking liberalization of the hierarchical family, argued for individual freedoms. According to Olsen, the focus of family reform on individualism has made family relations resemble market relations.[313]

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308. Olsen, *supra* note 55, at 1498.

309. *Id.* at 1498-1501.

310. *Id.* at 1513-15.

311. *Id.* at 1516-18.

312. *Id.* at 1528.

313. *Id.* at 1519. However, reformers who spearheaded the anti-heart balm legislation wielded an argument that was grounded on differentiating matters of love from transactions in the commercial markets. Tushnet, *supra* note 98, at 2589-90. They argued for a "firewall between personal, disinterested love relations and the selfish market." *Id.* at 2589. Thus, it was both unnecessary and unseemly to attempt to assuage emotions damaged in matters of love with money damages.

As for reform efforts, Olsen criticizes perpetuating the dichotomy. Trying to make the family more like the market, replicates both the successes and the failures of the market.[314] The juridicial equality of the market is not adequate or appropriate for the family. As for the individualism of the market, as applied to the family, such individualism "discounts communal ties and promotes isolation."[315]

What does the comparative history of regulation of the market and family have to do with the demise of criminal conversation and alienation of affections? First, it sheds some light on why the torts fell. Second, it may provide some insights into whether they are likely to be revived and whether they should be.

As for the history, feminists supported heart balm legislation in the 1930s and again in the 1970s. The revulsion toward the torts was based upon a view of them as relics of the feudal period from which they come.[316] Although women who were injured were able to use the torts to recover, feminists saw them as cementing the hierarchy of the feudal family in place, and they preferred the individualism and autonomy that had emerged in the market. Even today it is the clash between the historical roots of the torts and modern views of the equality of the sexes that leads to the most robust denunciations of the torts.[317]

What does or should this historical perspective forecast for marriage interference torts? The answer is not clear, but some observations are relevant. Many view the family as having now moved, albeit at a slower pace than the market,[318] into a period in which the state becomes involved, once again, in regulation. Recall that during the feudal period the role of government regulation of family was to ossify the unequal relationships. Such has not been the case in the recent period of regulation. One purpose

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314. Olsen, *supra* note 55, at 1530.

315. *Id.*

316. It is not surprising that during the feudal period, criminal conversation and alienation of affections were based on hierarchical relations and notions of a husband's property. As Professor Olsen explicates the feudal period, there was no separation between the market and the family. *Id.* at 1516. Both market and family were based on a hierarchy that was considered to be the natural order of things. *Id.* at 1513, 1516.

317. *See, e.g.*, DOBBS, *supra* note 7, at 1247-48.

> [T]he torts have become offensive because they have, sometimes quite explicitly, treated a spouse as the property of the other spouse and because they are thoroughly inimical to the freedom of every human being to choose their associations and to depart dangerous, stultifying, or deeply unhappy homes if they choose.

Id.

318. The lag theory posits that changes in the family replicate changes in the market, but the rate of change for the family lags behind that of the market. Olsen, *supra* note 55, at 1513.

of government regulation has been to help women both in the market and at the intersection of market and family. In the market, for example, feminists supported anti-discrimination in employment law.[319] Federal anti-discrimination law and the anti-harassment law thereunder have assisted women in pursuing equality in the workplace. In contrast to the marriage interference torts, it has not bothered feminists that women have been depicted as victims of men's power in the anti-discrimination laws. Indeed, they have embraced that image and argued that victimization has made the regulation necessary.[320] Federal law also has been called upon to regulate market activity so as not to disadvantage women due to the unequal burdens they bear with family responsibility. The Pregnancy Discrimination Act amendments of Title VII[321] and the Family and Medical Leave Act[322] are examples.

Feminist support of federal and analogous state discrimination law indicates that feminists favor some governmental regulation of the market and perhaps the family. Does that support extend to only public law? As discussed above, some modern feminists have argued for reinstitution or reconsideration of modern versions of some of the heart balm torts.[323] Moreover, other torts commentators have discussed the case for tort theories against abusive spouses.[324]

In comparing the current state of regulation of conduct in the market and the family, some have noted that there is more regulation of the commercial market than of sexual conduct[325] or the family. For example, leading commentators on tort law have noted that, although family relations are "among the most delicate and most important in our society," they receive only limited protection under tort law.[326] As discussed above, the tort of interference with business is recognized, in some form, in all states,

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319. *See, e.g.*, *id.* at 1552.

320. *Id.* ("[A] anti-discrimination law legitimates women's complaints of unfair treatment and provides women with a vehicle for fighting back against institutions that oppress them.").

321. 42 U.S.C. § 2000e(k) (1994).

322. 29 U.S.C. §§ 2601-2654 (1994 & Supp. V 1999). Although the FMLA does not distinguish between men and women in the entitlements it creates, the Act itself states that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." *Id.* at § 2601(a)(5).

323. *See* Larson *supra* note 59 (proposing a new tort of sexual fraud); *cf.* Coombs, *supra* note 59 (suggesting that breach-of-promise to marry tort plaintiffs were too cavalierly shunned by feminists who supported abolition of the cause of action).

324. Schwartz, *supra* note 273; Ellman & Sugarman, *supra* note 250.

325. Larson, *supra* note 59, at 412 ("Many scholars have noted the asymmetric legal protection provided within the commercial as opposed to the sexual sphere.") (citation omitted); Rasmusen, *supra* note 237, at 17.

326. HARPER ET AL., *supra* note 8, at 499-500.

although its appropriate parameters is a controversial topic.[327] In contrast, the marriage interference torts have been abolished in jurisdiction after jurisdiction. If family follows the market into a state of increased regulation, it is not far-fetched to think that some type of marriage interference tort might be a part of such increased regulation. It is not necessary that a modern tort of interference with marriage be based on anachronistic principles regarding men's property interests in their wives.[328] If the family is following the market, then legal theoreticians should overcome the common revulsion with the prior conceptualization of the torts of criminal conversation and alienation of affections and examine whether a modern iteration of the torts is an appropriate private law regulation.

D. American Society and Sexual Mores

Tort theoreticians posit that tort law reflects society's values.[329] If marital fidelity and supposed concomitant family stability are highly valued by American society, then why have the torts of criminal conversation and alienation of affections been in decline for over sixty-five years? Two issues merit attention here. First, what do Americans say they believe about adultery? Second, what are the practices of Americans regarding marital sexual fidelity?

First, when surveyed, an overwhelming percentage of Americans say that adultery is wrong.[330] Indeed, the percentage so indicating earns the United States standing as the most sexually conservative nation in the

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327. *See supra* notes 237-247 and accompanying text.

328. *See* Larson, *supra* note 59, at 381 ("The identification of the tort of sexual fraud with women's passivity and with hostility to sex is not a necessary one, but rather reflects the convergence of contingent social and historical forces.").

329. *See, e.g.*, Marshall S. Shapo, *In the Looking Glass: What Tort Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567, 1569 (1995) ("Tort jurisprudence is a relatively accurate reflector of American society's basic principles for microgovernance.").

330. Scot Lehigh, *Everything You Always Wanted to Know About the Sexual Revolution But Probably Didn't Ask*, BOSTON GLOBE, May 14, 2000, at E1 (discussing scholarly paper comparing attitudes about sex in twenty-four European and Asian countries, finding that 80% of Americans surveyed said that extramarital sex is always wrong); Handy, *supra* note 54. Although the demise of the marital interference torts began in the 1930s, more abrogations occurred in the 1970s and 1980s. Because of that and because surveys and polls were not a national fetish in the 1930s, this section will discuss survey information regarding the last thirty years. My guess is that the percentage of Americans saying adultery is wrong would have been higher in the 1930s than it is now. Thus, my question would be the same then as now: When an overwhelming majority of the population says something is morally wrong, should tort theories addressing that conduct be abrogated?

Western world.[331] A comparison of recent surveys with similar surveys in the late 1970s indicates that more Americans now believe adultery is wrong than believed that in the 1970s.[332] It probably is not surprising that adultery is less acceptable now than it was during the "sexual revolution" of the 1960s and 1970s.

Regarding practice, it is very difficult to get reliable data on how many married people have extramarital sex. A recent survey suggests that either a fairly high percentage of married people are having affairs, or at least, many Americans perceive that to be true. In the same survey in which about 85% said they believe adultery is morally wrong, 69% said they knew at least one husband who had an affair, and 60% said they knew at least one such wife.[333] In that survey, 62% said they "thought less" of the adulterous husband, and 56% said they thought less of such a wife, notwithstanding about 85% saying they believe adultery is wrong.[334]

It is common political rhetoric today to discuss family values,[335] and the topic was not invented by former Vice President Dan Quayle. Yet, for all the talk, it seems appropriate to question whether Americans' love affair with marriages with sexual fidelity as a cornerstone is exaggerated. The surveys indicate that extramarital sex does occur at some significant level. Moreover, books, movies, and television make it appear that extramarital sex is commonplace, and make it appear romantic and even heroic.[336] My point is not to bemoan the sordid state of Hollywood,[337] but instead to

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331. Lehigh, *supra* note 330.

332. Handy, *supra* note 54.

333. *Id.*

334. *Id.*

335. Olsen, *supra* note 55, at 1497; *see also* Larson, *supra* note 59, at 433 n.254.

336. I do not believe this requires citation of much authority, but consider, for example, the book and movie *The Bridges of Madison County*, in which the female protagonist has an extramarital affair with a man who comes to her farm while her husband and children are away. The book and movie end with the man leaving, and the woman staying behind, and the reader or viewer apparently supposed to feel that it is a tragedy that she feels imprisoned in her dull life. ROBERT JAMES WALLER, THE BRIDGES OF MADISON COUNTY (1992); THE BRIDGES OF MADISON COUNTY (Warner Bros. 1995). The producers of the recent television show *Temptation Island* chose to subject "committed" but unmarried couples to sexual temptation. The producers rejected use of married couples because that would have been encouraging adultery. Walt Belcher, *"Temptation Island" Is No Paradise*, TAMPA TRIB., Jan. 11, 2001, at 4. *Cheating Spouses: Caught on Tape* on the UPN network is a horse of a different color. It definitely shows acts of adultery, although it probably is not fair to characterize it as promoting adultery. *Cheating Spouses: Caught on Tape* (UPN television broadcast, Oct. 20, 2000).

337. I need not do that since the Federal Trade Commission's study regarding the marketing of R-rated movies, music, and video games to children and the subsequent Congressional hearings undoubtedly will result in reform. *See* Betsy Streisand, *Slasher Movies the Family Can Enjoy: Hollywood Can Find Loopholes in Its Promises*, U.S. NEWS & WORLD REP., Oct. 9, 2000, at 50.

suggest that Hollywood and the various media have a significant impact on Americans' views on what is morally acceptable, or at least, on what sexual practices occur with some frequency.

In the end, what can be said about sexual mores regarding adultery is that a very high percentage of Americans say adultery is wrong, probably some not insubstantial percentage engage in adultery, and most Americans believe adultery occurs fairly often and believe that they know someone who has engaged in it. There is a disconnect between the ideal and the actual, or what is perceived to be actual.

Regardless of the views on marriage and sexual mores, much is being written and spoken about the general decline of morality and traditional values in the United States.[338] Even if Americans might believe that one can have an extramarital affair and still be a moral person, the issue of sexual fidelity could be swept up in a campaign for a "return" to traditional values and morality.

V. SHOULD AN INTERFERENCE WITH MARRIAGE TORT BE RECOGNIZED?

Only nine states now recognize either criminal conversation, alienation of affections, or both. Setting aside for a moment what a modified tort theory of interference with marriage should look like, consider first whether such a theory of recovery should be recognized.

To begin with, a strong case never was made for the abolition of criminal conversation and alienation of affections.[339] It bears repeating that it is a remarkable event that established tort theories that redress devastating emotional injuries were abolished without a compelling case having been made for their abolition. That alone is not a reason, however, that should sustain the renaissance of such torts. I think there are good reasons for states to consider recognizing a new interference with marriage tort.

A. Redress for Interferences with Family Relations

As discussed above, tort law in the last seventy years or so increasingly has recognized tort recovery for emotional and relational harms. In view of the fact that many jurisdictions recognize theories that redress direct injuries to economic and employment relationships, the absence of theories that redress direct injuries to family relationships, specifically marriage, is

338. *See, e.g.*, David Broder, *Voters Worried America is Backsliding*, ADVOCATE (Baton Rouge) June 30, 1999, at 7B.

339. *See supra* Section III.

conspicuous.[340] One can explain the difference by saying that family relationships are private matters involving affective aspects of life, and courts are not well suited to addressing such matters. It is not clear, however, why courts are incompetent to deal with such matters. Consider, for example, courts' recent forays into emotional injuries and employment issues.

The refusal to provide tort redress for interference with the marital relationship may indicate several undesirable things about tort law in the United States. Professor Chamallas has noted that to cordon off emotional and relational harms from judicial competence is to maintain in tort law the disfavored status of injuries suffered to a greater extent by women.[341] As other commentators on tort law have observed, the abolition of the torts has left no means of redress at law when "grievous wrongs are suffered and some of life's most important interests ruthlessly invaded."[342] Leaving persons with devastating emotional injuries, without recourse at law, could lead to self help. At least, it leaves people with the belief that they were victims of wrong for which the law provides no redress. Finally, if tort law provides redress for interference with employment and business relationships but not a family relationship, what message does that send about the relative importance of family relationships in our society? If one rejects the incompetence of the court to address affective issues and the other reasons regarding the limitations of tort law given in the past for abolition of criminal conversation and alienation of affections, such as nondeterrence and insoluble causation and blame issues, then one is left with the answer that family relations are not as important as employment and business relations. That very well may be true.

It is also questionable whether palpable injuries to one of the most significant relationships in our society should be left to coverage under an occasional tort theory, such as intentional infliction of emotional distress. For the employment relationship, the movement has been in the opposite direction—to recognize a direct tort theory for abusive discharges and interferences with the employment relationship.[343] If the relationship of marriage is important enough to be protected by tort law, should plaintiffs

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340. HARPER ET AL., *supra* note 8, at 499-500 (stating that although family relations are among the "most delicate and important in our society," they are given little protection under tort law).

341. Chamallas, *supra* note 48, at 499.

342. HARPER ET AL., *supra* note 8, at 535.

343. Many states have recognized the tort theory of recovery for wrongful discharge in violation of public policy. Some states have codified wrongful discharge actions. *See, e.g.*, MONT. CODE ANN. §§ 39-2-901 to 39-2-915 (2001); LA. REV. STAT. ANN. § 23:967 (West 1998).

be made to try to fit their claims into occasional relational tort theories? They will seldom be able to convince a court that adultery is outrageous enough to constitute intentional infliction of emotional distress. If it were, then criminal conversation or alienation of affections would be recognized.[344]

In sum, it is a gaping and, for me, inexplicable hole in tort law coverage to fail to provide some theory of recovery for interference with marriage.

B. Harm Suffered by Women to a Greater Extent

I realize that feminists historically have supported abolition of criminal conversation and alienation of affections. I think the questions raised by some modern feminist writers about the position of the feminists regarding the heart balm torts demands an answer: Was it appropriate for feminists to support the abolition for the purpose of destroying stereotypes of women when the tort theories offered individual female plaintiffs who were injured a means of redress, and if it was, does such a position remain appropriate now?[345]

Women suffer more from adultery than men suffer. Professor Chamallas cites numerous writers for the proposition that men suffer a greater emotional injury from discovering that their spouses have engaged in adultery than do women; she describes the injury as a kind of emasculation and a wound to men's "manly pride."[346] On the other hand, Professor Larson argues that women, as the "emotional workers," are more likely to suffer emotional injury than men.[347] I do not wish to speculate whether men or women suffer a greater emotional injury upon learning of a spouse's adultery. The injury is great for both men and women.[348] I do argue, however, that the collective injuries to women are greater for two reasons. First, the survey data regarding extramarital sexual activity suggest, and most people would guess, that married men engage in adultery more than married women.[349] Second, if discovered adultery leads to divorce, as it

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344. Scamardo v. Dunaway, 694 So. 2d 1041, 1042 (La. Ct. App. 1997); Quinn v. Walsh, 732 N.E.2d 330, 338 (Mass. App. Ct. 2000).

345. *See* Coombs, *supra* note 59, at 15-19; Larson, *supra* note 59, at 397-401.

346. Chamallas, *supra* note 5, at 340-41.

347. Larson, *supra* note 59, at 448-49.

348. *See* SPRING, *supra* note 5.

349. *See* Rasmusen, *supra* note 237, at 2 n.1 (discussing "conventional wisdom" and a case study in a Virginia county).

often does,[350] the collateral losses of women are likely to be greater than those of men; women bear the brunt of the economic and life opportunity costs. Although women have made some strides toward economic independence, it is still true that many married women are, to a large extent, economically dependent on their husbands.[351] Anti-heart balm reformers in the 1930s argued for a view of marriage in which emotions, not economics, controlled decisions.[352] It should not be a stunning revelation to state that the view of the reformers which called for insulating marriage issues from the cold economic forces of the market was not realistic then and certainly is not today.[353] Money and economics matter in matters of the heart—both at the point of marriage and divorce. If a divorce occurs, quite often the woman will have more difficult financial circumstances,[354] and, if there are children, she may still have the principal child raising responsibilities. Moreover, both the disadvantaged financial circumstances and the family responsibilities are a result of the woman's investment in the marriage.[355] I do not suggest that a tort theory for interference with marriage would provide a remedy for all the economic injuries flowing from adultery and divorce. I do contend, however, that married women who divorce generally suffer economic loss as well as emotional harm. If women do suffer greater

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350. *See, e.g.*, Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994); Hutelmyer v. Cox, 514 S.E.2d 554, 559 (N.C. App. 1999), *review denied*, 514 S.E.2d 146 (N.C. 1999), *appeal dismissed*, 542 S.E.2d 211 (N.C. 2000).

351. *See, e.g.*, Larson, *supra* note 59, at 427-28 ("Despite notable advances in recent decades by an elite group of American women, persistent economic dependency and tenacious sex roles continue to make connection to a man an important avenue to a stable and secure life for many women."); *see also* Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 63-66 (1991) (discussing views of some that no-fault divorce has badly hurt women and children economically).

352. Tushnet, *supra* note 98, at 2615.

353. *Id.*

354. Professor Perry analogizes a divorce to an accident in tort law and identifies primary, secondary, and tertiary costs of a divorce. Perry, *supra* note 351, at 66-70. The secondary costs, which she identifies as "economic costs to the individuals and to society include the economic costs to the spouse who has sacrificed or compromised her career in order to further the interests of her marriage." *Id.* at 68; *see also* Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 WOMEN'S RTS. L. REP. 109 (1996) (arguing that divorcing spouse's interest in the property of their spouse's enhanced earning power should be recognized). In the *Hutelmyer* case, the court cited the plaintiff's evidence of loss of income, life insurance, and pension benefits as part of the evidence supporting the award of $500,000 in compensatory damages. *Hutelmyer*, 514 S.E.2d at 561. Professor Rasmusen notes that a spouse's threat to divorce upon discovering adultery will not be credible and thus will not deter adultery if the faithful spouse has made substantial investments in the marriage. The investments mean the faithful spouse has too much to lose. Rasmusen, *supra* note 237, at 2.

355. *See* source cited *supra* note 154 and accompanying text.

collateral loss from adultery, then not providing a tort remedy for interference with marriage will adversely affect women more than men.

Providing a theory of recovery for interference with marriage might not provide a substantial source of recovery for all or most plaintiffs. Some defendants would have the resources to satisfy a judgment, and some would not. This is no different from most other intentional tort theories. Many defendants in a battery claim will not be able to satisfy a judgment, unless they have an insurance policy that covers it.[356] The potential that some judgments will be unrecoverable, however, has not been seen as a reason to abolish the tort theory of battery. In the context of adultery, if divorce results, the unfaithful spouse may contribute to satisfaction of a judgment against the third party, and I do not see that as negative.[357]

C. Current Views in Society Favoring Reconsideration

There is a public discourse about family values and morality and concern with moral decline in American society. There is also a movement to change the no-fault divorce regime.[358] Perhaps most importantly, feminist scholars and others have questioned both some of the results and some of the underlying arguments of the heart balm abolition movement. Feminists and others are re-examining the very real emotional and economic injuries suffered by women before, during, and after marriages and questioning whether current family and tort law provide adequate protection. In a society in which such views are being expressed, it is appropriate to reconsider the need for an interference with marriage tort.

I realize that there is substantial opposition, wielding well-reasoned arguments, to recognition of such a tort. I know that the recognition of a modified tort, such as the one I propose in the next section, will create many problems. Nonetheless, in contemporary American society, with the issues being debated, the time has come to reconsider the marriage interference torts.

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356. *See* Smith v. St. Paul Guardian Ins. Co., 622 F. Supp. 867, 867-77 (W.D. Ark. 1985) (holding that liability for alienation of affections was covered by insurance policy).

357. I realize that some may read into this the old arguments against criminal conversation and alienation of affections on the ground that they are particularly susceptible to blackmail or extortion. I do not think, however, that the incentives to settle such a suit are significantly different from the incentives in other types of tort actions.

358. *See* Jones, *supra* note 40, at 86-88 (citing this as a reason for reconsidering the torts).

VI. A PROPOSAL FOR AN INTENTIONAL INTERFERENCE WITH MARRIAGE TORT

There are problems with alienation of affections and criminal conversation. Professor Dobbs' critique of interference torts raises a number of concerns. The one that troubles me the most is that the interference torts potentially impose liability for interference perpetrated by speech.[359] Applying that criticism to alienation of affections, parents or others might be sued for trying to persuade their child to leave an abusive spouse or companion. Although parents and others might avoid liability on the basis of privilege,[360] the potential coverage of speech as interference is troubling. An angry spouse might sue a would-be suitor who uses speech to try to entice a married person. Although it could be argued that if the propositioned spouse does not leave his spouse or commit adultery, the plaintiff spouse would be unlikely to recover, the potential for trivial lawsuits and the potential infringement on speech are vexing.

The concern with application of the torts to speech may be viewed as part of a larger criticism of the interference with business torts—that the tort does not proscribe specific conduct, but instead a state of mind.[361]

A concern I have with criminal conversation is that the tort does not require knowledge on the part of the interferer that the person is married. Writing about the interference with business tort, Professor Wonnell argued that the requirement of knowledge of the existence of the relationship is a crucial element of the tort to avoid overdeterrence.[362] I think the same is true of interference with marriage. Not requiring knowledge would impose too great a burden on the market for sexual relations. Moreover, the knowledge requirement ensures that the interferer has a high level of culpability or blameworthiness. Without the knowledge requirement, one could be liable for interference with marriage for having sexual relations with a married person who misrepresented his marital status.

In light of the foregoing concerns and others and in recognition of the fact that most states abolished the existing torts, I would confine the revised tort to the specific conduct of adultery. Thus, the tort would borrow the wrongful act requirement from criminal conversation and the knowledge of the marriage requirement from alienation of affections. I do not think that proof of alienation of love and affection should be retained as an

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359. Dobbs, *supra* note 24, at 361-63.
360. RESTATEMENT, *supra* note 8, § 686.
361. Dobbs, *supra* note 24, at 347-50
362. Wonnell, *supra* note 161, at 143-45.

element of the tort.[363] That should be left to valuation of damages. Thus, the elements of the new intentional interference with marriage tort would be the existence of a valid marriage, defendant's knowledge of existence of marriage, and sexual relations between the defendant and the spouse. Consent of the nonparticipating spouse, a defense to criminal conversation, should be a recognized defense and should be understood to include marriages in which the spouses have agreed that exclusive sexual relations is not part of their marriage.

This proposed tort is a narrow relational tort that certainly does not address all interferences with the marital relationship.[364] It does, however, address the type of interference that most Americans say is morally wrong and the one that seems to provoke the greatest sense of outrage and injury in married persons.

VII. CONCLUSION

Criminal conversation and alienation of affections have been under assault for sixty-five years, and there is not much left of them. The abolition of two old torts in a time of general expansion of tort liability is a remarkable occurrence, but few in the legal profession have remarked on it. Although the reasons usually given for abolition of these torts are unpersuasive, the demise can be understood in terms of changes in tort law, ideological movements, and changes in societal views and values. The *Hutelmyer* case brought the torts to the nation's attention briefly several years ago. Notwithstanding that brief notoriety (or perhaps because of it), it is likely that they will be abolished in the few states that continue to recognize them in the near future.

I have argued that the case never was made effectively for the abolition of the torts. Further, I have argued that there are good reasons to recognize a revised tort theory that provides redress for intentional interference with the important relationship of marriage. If recognized, would that tort theory

363. Jones, *supra* note 40, at 87 (noting problems with proof of existence of love and affection and suggesting that proof of adultery might be sufficient).

364. Professor Chamallas posed the question whether I think the tort should be limited to marriages in which the couple has children. That is a narrowing of the tort that I do not favor, but I do think the arguments for the proposed tort are strongest in that context. The potential harmful effects of adultery on children is a justification for the intervention of tort law to protect the third-party interests. *See supra* notes 169, 255-56 and accompanying text.

prevent adultery and save families? Of course it would—just like the tort law of battery prevents people from hitting each other and saves bodies.[365]

365. I will not close without making clear that my title exaggerates the effect that I believe the proposed tort would have. Nonetheless, complete deterrence has never been required by tort law to justify the existence of a tort. As I have suggested earlier, I think that tort law often recognizes theories of recovery as a reflection of society's values and for other reasons, even when the deterrent effect may be minimal. What conduct is deterred, for example, by the tort of intentional infliction of emotional distress?