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Falling out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina

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Falling Out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*

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INTRODUCTION

Assume Bill has met Robin on the Internet. He portrays himself as a single doctor. After the tenth date Robin and Bill have sexual relations. Can Bill's wife sue Robin? Absolutely!

... Bill has signed a separation agreement that says he and his wife can live as if unmarried in all respects. It is signed, notarized, and drafted by attorneys. It doesn't include a third

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party waiver. Bill tells Robin they have been legally separated. She is skittish about the fact that he is separated until she reads the language from his separation agreement that says they can live as if they were not married. And it is, after all, notarized. Feeling assured, they proceed to have a romantic relationship. Can Bill's wife sue Robin? Absolutely!¹

Absolutely—if you live in North Carolina. Though a majority of states have abolished the “heart balm” torts of criminal conversation and alienation of affections,² these torts are “alive and well in North Carolina.”³ At common law, criminal conversation enabled a husband to sue his wife's lover for money damages.⁴ These damages were thought to compensate him for the injury to his spousal right of his wife's fidelity.⁵ Though this classic case has changed over time, criminal conversation still exists in North Carolina as a cause of action to seek recovery for the defendant's sexual intercourse with the plaintiff's spouse.⁶ The tort requires two elements: (1) an existing marriage between the spouses plus (2) sexual intercourse between the defendant and plaintiff's spouse during coverture.⁷ In the past decade, North Carolina plaintiffs have enjoyed damages exceeding

1. Mary Nell Craven, *Teutonian Triangles*, FAM. F. (N.C. Bar Ass'n Family Law Section, Raleigh, N.C.), June 2007, at 1, 1, available at http://family.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=6459.

2. Alienation of affections is the sister “heart balm” tort of criminal conversation. It allows “[a] plaintiff [to seek] damages for the third party's role in estranging the affections of his or her spouse,” which usually means a loss of consortium. 1 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 5.45, at 386 (5th ed. 1993). The basis of this cause of action is that the defendant deprived the plaintiff of his “conjugal rights to the society, affection and assistance of his wife.” *Id.* (quoting *Chestnut v. Sutton*, 207 N.C. 256, 257, 176 S.E.2d 743, 743 (1934)).

3. *See id.* § 5.44, at 386. The states that have abolished criminal conversation include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See id.* § 5.45, at 387 n.666 (1993 & Supp. 2008). The District of Columbia has also abolished this tort. *See id.*

4. LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS 20 (1998).

5. *Id.*

6. 1 REYNOLDS, *supra* note 2, § 5.45, at 386.

7. *See Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996). “‘The fact that the wife consented, that she was the aggressor, that she represented herself as single, that she was mistreated or neglected by her husband, that she and husband were separated through no fault of her own, or that her husband was impotent, [are] not valid defenses.’” DAN DOBBS, THE LAW OF TORTS § 442, at 1246 (2000) (quoting *Kline v. Ansell*, 414 A.2d 929, 930 (Md. Ct. App. 1980)).

one million dollars when they successfully pursued a criminal conversation claim.⁸ The continued existence of the “heart balm” torts in North Carolina is a subject of controversy among family law practitioners, the state legislature, and the state supreme court.⁹ This Comment will focus on the tort of criminal conversation. Alienation of affection is the other “heart balm” tort usually discussed in conjunction with criminal conversation. Though alienation of affection will be analyzed briefly when comparisons with criminal conversation are relevant,¹⁰ alienation of affection is not the focus of this piece.¹¹

This Comment will begin with a brief history of the tort of criminal conversation and its origins at common law. Part II will discuss the status of the tort in North Carolina today, how it has developed in the case law, and the debate on whether to abolish it. Part III will argue for the abolition of criminal conversation in North Carolina. Criminal conversation should be abolished in North Carolina because its origins are outdated and irrelevant, it is susceptible to abuse by blackmail and excessive damages awards, it does not effectively deter marital infidelity, and it discourages collaborative divorce.

I. THE HISTORY OF CRIMINAL CONVERSATION IN THE UNITED STATES AND NORTH CAROLINA

A. *Criminal Conversation at Common Law*

The roots of criminal conversation are in seventeenth century English law.¹² Historically, criminal conversation was based on two major legal precepts: adultery¹³ was a criminal act, and women had

8. See, e.g., *Hutelmyer v. Cox*, 133 N.C. App. 364, 514 S.E.2d 554 (1999) (affirming a million dollar jury verdict for the plaintiff); see also *infra* Part II.C.

9. See, e.g., *Craven*, *supra* note 1, at 1; see also *infra* Part II.

10. See *infra* notes 210–16 and accompanying text.

11. The elements of alienation of affection are discussed *supra* note 2.

12. William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L. J. 985, 1003 (2001).

13. “Adultery” for purposes of this Comment is defined as *habitual* sexual intercourse between two people who are not married. See N.C. GEN. STAT. § 14-184 (2007) (classifying adultery as a Class 2 Misdemeanor); see, e.g., *Nicholson v. Hugh Chatham Mem’l Hosp., Inc.*, 300 N.C. 295, 303 n.1, 266 S.E.2d 818, 823 n.1 (1980) (noting that the only sexual relationship that North Carolina law protects is that between married partners); *State v. Kleiman*, 241 N.C. 277, 279–80, 85 S.E.2d 148, 151 (1954) (noting that a single act of illicit sexual intercourse is not fornication and adultery as defined by § 14-184, but that habitual sexual intercourse for two weeks was sufficient to constitute the offense).

no legal status.¹⁴ At common law, adultery was illegal.¹⁵ Adultery was severely punished in ancient civilizations, and the punishments were worse for women than men.¹⁶ Historians noted the disparities in punishment between men and women.¹⁷ For example, “[t]he infidelity of the husband is far from having similar consequences. The woman could not complain of it.”¹⁸ Some civilizations permitted the man to kill his wife’s seducer with no legal repercussions and allowed the adulteress to be mutilated by dogs.¹⁹ Some punishments were intended to publicly humiliate the adulteress, such as “running of the gauntlet” nude.²⁰ The extreme and public punishments for adultery were evidence of how seriously society valued marital fidelity but were also illustrative of the inequalities between the sexes within the institution of marriage.

The barbaric treatment of adulteresses in ancient civilizations was somewhat diminished in English law. At English common law, criminal conversation focused more on the plaintiff’s property right in his wife rather than the humiliation of the adulteress.²¹ Blackstone

14. See, e.g., JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 17 (Rapelje Howell trans., Little, Brown, & Co. 1912) (noting the control husbands held over adulterous wives and the severe punishments some women had to face).

15. Corbett, *supra* note 12, at 1002. The illegality of adultery still exists today. In North Carolina, adultery is a misdemeanor. See *infra* note 171 and accompanying text.

16. See Corbett, *supra* note 12, at 1002.

17. See, e.g., BRISSAUD, *supra* note 14, at 17 (commenting on the consequences that women had to suffer for their infidelity).

18. *Id.*

19. Corbett, *supra* note 12, at 1002.

20. *Id.* at n.65. Running the gauntlet was a gruesome affair. “According to the Germanic custom, the guilty wife, naked and with her hair shaved, was driven out of the house in the presence of the relatives by her husband, who pursued her through the village beating her.” BRISSAUD, *supra* note 14, at 17.

21. Corbett, *supra* note 12, at 1003; see also KOROBKIN, *supra* note 4, at 27. Describing early criminal conversation actions, Korobkin cites an English case from 1620 in which the defendant was alleged to have

“assaulted Elizabeth, the plaintiff’s wife, and beat and ill-treated her, and took and carried away the said Elizabeth together with a gown, a petticoat, a smock and a head-dress valued at 20 pounds, of the plaintiff’s goods and chattels, and detained and kept her for five years without the plaintiff’s leave, whereby the plaintiff wholly lost the comfort and company and also the advice and help in domestic affairs which the plaintiffs could and should have had and enjoyed with his wife during that time.”

KOROBKIN, *supra* note 4, at 27 (quoting *Hyde v. Cysell* [sic], 79 Eng. Rep. 462 (1619)). Korobkin notes that “sex is nowhere mentioned,” and instead, the emphasis is on the goods the wife left with and the services she would have rendered. *Id.* “The text describes a trespass on property, a theft of clothing, a kidnapping, and a physical assault. In all

shared this sentiment, noting that criminal conversation creates a “civil injury.”²² The injured spouse is given satisfaction through “an action of trespass . . . wherein the damages recovered are usually very large and exemplary.”²³ When a man trespassed on another man’s wife, the adulterer was obliged to pay damages for the injury as if he had taken the plaintiff’s livestock or gone uninvited onto the plaintiff’s land.²⁴ The wife was regarded as a form of property, and the adulterer was required to replace what he took through the act of adultery.²⁵ Commentators have also compared criminal conversation to actions available to masters when servants left or were lured away: “If the defendant injured a servant or enticed him away from service, the master would have a cause of action for the loss. Similar rules applied if the master’s wife was injured or enticed away.”²⁶ Thus, the origins of criminal conversation stem from the common law of trespass in which wives, like servants, were considered the property of their husbands and masters.²⁷

B. *Criminal Conversation in the United States*

All states except Louisiana initially recognized the husband’s exclusive right of action to a claim of criminal conversation.²⁸ The exclusivity of the action to male plaintiffs changed with the passage of the Married Women’s Property Acts.²⁹ The Acts generally required that state courts choose one of three options. The court could hold that a husband no longer had a right to his wife’s services, find that the wife had a complementary right to the services of her husband, or

likelihood, however, no one was hurt, no force was used, and Elizabeth was wearing the gown and petticoat when she left with her lover.” *Id.*

22. 2 WILLIAM BLACKSTONE, COMMENTARIES *139.

23. *Id.*

24. See, e.g., HENDRIK HARTOG, MAN AND WIFE IN AMERICA 137 (2d ed. 2002) (commenting that a criminal conversation claim, in form, “was an action in trespass”).

25. See KOROBKIN, *supra* note 4, at 139 (construing the traditional criminal conversation claim as one that focused on the defendant’s injury to the property interest of the non-adulterating spouse).

26. DOBBS, *supra* note 7, § 442, at 1245 (internal footnotes omitted); see also Corbett, *supra* note 12, at 1003 (comparing an action in criminal conversation to the enticement of a servant away from his master).

27. Corbett, *supra* note 12, at 1003.

28. *Id.* at 1005. The husband’s right was recognized as early as the late nineteenth century. *Id.*

29. *Id.* The Married Women’s Property Acts were a series of state laws enacted over the course of the nineteenth century that changed common law principles affecting the rights of married women. See Law Library of Congress, Married Women’s Property Laws, http://lcweb2.loc.gov/ammem/awhhtml/awlaw3/property_law.html (last visited Aug. 24, 2009).

ignore the historical basis of the tort and extend it to women.³⁰ Most states, including North Carolina, recognized a wife's right to the action.³¹

Currently, however, a great number of states have abolished criminal conversation either by explicit legislation or by judicial decision.³² Indiana was the first state to abolish the tort, doing it through a legislative act ironically titled "An Act to promote public morals."³³ The belief that criminal conversation leads to blackmail and promotes vindictive behavior moved many states' legislatures and courts to abolish the tort.³⁴ However, there are a handful of states, North Carolina included, in which the tort still exists.³⁵

C. *Criminal Conversation's Development in North Carolina Courts*

Criminal conversation in North Carolina has developed through a handful of judicial precedents. In *Johnston v. Allen*,³⁶ an 1888 case, the court found the defendant liable for criminal conversation. The court based its conclusion primarily on circumstantial evidence that the defendant gave the plaintiff's wife a sewing machine and had the machine delivered to the wife while she was on the defendant's land.³⁷ A 1920 case, *Cottle v. Johnson*,³⁸ contains dicta that reflect the gender attitudes and social mores that were the basis of common law criminal conversation.³⁹ The court described the injury to the plaintiff as the "defilement of [his] wife by sexual relation."⁴⁰ The court, generally describing criminal conversation actions, stated:

In criminal conversation, "The authorities show the husband has certain personal and exclusive rights with regard to the

30. Corbett, *supra* note 12, at 1005–06.

31. *Id.* at 1006. North Carolina recognized a wife's action against her husband in criminal conversation in *Knighten v. McClain*, 227 N.C. 682, 44 S.E.2d 79 (1947).

32. 1 REYNOLDS, *supra* note 2, § 5.45, at 387 n.666 (1993 & Supp. 2008).

33. Corbett, *supra* note 12, at 1007; *see* 1935 Ind. Acts 1009 (codified at IND. CODE ANN. § 34-12-2-1 (1999)).

34. *See* 1 REYNOLDS, *supra* note 2, § 5.45, at 388.

35. The following states, in addition to North Carolina, still recognize criminal conversation: Hawaii, Kansas, Maine, Mississippi, Missouri, Tennessee, and Utah. *Id.* § 5.45, at 388 n.667 (1993 & Supp. 2008).

36. 100 N.C. 131, 5 S.E. 666 (1888).

37. *Id.* at 133–34, 5 S.E. at 667; *see also supra* Part I.A (noting how early cases in criminal conversation emphasized the loss of property rights rather than the adultery itself).

38. 179 N.C. 426, 102 S.E. 769 (1920).

39. *See id.* at 428–29, 102 S.E. at 770.

40. *Id.* at 428, 102 S.E. at 770.

person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer; and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful."⁴¹

The dicta, relied upon by the court to reach its holding, reflect outdated generalities about gender and sexual autonomy no longer cited by courts today. Still, neither *Johnston* nor *Cottle* has been overruled or overturned by a subsequent decision.

The elements of a criminal conversation action are well entrenched in a large body of North Carolina case law.⁴² *Brown v. Hurley*⁴³ holds that all the tort requires is an actual existing marriage plus sexual intercourse between the defendant and the plaintiff's spouse.⁴⁴ In addition, *Scott v. Kiker*⁴⁵ holds that the plaintiff's own infidelity does not bar recovery for criminal conversation.⁴⁶ The plaintiff's consent is the only substantive defense to a claim for criminal conversation.⁴⁷ A recent 2006 decision, *Misenheimer v. Burris*,⁴⁸ holds that the three-year statute of limitations period for criminal conversation begins to run when the tort is discovered or should have been discovered, not upon completion of the last act constituting the offense.⁴⁹ The mere fact of a valid separation⁵⁰

41. *Id.* at 428–29, 102 S.E. at 770 (quoting *Tinker v. Colwell*, 193 U.S. 473, 481 (1904)).

42. *See, e.g.*, *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938) (holding that the mere fact of a separation will not bar a recovery for criminal conversation); *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 238 (1996) ("The elements of criminal conversation are the actual marriage between spouses and sexual intercourse between defendant and plaintiff's spouse during the coverture."); *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982) (finding that the plaintiff's own infidelity did not bar a recovery for criminal conversation).

43. 124 N.C. App. 377, 477 S.E.2d 234 (1996).

44. *Id.* at 380, 477 S.E.2d at 238.

45. 59 N.C. App. 458, 297 S.E.2d 142 (1982).

46. *Id.* at 463, 297 S.E.2d at 146.

47. *Cannon v. Miller*, 71 N.C. App. 460, 472, 322 S.E.2d 780, 789 (1984). Similarly, the *connivance* of a spouse in the adultery of the other spouse will bar an action for criminal conversation. *See Barker v. Dowdy*, 223 N.C. 151, 25 S.E.2d 404 (1943) (illustrating the difficulty of proving a plaintiff's connivance, and holding that the fact that the plaintiff continued to live with his wife while she had an affair did not constitute a showing that the plaintiff connived in her adultery).

48. 360 N.C. 620, 637 S.E.2d 173 (2006).

49. *Id.* at 624–25, 637 S.E.2d at 176.

between plaintiff and his or her spouse will also not bar an action for criminal conversation.⁵¹ Though the tort is firmly entrenched in North Carolina case law, there have been unsuccessful efforts in the state to abolish it.

II. THE CURRENT APPLICATION OF CRIMINAL CONVERSATION IN NORTH CAROLINA

A. *An Unsuccessful Effort by the North Carolina Court of Appeals to Abolish Criminal Conversation*

Though criminal conversation is alive and well in North Carolina, the court of appeals has expressed its distaste for criminal conversation. In a 1985 case, *Cannon v. Miller*,⁵² the court of appeals attempted to abolish criminal conversation and alienation of affections,⁵³ but the Supreme Court of North Carolina overruled that decision.⁵⁴ The facts of *Cannon*, as stated by the court of appeals, are similar to many criminal conversation actions. The Cannons were married in May of 1975, and evidence suggested they had an unhappy marriage.⁵⁵ In 1979, Mrs. Cannon started working at the Pitt County Courthouse, where she met and proceeded to have a romantic relationship with Jeffrey Miller.⁵⁶ The Cannons were divorced in 1981, and Mr. Cannon brought an action against Miller for criminal conversation, alleging that on numerous occasions prior to May 1981 Mrs. Cannon and Miller had sexual intercourse.⁵⁷ Miller denied the allegations, and the court of appeals affirmed summary judgment for Miller in light of its abolition of criminal conversation.⁵⁸

50. "Separation" in North Carolina is when two spouses live "separate and apart" for one year prior to obtaining a divorce. N.C. GEN. STAT. § 50-6 (2008) ("Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months.").

51. *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938). This element of the tort will be discussed in more detail *infra* Part II.B.

52. 71 N.C. App. 460, 322 S.E.2d 780 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985).

53. *Id.* at 497, 322 S.E.2d at 804.

54. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

55. *Cannon*, 71 N.C. App. at 460-61, 322 S.E.2d at 783.

56. *Id.* at 461, 322 S.E.2d at 783.

57. *Id.*

58. *Id.* at 497, 322 S.E.2d at 804.

The court of appeals' opinion in *Cannon* was a synthesis of the many arguments that numerous other states have cited to abolish criminal conversation. The court argued that the common law origins of criminal conversation⁵⁹—from public beating of adulteresses to money damages for the husband—illustrated how outdated the tort was.⁶⁰ The court also cited the misogynistic and sexist language of *Cottle* as reasons for abolition.⁶¹ Additionally, the court cited case law in which the court of appeals changed common law rules relating to marriage to illustrate that “absent a legislative declaration, the courts possess the authority to alter judicially created common law rules when such action is deemed necessary in light of experience and reason.”⁶² The case law included the “equalization of presumption of gift in inter-spousal property conveyances,” judicial alteration of the “common law rule rendering spouses incompetent to testify against each other in a criminal [trial],” and “recognition of [a] cause of action for [a] spouse's loss of consortium when joined with a personal injury action.”⁶³ The court found:

A review of the historical and theoretical bases of the actions, and the largely unsuccessful attempts to articulate a convincing modern basis for the “heart balm” torts lead us to conclude that there is no continuing legal basis for the retention of these tort actions today. They protect no interests and further no public policies not better served by other means, and the potentialities for abuse posed by their existence outweighs [sic] any possible benefits to be obtained by their retention in contemporary society. While the historical remedies allowed by these causes of action have undergone some progressive changes through the years, the actions remain permeated with the uncultivated and obsolete ideas which marked their origin. We hold that the causes of action of alienation of affections and criminal conversation are hereby abolished in this jurisdiction.⁶⁴

Despite the court of appeals' argument, the supreme court swiftly overruled the court of appeals decision.⁶⁵ The supreme court, with cursory language, noted that the court of appeals, in making its

59. *Id.* at 471–72, 322 S.E.2d at 789.

60. *Id.* at 497, 322 S.E.2d at 803–04.

61. *Id.* at 473, 322 S.E.2d at 790 (citing *Cottle v. Johnson*, 179 N.C. 426, 428–29, 102 S.E. 764, 770 (1920)) (describing the “certain personal and exclusive rights” that a husband has “with regard to the person of his wife”).

62. *Id.* at 496, 322 S.E.2d at 803.

63. *Id.*

64. *Id.* at 497, 322 S.E.2d at 803–04.

65. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

decision, “acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina.”⁶⁶ Accordingly, the decision of the court of appeals attempting to abolish the tort of criminal conversation was vacated.⁶⁷ It is notable that the supreme court did not include a justification for criminal conversation in its opinion overruling the court of appeals. The purpose of the opinion, it seems, was to correct the court of appeals’ misunderstanding of its authority, and not to bolster the tort. Nevertheless, after the supreme court reinstated the tort, plaintiffs continued to file criminal conversation actions in the late 1990s and 2000s.⁶⁸ The *Cannon* decisions illustrate the continued controversy that criminal conversation creates in the North Carolina legal community.

B. *The Complications of Post-Separation Conduct*

During the late 1990s and 2000s, valid separation agreements did not prevent criminal conversation claims,⁶⁹ and high damages awards for criminal conversation actions brought North Carolina into the national spotlight. In *Johnson v. Pearce*,⁷⁰ the court of appeals held that a claim for criminal conversation may be based solely upon post-separation sexual relations.⁷¹ The court of appeals took this holding a step further in *Nunn v. Allen*⁷² to find that even a valid separation agreement will not bar a claim for criminal conversation.⁷³

The plaintiff, Donald Nunn, brought an action for criminal conversation against his former wife’s boyfriend.⁷⁴ Although the facts were somewhat disputed, it appeared that Mrs. Nunn and the defendant became acquainted at work before Mrs. Nunn’s marriage ended.⁷⁵ The defendant contended that no sexual relationship existed between him and Mrs. Nunn until after the Nunn’s were living apart and signed a separation agreement in September of 1997.⁷⁶ The agreement provided:

66. *Id.* at 324, 327 S.E.2d at 888.

67. *Id.*

68. See, e.g., Mark Johnson, *Making it Safer to Fool Around After You Split*, NEWS & OBSERVER (Raleigh, N.C.), May 17, 2009, at A11.

69. See, e.g., *Nunn v. Allen*, 154 N.C. App. 523, 535–36, 574 S.E.2d 35, 43–44 (2002).

70. 148 N.C. App. 199, 557 S.E.2d 189 (2001).

71. *Id.* at 201, 557 S.E.2d at 190.

72. 154 N.C. App. 523, 574 S.E.2d 35 (2002).

73. *Id.* at 536, 574 S.E.2d at 44.

74. *Id.* at 528–29, 574 S.E.2d at 39.

75. *Id.* at 528, 574 S.E.2d at 39.

76. *Id.* at 528–29, 574 S.E.2d at 39.

LIVING SEPARATE: Husband and Wife shall continue to live separate and apart, each at such place of residence as he or she may freely choose, free from all interference, authority and control, direct or indirect, by the other party, *as fully as if each party were unmarried*. Neither shall molest the other nor harass the other, nor compel nor endeavor to compel the other to cohabit or dwell with him or her.⁷⁷

The defendant raised two issues to contest the criminal conversation claim. First, he argued that this case was distinguishable from *Johnson* because of the valid separation agreement that provided the parties should live separately as an unmarried couple.⁷⁸ Second, the defendant argued that the separation agreement was, in effect, the equivalent of the plaintiff's consent for Mrs. Nunn to have sexual relations with another man.⁷⁹ The court refused to accept either defense.⁸⁰

A brief analysis of the defendant's arguments reveals the detrimental impact of *Nunn* on defendants in later criminal conversation cases. The court rejected the defendant's first argument—that the separation agreement allowing the parties to live separately as if unmarried barred a criminal conversation claim—by strictly construing the agreement as a contract between the Nunn's whose terms were to be applied exclusively to the spouses.⁸¹ The court noted that “[s]eparation agreements are generally construed like any contract between two parties.”⁸² Since the defendant was not a party to the agreement, its terms did not apply to him.⁸³ The provisions in the agreement that addressed the spouse's “‘right to exclusive sexual intercourse’ ”⁸⁴ with one another “related only to the spouses’ rights against each other,” and “[a]s a matter of law . . . did not waive the parties’ rights, with respect to third parties for purposes of a criminal conversation claim.”⁸⁵ The court held the separation agreement did not shield the defendant from liability based on his

77. *Id.* at 535, 574 S.E.2d at 43 (emphasis added).

78. *Id.* at 536, 574 S.E.2d at 43. The defendant argued that his case was distinguishable from *Johnson* because, although both cases were based on post-separation conduct, there was no separation agreement in *Johnson*. *Id.*

79. *Id.* at 536, 574 S.E.2d at 44.

80. *Id.* at 536–37, 574 S.E.2d at 43–44.

81. *Id.* at 536, 574 S.E.2d at 43–44.

82. *Id.* at 536, 574 S.E.2d at 43.

83. *Id.* at 536, 574 S.E.2d at 43–44.

84. *Id.* at 535, 574 S.E.2d at 43 (quoting *Johnson v. Pearce*, 148 N.C. App. 199, 200, 557 S.E.2d 189, 190 (2001)).

85. *Id.* at 536, 574 S.E.2d at 43–44.

post-separation sexual relationship with Mrs. Nunn.⁸⁶ The court's reasoning leaves unanswered the question of whether parties to a separation agreement could *ever* create a contract that protects third parties from criminal conversation claims. Perhaps a third party waiver would protect others from liability, but this proposition is not supported by North Carolina case law.⁸⁷

The defendant's second argument was that the separation agreement was the equivalent of the plaintiff's consent for Mrs. Nunn to have sexual relations with another man.⁸⁸ The court stated that it was aware of no authority in North Carolina that supported the defendant's position.⁸⁹ The court cited *Lee's North Carolina Family Law*,⁹⁰ in which Professor Reynolds suggests that to establish the plaintiff's consent, the defendant would be required to show that, before the sexual intercourse between the defendant and the plaintiff's spouse occurred, the plaintiff "either encouraged the conduct or at least approved it."⁹¹ The court found no evidence that the plaintiff approved of the sexual conduct between the defendant and Mrs. Nunn, and thus concluded that the separation agreement did not establish the plaintiff's consent "without evidence of plaintiff's prior knowledge and approval of defendant's sexual intercourse with Mrs. Nunn while she was married to plaintiff."⁹²

The record contained evidence that the plaintiff knew of the defendant's partiality to Mrs. Nunn prior to the separation, and had even seen Mrs. Nunn and the defendant engaged in what appeared to

86. *Id.*

87. It is possible that parties to a separation agreement could waive their right to sue a potential third party defendant for criminal conversation. It is a general principle of contract law that a party to a contract may waive any provisions made for his or her benefit. 17A AM. JUR. 2D *Contracts* § 635 (2004). Whether such a waiver would be enforceable after *Nunn* is unknown. A defendant in a criminal conversation action is unlikely to prevail on a claim that he is a third party beneficiary of the contract between the spouses in the separation agreement. To prevail on a third party beneficiary claim, the contract must have been entered into for the defendant's "direct" benefit. *See Leasing Corp. v. Miller*, 45 N.C. App. 400, 405–06, 263 S.E.2d 313, 317 (1980) ("To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his *direct*, and not incidental, benefit."). Considering the nature of a criminal conversation action, it is unlikely that the plaintiff spouse would have willingly entered into the separation agreement intending for the defendant to enjoy a direct benefit of the contract.

88. *Nunn*, 154 N.C. App. at 536, 574 S.E.2d at 44.

89. *Id.*

90. *Id.* at 537, 574 S.E.2d at 44 (referring specifically to § 5.46(B), at 405).

91. *Id.* at 536–37, 574 S.E.2d at 44.

92. *Id.* at 537, 574 S.E.2d at 44.

be oral sex the day prior to the signing of the separation agreement.⁹³ With knowledge of this conduct, the plaintiff then signed an agreement allowing his wife to live as if unmarried to him, and subsequently pursued a claim of criminal conversation against the defendant.⁹⁴ He knew that his marriage was over and that his wife was interested in another man. He signed an agreement to live as if he was not married to her, and subsequently sought liability from the defendant. The plaintiff exploited his wife's and her lover's ignorance of the law, and recovered damages from the lover, whom the separation agreement did not protect.⁹⁵ And, North Carolina law supported the plaintiff the entire time.

Nunn remains good law in North Carolina, and its effect is to guarantee that any sexual relationship between a person who is legally separated and a third party is fraught with risk. In *Harris v. Stamey*,⁹⁶ a case decided shortly before *Nunn*, the defendant did not engage in sexual intercourse with the plaintiff's wife for the first time until after plaintiff separated from his wife.⁹⁷ Still, the post-separation conduct was sufficient to establish a claim of criminal conversation.⁹⁸ The effect of these cases is to prohibit people who have not met the one-year separation requirement from initiating a sexual relationship with another person.⁹⁹ For those who choose to begin a relationship with a person whose divorce is not final, they open themselves up to

93. *Id.* at 528–29, 574 S.E.2d at 39.

94. *See infra* Part III.C. Criminal conversation is a trap for the unwary. Although it is difficult to infer from the facts given, the sequence of events suggests that perhaps Mr. Nunn was planning all along to use his wife's partiality for the defendant as leverage to get a substantial damages award.

95. *Nunn*, 154 N.C. App. at 542, 574 S.E.2d at 47.

96. No. COA01-1475, 2002 N.C. App. LEXIS 2368 (N.C. Ct. App. Aug. 6, 2002).

97. *Id.* at *3.

98. *Id.* at *4.

99. *See* N.C. GEN. STAT. § 50-6 (2008). For an argument that the one-year separation requirement should be shortened, see 2 LLOYD T. KELSO, NORTH CAROLINA FAMILY LAW PRACTICE § 18:6, at 171 (2008).

While a decision to divorce is not a decision that should be made in haste, in twenty-first century North Carolina, the State should have already adopted a policy that a marriage is no longer salvageable once parties have separated and have entered into a valid separation agreement that provides that they intend to live separate and apart indefinitely. . . .

As Justice Eagles said, "little is to be gained, and much harm may result, from denial of divorce when the parties have reached the point where they are wholly discordant and no longer living together."

2 KELSO, *supra*, § 18:6, at 171 (quoting *Bruce v. Bruce*, 79 N.C. App. 579, 339 S.E.2d 855 (1986)). The argument for a shorter separation period is the subject for another paper.

liability for criminal conversation whether or not they are aware of the tort or that their conduct has any legal repercussions.

C. *High Damages Awards Popularize Criminal Conversation Actions*

During the late 1990s and the first decade of 2000, the success of North Carolina plaintiffs in criminal conversation actions received national attention.¹⁰⁰ When Dorothy Hutelmyer sued her husband's secretary and second wife for having an affair with Dorothy's husband, she won a million dollar jury verdict—\$500,000 in compensatory damages and another \$500,000 for punitive damages.¹⁰¹ The Lifetime Movie Network made Dorothy's story into a television movie titled, "The Price of a Broken Heart."¹⁰² To entice viewers, the movie trailer asked: "What would you do if your husband of 18 years divorced you for his sexy secretary? . . . Well, Dorothy Hutelmyer did the unthinkable: She sued the woman who stole her husband and destroyed her marriage. What followed was a landmark lawsuit that had wives everywhere cheering."¹⁰³ Ms. Hutelmyer's successful case might be one of the most publicized, but it is certainly not the only successful criminal conversation action enjoyed by a plaintiff in the last decade in North Carolina.¹⁰⁴ Other North Carolina plaintiffs followed Ms. Hutelmeyer's example, receiving damages awards ranging from the tens of thousands to the millions.¹⁰⁵

In actions for criminal conversation, plaintiffs often seek punitive damages in addition to compensatory damages. For this reason, many North Carolina plaintiffs have received damage awards in the tens of thousands of dollars if not more.¹⁰⁶ In addition to the

100. See, e.g., *Hutelmyer v. Cox*, 133 N.C. App. 364, 375, 514 S.E.2d 554, 562 (1999) (providing a verdict of one million dollars against the defendant female who had an affair with the plaintiff's husband).

101. *Id.* at 375, 514 S.E.2d at 562; Corbett, *supra* note 12, at 994–95.

102. *The Price of a Broken Heart* (Lifetime Movie Network television broadcast Aug. 25, 1999); see Foon Rhee, *Jilted Wife Takes Her Tale to TV Screen*, CHARLOTTE OBSERVER (N.C.), Aug. 14, 1999, at 1C.

103. Rhee, *supra* note 102, at 14C (quoting the trailer for "The Price of a Broken Heart").

104. See *infra* note 106.

105. See, e.g., *infra* note 107.

106. See, e.g., *Oddo v. Presser*, 358 N.C. 128, 592 S.E.2d 195 (2004) (per curiam) (affirming the trial court's award of \$910,000 in compensatory damages and \$500,000 in punitive damages for plaintiff); *Boileau v. Seagrave*, No. COA07-1431, 2008 N.C. App. LEXIS 1833, at *21–22 (N.C. Ct. App. Oct. 21, 2008) (affirming the judgment for plaintiff and finding defendant liable for criminal conversation, liable for \$1.00 in compensatory

Hutelmyer case, a Greensboro woman received one million dollars in punitive damages and another million dollars in compensatory damages against the woman she alleged broke up her marriage.¹⁰⁷ Another North Carolina man successfully sued a physician who had an affair with the man's wife.¹⁰⁸ The jury directed the defendant to pay the plaintiff \$910,000 in compensatory damages and \$500,000 in punitive damages.¹⁰⁹ A Burlington paper reported in 2006 that in the preceding five years at least fourteen alienation of affection and criminal conversation lawsuits were filed in Alamance County Superior Court.¹¹⁰ The article linked the large number of suits filed to the success of Dorothy Hutelmyer.¹¹¹ These cases illustrate what has become a growing trend among North Carolina plaintiffs.

D. Failed Legislative Efforts to Abolish Criminal Conversation

North Carolina legislators have made numerous attempts to abolish criminal conversation in the state.¹¹² State legislators frequently propose bills to abolish criminal conversation, but the bills

damages, and liable for \$105,000 in punitive damages); *Teague v. Teague*, No. COA01-646, 2002 N.C. App. LEXIS 1877, at *1-2, *12-13 (N.C. Ct. App. Apr. 16, 2002) (dismissing the appeal that challenged a jury award of \$500,000 in compensatory damages and \$100,000 in punitive damages for plaintiff in criminal conversation suit); *Hutelmyer*, 133 N.C. App. at 375, 514 S.E.2d at 562 (affirming lower court's award of \$500,000 in compensatory damages and \$500,000 in punitive damages for plaintiff in criminal conversation suit).

107. Mike Fuch, *Suit Over Husband's Affair Leads to \$2 Million Award*, NEWS & REC. (GREENSBORO, N.C.), Nov. 10, 2001, at A1. The award surpassed a \$1.4 million verdict a jury awarded to Davidson College's head wrestling coach who sued a doctor for having an affair with his former wife. *Id.*; see also *Oddo*, 358 N.C. at 128, 592 S.E.2d at 196.

108. *Oddo*, 358 N.C. at 128, 592 S.E.2d at 196.

109. Kathryn Quigley, *Love Affair Comes with Price: \$1.4 Million in Damages*, CHI. TRIB., June 10, 2001, at 14.

110. Keren Rivas, *Alienation Cases Are All Too Common*, TIMES-NEWS (BURLINGTON, N.C.), Feb. 19, 2006, at A1.

111. *Id.* at A2. The attorney who represented Hutelmyer, the article reported, was involved in twenty to twenty-five "heart balm" cases since 1997. *Id.*

112. Representatives Micheaux, Insko, and Wray sponsored one such attempt in March of 2008. H.B. 681, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/PDF/H681v1.pdf>. The bill was entitled "An Act to Abolish the Civil Actions of Alienation of Affection and Criminal Conversation." *Id.* The bill proposed that North Carolina General Statutes § 52-14 state: "The common-law cause of action for criminal conversation is abolished." *Id.* However, the bill appears to have disappeared after it was referred to the Committee on the Judiciary I. See General Assembly of North Carolina, House Bill 1123, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H681> (last visited Aug. 24, 2009).

consistently never come up for vote in committees.¹¹³ Nevertheless, many North Carolina legislators, including Representatives Micheaux, Insko, and Wray, along with current U.S. Senator Kay Hagan, have attempted to enact legislation to abolish criminal conversation.¹¹⁴ In April of 2009, House Bill 1123, entitled “An Act to Abolish the Civil Actions of Alienation of Affection and Criminal Conversation,” passed its first reading in the North Carolina House,¹¹⁵ but seems to have been lost in committee.¹¹⁶ In the summer of 2009, however, the House passed House Bill 1110 that significantly limits actions in criminal conversation and alienation of affection.¹¹⁷ The bill prohibits a plaintiff from filing an action in alienation of affection or criminal conversation more than three years after the last act occurs that gives rise to the cause of action.¹¹⁸ Additionally, the bill limits a plaintiff’s ability to sue for criminal conversation or alienation of affection after the spouses have separated with the intent that the separation will be permanent.¹¹⁹ Though this bill does not abolish criminal conversation, it is an encouraging step in the right direction. The bill is also direct evidence of the legislature’s desire to limit criminal conversation. Perhaps in the General Assembly’s next term, after the successful passage of House Bill 1110, a bill like House Bill 1123 will pass.

113. See *supra* note 112; see also H.B. 1047, 2003 Gen. Assem., Reg. Sess. (N.C. 2003), available at <http://www.ncleg.net/sessions/2003/bills/house/pdf/h1047v1.pdf>.

114. See discussion *supra* note 112.

115. H.B. 1123, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), available at <http://www.ncleg.net/sessions/2009/bills/house/pdf/H1123v1.pdf>.

116. See General Assembly of North Carolina, House Bill 1123, <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1123> (last visited Aug. 9, 2009).

117. H.B. 1110, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1110>; see also *A heave-ho to the ‘he’ in the constitution?*, NEWS & OBSERVER (Raleigh, N.C.), July 8, 2009, at 3B (noting that the bill limiting criminal conversation cleared a Senate committee).

118. See H.B. 1110, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1110>.

119. *Id.* (“No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and plaintiff’s spouse physically separate with the intent of either the plaintiff or plaintiff’s spouse that the physical separation remain permanent.”).

III. WHY NORTH CAROLINA SHOULD ABOLISH CRIMINAL CONVERSATION

Beyond those stated by North Carolina's courts and legislature, numerous reasons exist to abolish the tort of criminal conversation. The continued existence of criminal conversation in North Carolina illustrates that there are enough proponents of the tort in the state who have kept the tort alive. But analyzing these proponents' arguments reveals errors in both theory and reality. Proponents of the tort are untroubled by its outdated origins because they argue that the Married Women's Property Act remedied any inequality between male and female plaintiffs that existed at common law.¹²⁰ Proponents have long argued that the tort promotes family values and addresses a concern with the "moral decline in American society."¹²¹ They claim that tort liability can deter marital infidelity,¹²² and the "[l]aw . . . has regulated sexual conduct" throughout history.¹²³ Though damages in criminal conversation actions may be surprisingly high, proponents also point out that the tort system is meant to provide plaintiffs with remedies.¹²⁴ Some even suggest that women suffer more collateral damage from divorce and adultery.¹²⁵ Failure to provide these women with a tort remedy would "adversely affect women more than men."¹²⁶ These arguments have been put forth for decades as reasons to keep the tort, but each of them has weakened with time. The arguments for abolition, however, continue to be compelling and numerous.

Although the principal purpose of this Comment is to argue for the complete abolition of criminal conversation, at the very least North Carolina should consider limiting this action. Possible limitations would include inserting a mens rea requirement into the elements of the tort, limiting the tort to pre-separation conduct, and recognizing the validity of separation agreements that relieve third parties from liability. These limitations would remedy some of the worst effects of criminal conversation, such as holding liable defendants who are unaware of criminal conversation or the marital

120. See Corbett, *supra* note 12, at 1014–15.

121. *Id.* at 1052.

122. *Id.* at 1016–17.

123. *Id.* at 1018.

124. *E.g., id.* at 1011.

125. *Id.* at 1050–51 (stipulating that some of the ways women may suffer more collateral damages from adultery than men are that married men engage in adultery more than married women and that many married women are economically dependent on their husbands).

126. *Id.* at 1052.

status of their partners. Though limiting the tort would curb its negative effects, the most effective way to remedy the ills of criminal conversation is complete abolition.

A. The Historic Basis for Criminal Conversation No Longer Exists

This section will outline several historic bases for criminal conversation that, because they are no longer relevant, support abolishing the tort. First, wives are no longer considered the property of their husbands. Second, the Married Women's Property Acts illustrate the inherent contradictions of criminal conversation. Third, the tort is based on the concept of spousal property rights, rights no longer recognized today. Fourth, an element of the tort historically required the subordination of women to their husbands. Fifth, the modern treatment of adultery illustrates North Carolina's movement away from treating certain sexual behavior as "criminal," a concept from which the tort is derived.

The historic premise upon which criminal conversation developed no longer exists. Wives are no longer considered to be the property of their husbands. Thus, the need to compensate a man for his "property loss" when his wife sleeps with another man is certainly no longer a valid argument to retain criminal conversation.¹²⁷ The Married Women's Property Acts, which extended the right to sue for criminal conversation to women,¹²⁸ do not erase the inherent sexism of the tort, but actually weaken the tort's foundation. Proponents of criminal conversation, however, point to the Married Women's Property Acts as evidence that the sexist underpinnings of the tort are no longer the reason for its existence.¹²⁹ These proponents argue that since the Married Women's Property Acts permitted women to bring suits in criminal conversation, the historic basis of the tort is irrelevant.¹³⁰ Many courts and commentators do not agree with this

127. See KOROBKIN, *supra* note 4, at 135 ("When a new cause of action is invented, as criminal conversation was in the last decades of the seventeenth century, its legal/factual requirements inevitably depend on the web of assumptions about the legal and social world in force at the time. For the tort to continue as a viable legal cause of action, those assumptions must either remain in force or be replaced by others compatible with the law's skeletal requirements.").

128. *Id.* at 127.

129. For an argument rejecting the historical basis of the tort as an argument for its abolition, see Corbett, *supra* note 12, at 1014–15.

130. See *id.*

argument.¹³¹ The Maryland Court of Appeals abolished the tort of criminal conversation despite the argument that both sexes could sue after the Married Women's Property Acts.¹³² The court noted that the gender inequality of the "tort's fundamental underlying 'rationale' could not be canceled out simply by opening litigative doors to women."¹³³

At least one commentator sees the Married Women's Property Acts as a further reason to abolish the tort.¹³⁴ The Acts, according to Laura Korobkin, illustrate the tort's inherent contradictory structure, regardless of whether it is available as a cause of action to men and women.¹³⁵ Korobkin notes that prior to the enactment of the Married Women's Property Acts, the classic criminal conversation action was a property dispute in which damages were awarded to the husband for trespass with his wife.¹³⁶ "[T]he wife's role in bringing about the act of adultery had no bearing on the husband's right to bring the action"¹³⁷ because the husband sued the paramour, not the wife. Female sexuality was completely irrelevant.¹³⁸ Thus, "[w]hen wives began to bring criminal conversation . . . cases, courts thus found themselves constrained by . . . the criminal conversation script" that previously failed to recognize female sexuality.¹³⁹ Holding a female defendant liable for her sexual "trespass" with another woman's husband was contradictory to the assumption that women had no sexuality, and Korobkin notes that this contradiction was the cause of the demise of criminal conversation in many courts decades later.¹⁴⁰

Opening the doors for women to sue other women for criminal conversation challenged the historic structure of the tort. For a woman to sue another woman based on the latter's sexual act, the tort

131. See, e.g., *Kline v. Ansell*, 414 A.2d 929, 933 (Md. 1980) (holding that the common law cause of action for criminal conversation is unconstitutional and no longer viable in Maryland).

132. *Id.* at n.4 (commenting that the "married women's act did not extend" the right to bring a criminal conversation claim to women).

133. KOROBKIN, *supra* note 4, at 172 (noting the court's decision in *Kline*, 414 A.2d 929).

134. *Id.* at 160.

135. *Id.* at 138-39 (arguing that the acceptance of the Marriage Property Acts eliminated spousal property in one another, but that criminal conversation required spousal property in one another).

136. *Id.* at 139.

137. *Id.* at 160.

138. *Id.* at 160-61.

139. *Id.* at 161.

140. *Id.* at 162.

implicitly accepted the existence of female sexuality, suggesting that adultery was a matter of mutual choice rather than seduction.¹⁴¹

[T]he structure of the criminal conversation tort still required that a single actor—the defendant—be held fully financially responsible for the affair’s adverse consequences to the plaintiff’s marriage and family. . . . If female defendants were allowed independence and control over their bodies, why wasn’t each marital partner entitled to the same privilege? And if they were—that is, if adultery was ultimately a choice made by consenting adults—then on what grounds could a plaintiff—husband or wife—be entitled to damages when a spouse decided to engage in an extramarital affair? The causal link that had made the act of adultery first a direct trespass by the defendant on the husband’s sexual property, then an equally direct injury to the plaintiff spouse’s feelings, was weakening.¹⁴²

The Married Women’s Property Acts did not eradicate the inherent problems of the historic basis of criminal conversation. When the Acts made the tort available to women, courts had to acknowledge the sexuality of both men and women, which further complicates the structure of a criminal conversation claim that imposes liability only on the third party.¹⁴³ From this perspective, the Married Women’s Property Acts make the continued existence of the tort more contradictory than ever.¹⁴⁴ Criminal conversation was based on an assumption that sexuality is an exclusively male trait. That is why at common law only men could sue men. Even if lawmakers no longer countenance this assumption, it serves as the basis for the tort. Arguments that the tort serves a social purpose¹⁴⁵ still fall flat when the history of the tort is so marred by logical inconsistencies and stereotypical assumptions. It seems unlikely that any member of the state legislature or judiciary believes that female sexuality is

141. *Id.* at 168.

142. *Id.* at 168–69.

143. *See id.* at 161 (viewing the plaintiff’s spouse’s “sexual aggression” as irrelevant).

144. *Id.* at 177.

The female-plaintiff cases came to play an important interim role in the eventual abolition of the torts, partly by giving women a voice and a story, but at least as importantly by bringing the torts’s narrative assumptions out into the open, where they could not be ignored. Once seen in the light of day, the cases’ property-based claims looked not just atavistic but ridiculous.

Id.

145. *See Corbett, supra* note 12, at 1015–16.

nonexistent. Why, then, does North Carolina law allow plaintiffs to sue under a tort that assumes so?

Another outdated historic basis for criminal conversation is the emphasis of spousal property rights. The historic property right that was the basis of criminal conversation was the fidelity of the wife.¹⁴⁶ The husband was entitled to exclusive sexual relations with her.¹⁴⁷ If this right was compromised, he was entitled to monetary damages as compensation.¹⁴⁸ Now, as a result of the Married Women's Property Acts, it would seem that both spouses have an exclusive right to the fidelity of the other.¹⁴⁹ At least one commentator thinks this "new" kind of property right is actually beneficial to women, suggesting that since women are traditionally more dependent on their husbands than vice versa, allowing wives to sue based on fidelity serves as a vehicle for empowerment.¹⁵⁰ To classify love, affection, and sexual autonomy as a property right is an outdated and unrealistic way of looking at marriage. The Iowa Supreme Court noted, "spousal love is not property which is subject to theft. . . . [P]laintiffs in such suits do not deserve to recover for the loss of or injury to 'property' which they do not, and cannot, own."¹⁵¹ Additionally, courts have rejected

146. See *supra* Part I.A.

147. See *Nunn v. Allen*, 154 N.C. App. 523, 535, 574 S.E.2d 35, 43 (2002) (quoting *Johnson v. Pearce*, 148 N.C. App. 199, 200, 557 S.E.2d 189, 190 (2001), as a traditional foundation for a criminal conversation claim).

148. See *supra* Part I.A.

149. See *supra* notes 28–31 and accompanying text.

150. Corbett, *supra* note 12, at 1016 ("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.").

151. *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981) (abolishing alienation of affections in Iowa); see also Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 340 (1998). Chamallas describes the "gendered dignitary harms" for which the tort offers redress. *Id.* at 341. This harm is

a dignitary or psychological injury to the "betrayed" spouse, of a specifically gendered sort. Some men describe their response to their wife's adultery—particularly their realization that another man has "captured" their wife—as a wound to their manly pride and a disgrace that reflects on the man's "weakness and inadequacy."

...

... [T]hey are not the sort of injury that the law ought to redress. The sense of honor that is damaged in each of these scenarios is derived from an outmoded hierarchical image of husband and wife, in which the wife is treated as the property of the husband and the marriage is organized primarily to serve the

the argument that abolishing criminal conversation leaves hapless plaintiffs with no remedy for their injury because it is unclear the plaintiffs have suffered the type of “injury” that the tort system is designed to address.¹⁵² In *Saunders v. Alford*,¹⁵³ the Mississippi Supreme Court noted:

The problem is that he does not identify how he is injured in person, property or reputation. Detached as it is from an actual injury to the marital relation, criminal conversation requires no actual injury at all. It is born of the notion that the cuckold spouse . . . has some property interest in the chastity of the other. Such [a] presumption[] and notion[] ha[s] no vitality in today’s society.¹⁵⁴

The Mississippi Supreme Court used the outdated historical basis of the tort to argue that the injured plaintiff was not really injured at all according to modern views of marriage and property rights.¹⁵⁵

Spousal property rights are no longer recognized because of the differences between today’s legal context and that of common law.¹⁵⁶ Moreover, significant changes in our legal context, such as the recognition of married women’s rights and the rejection of married women as the property of their husbands, should be reflected in the law.¹⁵⁷ Significant changes in our social context that affect marriage and divorce, such as the growing number of professional women¹⁵⁸

husband’s sexual and emotional needs. I fear that legal recognition of such harms would run a great risk of reproducing the sexist ideology behind these gendered scripts and perpetuating the objectification of women.

Id. at 340–42 (quoting Constantina Safilios-Rothschild, *Attitudes of Greek Spouses Toward Marital Infidelity*, in *EXTRA-MARITAL RELATIONS* 78–79 (Gerhard Neubeck ed., 1969)).

152. *See infra* Part III.B.

153. 607 So. 2d 1214 (Miss. 1992).

154. *Id.* at 1218–19.

155. *See id.*

156. *See* Kay Kavanaugh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 338–39 (1981).

157. Though the Married Women’s Property Acts were a significant step forward for the law, to retain a tort that originated from a husband’s exclusive right to his wife’s sexuality arguably promotes disrespect for the law. For an argument that retaining criminal conversation is antithetical to current ideas about gender, sexuality, and contraception, see KOROBKIN, *supra* note 4, at 170–71 (citing Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 651–64 (1930)).

158. “Women comprised 46.5 percent of the total U.S. labor force and are projected to account for 47 percent of the labor force in 2016.” U.S. Dep’t of Labor, Quick Stats on Women Workers (2008), available at <http://www.dol.gov/wb/stats/main.htm>. “Women are

and a steady divorce rate,¹⁵⁹ should also be reflected in the law. Today, there is an “implicit and explicit recognition that marital partners are individuals, ‘each with a separate intellectual and emotional makeup.’”¹⁶⁰ To allow one spouse to assert a property interest in the sexual behavior of another is to offer a remedy where there should be none since spousal sexuality is no longer considered a property right.

Furthermore, criminal conversation should be abolished because one of its elements is historically based on the subordination of women to their husbands. An element of criminal conversation is “coverture.”¹⁶¹ Modern cases that cite the elements of the claim tend to glaze over the historic meaning of “coverture.” The common law doctrine of coverture “meant that the act of marriage collapsed the wife’s legal capacities into the personality and powers of her husband,” creating a legal fiction where the wife’s identity was subsumed by the husband’s identity.¹⁶² Coverture is not a synonym for marriage, it is a separate entity; “[a] wife could recover some of her legal capacity by agreeing with her husband to cancel her coverture during marriage.”¹⁶³ “For centuries, the law of marital coverture produced—indeed, *required*—the legal subordination of wives to their husbands.”¹⁶⁴ Feminist scholars have argued that the common law concept of coverture created a sphere of “privacy” for the family that “prevented the state from identifying and remedying dysfunction within marriages.”¹⁶⁵ When North Carolina courts cite coverture as an element of a criminal conversation claim, they seem to use it as a way of describing the marital unit, and not as a reference

projected to account for 49 percent of the increase in total labor force growth between 2006 and 2016.” *Id.*

159. Between 2004 and 2007 the national divorce rate, per 1,000 people, fluctuated between 3.6 and 3.7 percent. Nat’l Ctr. for Health Statistics, National Marriage and Divorce Rate Trends, http://www.cdc.gov/nchs/nvss/mardiv_tables.htm (last visited Aug. 24, 2009).

160. Kavanaugh, *supra* note 156, at 339 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (footnote omitted); *see supra* text accompanying note 129.

161. *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996) (“The elements of criminal conversation are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff’s spouse during the coverture.”).

162. Joshua Getzler, *Plural Ownership, Funds, and the Aggregation of Wills*, 10 THEORETICAL INQ. L. 241, 264 (2009).

163. *Id.*

164. Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395, 1402 (2008).

165. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 398 (2008).

to the subordination of the wife to the husband.¹⁶⁶ The courts purposefully apply only part of the common law meaning of coverture; they cite to it to reference the common law concept that “a husband and wife were one legal entity,”¹⁶⁷ but refrain from alluding to the aspects of coverture that require the disappearance of the wife’s autonomy. The courts cannot ignore the fact that coverture is still regarded as a common law method of subordinating women to the power of their husbands and is an essential element of criminal conversation.

Additionally, under *Johnson v. Pearce*, North Carolina courts extended the concept of “coverture” to apply to post-separation conduct.¹⁶⁸ If there is ever a time, aside from actual divorce, in which a husband and wife are less like a marital unit, it is during the period of separation. North Carolina courts are explicit that post-separation conduct will not bar a claim for criminal conversation.¹⁶⁹ To hold that a period in which two people have signed an agreement to live separate as if unmarried as part of “coverture” is contrary to its common law definition. Ignoring the historic basis of coverture is further evidence of the uncomfortable way courts attempt to fit criminal conversation into a modern legal landscape that recognizes husbands and wives as autonomous, independent beings.

A further criticism of criminal conversation is its close relationship with the historic treatment of adultery. At common law, adultery was a crime, and the earlier in history the more severe the punishment.¹⁷⁰ Today in North Carolina, adultery is still a crime.¹⁷¹

166. See, e.g., *Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237 (1996) (citing “coverture” as one of the elements of a criminal conversation claim, but not expanding on the concept outside of the meaning of an existing marriage).

167. Elizabeth Katz, Note, *How Automobile Accidents Stalled the Development of Interspousal Liability*, 94 VA. L. REV. 1213, 1220 (2008).

168. *Johnson v. Pearce*, 148 N.C. App. 199, 200, 557 S.E.2d 189, 190 (2001).

169. See *Nunn v. Allen*, 154 N.C. App. 523, 535–37, 574 S.E.2d 35, 43–44 (2002). But see *supra* Part II.D (indicating that a recently considered bill limits a plaintiff’s ability to sue for criminal conversation after the spouses have separated with the intent that the separation will be permanent).

170. For a discussion on ancient methods of punishment for female adulteresses, see *supra* Part I.A.

171. See N.C. GEN. STAT. § 14-184 (2007). “If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor.” *Id.* “Lewdly and lasciviously” has been interpreted as “habitually, in the manner of husband and wife.” REYNOLDS, *supra* note 2, § 4.8, at 242; see also *State v. Kleiman*, 241 N.C. 277, 279–80, 85 S.E.2d 148, 151 (1954) (noting that a single act of illicit sexual intercourse is not fornication and adultery as defined by § 14-184, but that habitual sexual intercourse for two weeks was sufficient to constitute the

Yet, *Lee's North Carolina Family Law* notes that while the State's continued criminalization of adultery reflects a "certain policy," "there are few prosecutions under these statutes."¹⁷² Professor Reynolds also notes that in certain situations the criminality of adultery is disregarded in favor of protecting people from harm or other "higher goals."¹⁷³ For example, North Carolina criminalizes adultery but has also enacted statutes that protect couples who cohabitate.¹⁷⁴ While adultery remains a crime in North Carolina, the infrequency with which it is prosecuted¹⁷⁵ suggests that it is not regarded as a crime in the same sense it was at common law. The changing attitudes of the legal system toward adultery are further evidence of how courts and legislatures have rejected the historic assumptions underlying criminal conversation.

B. Criminal Conversation Does Not Deter Extra-Marital Relations

While past justifications for criminal conversation are inapplicable now, current justifications, such as deterring extra-marital relations, do not support the continuance of criminal conversation. There is a significant lack of evidence that the continued existence of criminal conversation in North Carolina has done anything to deter marital infidelity.¹⁷⁶ Courts and legal commentators generally agree that criminal conversation does not deter adultery.¹⁷⁷ The Idaho Supreme Court, in abolishing criminal conversation, noted that "[d]eterrence is not achieved; the nature of the activities underlying criminal conversation, that is sexual activity, are not such that the risk of damages would likely be a deterrent."¹⁷⁸ Most state courts, in their abolition of criminal conversation, note

offense). The misdemeanor is "punishable by a fine of \$500, six months' imprisonment, or both." 1 REYNOLDS, *supra* note 2, § 4.8, at 243.

172. 1 REYNOLDS, *supra* note 2, § 4.8, at 246.

173. *Id.*

174. *Id.* Specifically, North Carolina has protected unmarried couples that live together under the domestic violence statute. *Id.*

175. *Id.*

176. *But see* Corbett, *supra* note 12, at 1016-17 ("I think it is an equally plausible hypothesis that the prospect of tort liability could dampen the fires of sexual passion."). Corbett argues that because the financial liability would be placed on the third party and not the adulterous spouse, the deterrent effect might be achieved by making third party outsiders less interested in the married person. *Id.*

177. *See, e.g.,* Thomas v. Siddiqui, 869 S.W.2d 740, 742 (Mo. 1994) (finding plaintiff's argument that criminal conversation deters adultery unpersuasive and noting that "other disincentives" exist to more effectively deter adultery).

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

that the tort does not deter marital infidelity.¹⁷⁹ Modern attitudes toward marriage and divorce contradict the assertion that the threat of legal liability promotes a healthy marriage. “‘[V]iable contented marriages are not broken up by the vile seducer of the Nineteenth Century melodrama, though this is what [criminal conversation] assumes.’”¹⁸⁰ In Justice McCormick’s dissenting opinion in *Bearbower v. Merry*,¹⁸¹ in which the Iowa Supreme Court abolished criminal conversation, McCormick argued that both of the “heart balm” torts should be abolished because of the nature of the dissolution of marriage.¹⁸²

The disintegration of a marriage is ordinarily as complex a process as is its integration. It seldom occurs overnight. It starts from within. It is not caused by only one factor or through some imperfection of only one of the spouses. Any third person who kicks at the cornerstone of a shaky marriage will not bring it down without active support from one or both of the parties. It is simplistic and unrealistic to suppose the edifice will be held together either so long as or because spouses have the right to obtain vengeance in the form of damage suits against the third person.¹⁸³

The dissent noted that the recovery of damages will “sooth [sic] the ego” and “enrich[] the purse of the plaintiff,” but will do little to “maintain[] or restore[] a mature and stable marriage between two individuals with free will and separate identity.”¹⁸⁴ Proponents of criminal conversation argue that it deters “interference” with marriage;¹⁸⁵ yet there is a growing understanding that marriages are not just broken up by third party interference. Instead, the interference often begins within the marriage, when two spouses find themselves discontented with their marriage or with one another. Punishing a third party for interfering with a marriage unrealistically assumes that fault lies entirely with that party.

179. See, e.g., *Helsel v. Noellsch*, 107 S.W.3d 231, 232 (Mo. 2003) (“[S]ome still argue that suits for alienation of affection must be retained as a useful means of preserving marriages and protecting families. . . . While these are laudable goals, it is unlikely that suits for alienation of affection actually serve this purpose.”).

180. KOROBKIN, *supra* note 4, at 174 (quoting HOMER H. CLARK, *LAW OF DOMESTIC RELATIONS* 267 (West, 1968)).

181. 266 N.W.2d 128 (Iowa 1978).

182. *Id.* at 136–38 (McCormick, J., dissenting).

183. *Id.* at 138 (McCormick, J., dissenting).

184. *Id.* (McCormick, J., dissenting).

185. See Corbett, *supra* note 12, at 998.

Additionally, other laws punish adultery more effectively than criminal conversation. In response to those that argue that abolishing the tort of criminal conversation would encourage adultery, the Supreme Court of Missouri noted that there are other areas of family law that deter adultery.¹⁸⁶ The court noted that adultery can serve as grounds for dissolution, can result in the guilty party receiving “a smaller split of property after dissolution,” or can serve as a means of “bar[ring] a spouse from certain inheritance rights.”¹⁸⁷ North Carolina law includes similar statutes. North Carolina allows the judge to consider “marital misconduct” in determining post-separation support.¹⁸⁸ Participating in “illicit sexual behavior”¹⁸⁹ can prevent a dependent spouse from receiving alimony,¹⁹⁰ or affect the amount of alimony a spouse receives or gives.¹⁹¹ These methods of deterring adultery focus on the break-up of the marriage and deal exclusively with the estranged spouses. No third party paramours need be involved. Leaving the deterrence of adultery to these laws reflects the understanding of marital dissolution reflected in McCormick’s dissent in *Bearbower v. Merry*.¹⁹² While criminal conversation might deter extra-marital relations for the few spouses and paramours who know about the tort and its legal ramifications, if the purpose is to prevent adultery and promote marriage, there are

186. *Thomas v. Siddiqui*, 869 S.W.2d 740, 742 (Mo. 1994)

187. *Id.*

188. N.C. GEN. STAT. § 50-16.2A(d) (2007).

At a hearing on postseparation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

Id.

189. § 50-16.1A(3)(a) (“[A]cts of sexual or deviate sexual intercourse [or] deviate sexual acts . . . voluntarily engaged in by a spouse with someone other than the spouse.”).

190. See § 50-16.3A (2007) (“If the court finds that the dependent spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, the court shall not award alimony.”).

191. *Id.* (“If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances.”).

192. *Bearbower v. Merry*, 266 N.W.2d 128, 135 (Iowa 1978) (McCormick, J., dissenting); see also *supra* notes 181–83 and accompanying text.

laws designed to punish adultery that keep the punishment appropriately between the parties to the marriage.¹⁹³

A further reason for the abolition of criminal conversation is the fact that the punishment disregards any knowledge on the part of the defendant of the existence of criminal conversation or even that his or her behavior could lead to legal liability. Liability is often a trap for the unwary, especially when one considers the “alarming simplicity” of the elements of the tort.¹⁹⁴ “In the action for criminal conversation, the plaintiff can prevail even if the defendant was unaware that the partner was married. . . . For these reasons, criminal conversation has been described as a strict liability tort.”¹⁹⁵ Despite the frequency with which actions for criminal conversation are brought, it is very likely that a third party defendant might not have any idea that the partner with whom he or she has begun a sexual relationship is married or legally separated if the partner does not disclose that fact. Furthermore, a defendant might not know that criminal conversation is available as a tort remedy in North Carolina, especially when the action has been abolished in most states. Many plaintiffs only become aware of the cause of action when they consult a family law practitioner. At the very least, ignorance of the tort raises an argument that the severe punishment of criminal conversation should be limited. Is it right for persons pursuing a relationship to shoulder the burden of confirming their partner’s legal status as married or not? Is it reasonable? If paramours are unaware that their conduct makes them liable for criminal conversation, how can the tort successfully deter behavior they have no reason to think is wrong? Criminal conversation should be abolished, or at least seriously

193. It may be possible, although unlikely, for a spouse to sue their spouse’s paramour for intentional infliction of emotional distress. See *Poston v. Poston*, 112 N.C. App. 849, 850, 436 S.E.2d 854, 855 (1993) (holding that a husband could not sue his wife for intentional infliction of emotional distress for her adultery, but leaving unanswered the question of whether or not the husband could sue her paramour).

194. DOBBS, *supra* note 7, § 442, at 1246. Remember that the elements of criminal conversation in North Carolina are *only* “actual marriage . . . and sexual intercourse between the defendant and the plaintiff’s spouse during coverture.” *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996). Of the two “heart-balm” torts, criminal conversation has been called “‘the more definite action’” because the only conduct that must be proved is adultery of the defendant and the plaintiff’s spouse “without establishing a causal link between any damages and the defendant’s wrongful conduct.” Corbett, *supra* note 12, at 991 (quoting Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 474 (1934)).

195. 1 REYNOLDS, *supra* note 2, § 5.46(B), at 403.

limited, because it fails to deter adultery and imposes liability on those who might not even be aware of its existence.

C. Abuse of the North Carolina Legal System

The continued existence of criminal conversation promotes abuse of the North Carolina legal system. A plaintiff suing a defendant in an action for criminal conversation cannot deter the spouse or defendant's conduct since infidelity has already occurred when the action is brought. Since a single plaintiff bringing a criminal conversation action is bringing the action based on past conduct, the plaintiff is not motivated by a genuine desire to prevent this type of behavior in others. Rather, the plaintiff is angry, and seeks vindication in the courtroom where he or she hopes to be financially compensated for a primarily emotional and "relational" injury.¹⁹⁶ The vindictive motivation underlying the tort illustrates several reasons why it should be abolished.¹⁹⁷ These include the use of the tort for blackmail and as a means of seeking excessive damages awards.

196. Torts that compensate for "emotional or mental injuries" can be distinguished from torts that compensate for "relational injuries" or injuries from relationships. Corbett, *supra* note 12, at 1025 (describing the difference between the two types of torts and noting that courts have been more receptive to recognizing emotional injuries than relational ones).

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. . . . The other strand was recognition of injuries to relationships. . . .

The evolution of tort law in [the twentieth] century has seen the growing recognition of tort recovery for both emotional injuries and relational injuries. In the area of emotional injuries . . . all or almost all jurisdictions now recognize intentional infliction of emotional distress or the tort of outrage. . . . Relational torts have not made a similar widely chronicled march toward acceptance

Id.

197. See, e.g., 1 REYNOLDS, *supra* note 2, § 5.49, at 419 ("[T]he mere filing of actions for . . . criminal conversation can ravage a person's reputation."). But see Corbett, *supra* note 12, at 1021–22 (noting that the vindictive motives often accompanying a criminal conversation action also accompany most other tort actions and, therefore, are not reason enough to abolish the tort). " 'Revenge, which may be a motive for bringing the cause of action, has no place in determining the legal rights between two parties.' 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." *Id.* at 1022 (quoting *Neal v. Neal*, 873, P.2d 871, 875 (Idaho 1994)). Professor Corbett's analogy is troubling. Suing a third party for having sex with your spouse is not the same as suing someone who intentionally hits you on the nose. With criminal conversation actions, it is very possible that the third party does not know his or her partner is married or separated. Perhaps the third party even

Criminal conversation is susceptible to blackmail and potentially malicious prosecution¹⁹⁸ because of the social injury that occurs when the action is brought.¹⁹⁹ The tort makes private matters public in a way that does not consider why the actors might have made the decisions they did. Today, to label one as an “adulterer” might not be as terrible as it was for Hester Prynne,²⁰⁰ but it certainly carries a negative connotation. “No matter what the outcome of litigation, the mere filing of actions for . . . criminal conversation can ravage a person’s reputation.”²⁰¹ Parties to separation agreements or property settlements will sometimes use the ability to bring an action in criminal conversation as leverage for other favorable concessions.²⁰² “Because the mere filing of the action may destroy reputations or inflict devastating psychological harm, they [sic] have disproportionate settlement value for unscrupulous plaintiffs.”²⁰³

saw a signed separation agreement and believed in good faith that his or her partner’s marriage was over. This situation is different from somebody who hits another on the nose. The hitter is aware of his or her culpability.

198. Professor Reynolds notes that “actions for malicious prosecution [based on] frivolous suits for . . . criminal conversation usually fail.” 1 REYNOLDS, *supra* note 2, § 5.49, at 420. In North Carolina, a claim for malicious prosecution requires that the action be “based on an earlier civil proceeding, the plaintiff must establish that the defendant initiated the earlier proceeding maliciously, that the earlier proceeding ended in the plaintiff’s favor, and that the plaintiff suffered some special damage to person or property that would not be the case in other suits of that type.” *Id.* The Supreme Court of North Carolina has held that damages to reputation that one suffers in an action for criminal conversation did not satisfy the special damages requirement of malicious prosecution. *Id.* (citing *Stikeleather v. Willard*, 83 N.C. App. 50, 348 S.E.2d 607 (1986)).

199. See generally *McComb v. Phelps*, No. COA05-362, 2005 N.C. App. LEXIS 2732 (N.C. Ct. App. Dec. 20, 2005) (illustrating how criminal conversation can be used in an extortionate way).

200. Hester Prynne is the main character, an adulteress, of Nathaniel Hawthorne’s *The Scarlet Letter*. See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Vintage Books/The Library of America 1990) (1850).

201. 1 REYNOLDS, *supra* note 2, § 5.49, at 419.

202. *Id.*; see also *McComb*, 2005 N.C. App. LEXIS 2732, at *2 (discussing one party’s use of the threat of criminal conversation action against the other). The Supreme Court of North Carolina acknowledged the danger of using the action of criminal conversation as leverage in *Boone v. Boone*, 217 N.C. 722, 729–30, 9 S.E.2d 383, 387–88 (1940). In *Boone*, the court enjoined the husband from bringing an action for alienation of affections until the trial court could determine whether the husband had agreed with his wife that he would not. *Id.* Even acknowledging the danger of using the tort as leverage, the Supreme Court seems to have not found this to be sufficient reason to judicially abolish it.

203. 1 REYNOLDS, *supra* note 2, § 5.45(B), at 391. Reynolds is not the only commentator to suggest that the tort serves as a potential for blackmail. See, e.g., PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 929 (W. Page Keeton et al. eds., 5th ed. 1984); see also Paul D. Schoonover, Comment, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 Sw. L.J. 594, 613 (1971) (“[T]he public scandal that can be engendered by the filing of one of these actions is an open invitation to extortion

Plaintiffs who know that bringing a claim for criminal conversation would be crippling to their spouse and his or her paramour need only threaten to bring the claim to subsequently enjoy a hefty settlement. Such extortionate behavior is devastating not only to the defendant's or spouse's reputation, but also to any hope that collaborative divorce settlement proceedings might take place.²⁰⁴

Actions for criminal conversation promote excessive damages awards. Historically, North Carolina took the view that punitive damages could only be recovered in an action for criminal conversation where the defendant's conduct was " 'willful, aggravated, malicious, or of wanton character.' " ²⁰⁵ Now, however, a jury may consider the issue of punitive damages for an action in criminal conversation based solely upon evidence that the defendant engaged in sexual intercourse with the plaintiff's spouse.²⁰⁶ The very misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages.²⁰⁷ For instance, in *Horner v. Byrnett*, the fact that the paramour "engaged in sexual intercourse with the plaintiff's wife [and] before becoming intimate, [had] met several times to discuss the harm that a sexual relationship would cause, and yet . . . willfully engaged in the injurious conduct" was more than sufficient evidence to support the award for punitive damages.²⁰⁸ Other cases follow this simple standard for warranting punitive damages in an action for criminal conversation.²⁰⁹

and blackmail. This problem was a major consideration in the 1930's [sic] campaign to abolish the actions. If this argument was persuasive then, there is no reason to think it is less of a problem today.").

204. *Cf. McComb*, 2005 N.C. App. LEXIS 2732, at *6 (affirming the dismissal of plaintiff's claim for intentional infliction of emotional distress after the defendant threatened to bring a criminal conversation claim against plaintiff, his former lover). The facts of *McComb* illustrate how criminal conversation can be used in an extortionate manner. Defendant and plaintiff began a sexual relationship in 1990. *Id.* at *1. When plaintiff learned that defendant was married she broke off the relationship. *Id.* at *2. Plaintiff and defendant resumed their relationship when defendant promised to leave his wife. *Id.* When defendant did not leave his wife and plaintiff angrily confronted the defendant, defendant hired a lawyer to send plaintiff a letter threatening to bring a claim of criminal conversation against plaintiff if she would not leave him alone. *Id.*

205. *Gray v. Hoover*, 94 N.C. App. 724, 730, 381 S.E.2d 472, 475 (1989) (citing *Sebastian v. Klutz*, 6 N.C. App. 201, 220, 170 S.E.2d 104, 116 (1969)).

206. *Horner v. Byrnett*, 132 N.C. App. 323, 327, 511 S.E.2d 342, 345-46 (1999).

207. *Id.* at 327, 511 S.E.2d at 345.

208. *Id.*

209. *See Hutelmyer v. Cox*, 133 N.C. App. 364, 372, 514 S.E.2d 554, 560 (1999) (holding that sexual intercourse alone is enough to warrant punitive damages in a criminal conversation action); *see also* 1 REYNOLDS, *supra* note 2, § 5.48(C), at 417-18. Professor Reynolds notes that "when the plaintiff proves sexual relations between the defendant and spouse, then it seems to take little else to establish both the tort and the right to punitive

The issue of excessive punitive damages is one characteristic of criminal conversation that makes it more egregious than alienation of affection actions,²¹⁰ thus a brief comparison with alienation of affection is appropriate here. Common law supports awards of punitive damages for both torts, but “the law of North Carolina has conditioned punitive damages on establishing malice *beyond* what is needed simply to satisfy the elements of the torts.”²¹¹ As “alienation of affections requires proof of malice,” it can be difficult for plaintiffs in actions for alienation of affection to get beyond the requirement of malice that is necessary to establish the tort itself, and thus generally more difficult to get punitive damages.²¹² Criminal conversation, however, requires no proof of malice.²¹³

For [criminal conversation], the question is not whether the plaintiff has shown malice beyond what is needed to establish the tort, but what evidence suffices to show the kind of reckless conduct justifying punitive damages. In fact, the appellate cases prove that the sexual intercourse that is necessary to establish the tort also supports an award of punitive damages²¹⁴

As criminal conversation requires no proof of actual malice, the requirements for bringing the action (“actual existing marriage plus sexual intercourse”)²¹⁵ are the same as those for recovering punitive damages.²¹⁶

Punitive damages become a problem when plaintiffs, motivated primarily by vindictive desires to hurt their spouses, consistently recover excessive awards. The size of the sums makes the criminal conversation claim more popular. The pain over a spouse’s adultery turns into greed when a plaintiff learns that millions are just a lawsuit

damages.” *Id.* § 5.48(C), at 418 (citing *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982) (finding that there was evidence from which the jury could infer sexual relations and affirming the \$25,000 in punitive damages and \$25,000 in compensatory damages even when there was minimal evidence supporting the claims for criminal conversation)).

210. See 1 REYNOLDS, *supra* note 2, § 5.48(C), at 417 (noting that alienation of affections, unlike criminal conversation, requires a showing of malice).

211. *Id.* at 416.

212. *Id.* at 416–17.

213. *Id.* at 417.

214. *Id.*

215. *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996).

216. 1 REYNOLDS, *supra* note 2, § 5.48(C), at 417.

away. In states like North Carolina that continue to recognize criminal conversation, the number of cases filed appears to be rising.²¹⁷ The average recovery for an action in criminal conversation often runs in the tens of thousands.²¹⁸ Yet, some high profile North Carolina damages awards suggest that a successful plaintiff in an action for criminal conversation might recover an award in the hundreds of thousands or even millions.²¹⁹ Though it is difficult to draw the line as to what constitutes an “excessive” damages award, when the plaintiff’s primary motivation for the damages is greed, vindication, or blackmail, awards in excess of the hundreds of thousands or millions of dollars begin to raise concerns. Is the ability to win these amounts a positive characteristic of the North Carolina legal system? Do we want plaintiffs and plaintiffs’ attorneys to expend their energy trying to catch the spouse “in the act” with a luckless paramour instead of attempting new forms of separation and divorce proceedings that emphasize empathy and collaboration?²²⁰ One North Carolina attorney notes that while attending a Continuing Legal Education course on the “heart balm” torts in eastern North Carolina, another attorney noted that she was attending because there was “money to be made” in the torts.²²¹ The attorney’s comment reveals what is probably the single most motivating factor for bringing a criminal conversation action: money. The use of the tort as a way to fill the purses of plaintiffs and their lawyers has become an embarrassment for the North Carolina legal system. Torts are meant to compensate injured plaintiffs. The damages plaintiffs have received in criminal conversation are not astronomical in themselves, but they are very large when one considers what “injury” the plaintiffs have suffered. Damages in the hundreds of thousands and millions are inappropriate when there is a question as to whether any *injury* has occurred or not.

D. North Carolina’s Growing Interest in Collaborative Divorce

Criminal conversation frustrates this state’s promotion of collaborative divorce, a process that resolves divorces in a more humane way and greatly increases judicial economy. In 2003, North Carolina joined Texas as the second state to enact a statute

217. KOROBKIN, *supra* note 4, at 178.

218. See discussion *supra* Part II.C.

219. See discussion *supra* Part II.C.

220. Collaborative divorce will be discussed *infra* Part III.D.

221. Email from Jeff Miller, Solo Practitioner, to Author (Dec. 17, 2008, 7:14:49 EST) (on file with the North Carolina Law Review).

authorizing the use of collaborative law procedures for divorce.²²² Collaborative divorce is a recent trend that seeks to limit the destructive nature of divorce proceedings.²²³ Collaborative law “‘rejects the adversarial system’”²²⁴ by having divorcing couples and their attorneys sign a binding agreement to make a good faith attempt to “resolve disputes arising from dissolution of the marriage by reaching an agreement rather than by judicial intervention.”²²⁵ Couples contemplating divorce sign a collaborative law agreement committing themselves and their attorneys to “‘good faith bargaining, voluntary full disclosures, interest-based bargaining, [and] inclusion of relational and long term interests in the identification of clients’ goals and strategies.’”²²⁶ The terms of the collaborative agreement are usually realized through a series of four-way meetings between the parties and their attorneys.²²⁷ “From the outset of these meetings, the focus is on negotiation, and in that setting, collaborative law practitioners provide a ‘civilized process, produce outcomes meeting the needs of both parties, minimize costs, and increase clients’ control, privacy, and compliance with agreements.’”²²⁸ On the whole, collaborative divorce is a more humane, more cost efficient, and remarkably more congenial process than a traditional adversarial divorce.²²⁹

222. N.C. GEN. STAT. §§ 50-70 to -79 (2007). The applicable Texas statute is TEX. FAM. CODE ANN. § 6.603. See Elizabeth K. Strickland, Comment, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 982 (2006) (“Although only two states currently have collaborative law statutes, practitioners in other states and countries have begun using the technique, forming groups to develop training and practice protocols for collaborative law.”).

223. See Strickland, *supra* note 222, at 982.

224. *Id.* at 983 (quoting Pamela H. Simon, *Collaborative Law: How Goes the Quiet Revolution?*, FAM. F. (N.C. Bar Ass’n Family Law Section, Raleigh, N.C.), Feb. 2003, at 1, 1).

225. *Id.*

226. *Id.* at 984 (quoting Pauline Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 320 (2004)).

227. *Id.*

228. (quoting John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 281 (2004)).

229. Though collaborative divorce is still a relatively new procedure, proponents of it have noted that “years of experience with collaborative law indicates that no other dispute-resolution modality matches collaborative law in its ability to manage conflict, elicit creative ‘out of the box’ solutions, and support parties in realizing their highest intentions for their lives after the legal process is over.” PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 1, 5 (2001).

Collaborative law procedures also have another important benefit—relieving an overburdened court system. “[B]ecause collaborative law takes places outside the court setting, it has the potential to alleviate the strain on judicial resources associated with traditional court-obtained divorces” and civil suits like criminal conversation that arise out of divorce or separation proceedings.²³⁰

[N]o-fault divorce and the presence of additional life stressors have resulted in an increase in the number of divorces and divorce-related proceedings in state courts. Furthermore, courts are already overwhelmed by growing civil dockets, an issue further complicated by budget cuts, mandatory personnel cuts, and similar factors. If more couples chose to use collaborative law, fewer cases would go to court, and dockets would be clearer. Collaborative lawyers would also have more time within each case to devote to engaging in effective problem solving with their client instead of spending the majority of their time on discovery, working on court documents, and preparing for court appearances. Moreover, collaborative law is also “readily adaptable across jurisdictional lines, despite significant differences in substantive and procedural laws from jurisdiction to jurisdiction.”²³¹

Additionally, there is evidence that in collaborative law costs are “manageable” and generally less expensive than litigation.²³² Collaborative proceedings “typically [cost] clients only one-tenth to one-twentieth of what a normal in-court case costs.”²³³ Collaborative law is more cost effective than traditional litigation because it is a more efficient process for the parties’ needs and objectives.²³⁴ Parties and attorneys need not burden themselves with extensive filings, discovery, and motions.²³⁵ Instead, they can move directly to face-to-face meetings where the dispute can be privately resolved.²³⁶

230. Strickland, *supra* note 222, at 997 (describing how collaborative law procedures ease burdens on the court system).

231. *Id.* (quoting Pauline Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317 (2004)).

232. TESLER, *supra* note 229, at 8.

233. Pauline Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 324 (2004).

234. Strickland, *supra* note 222, at 987.

235. *Id.*

236. *Id.*

North Carolina has demonstrated its interest in promoting collaborative divorce by enacting a Collaborative Divorce Act.²³⁷ The Act defines collaborative law as:

a procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.²³⁸

The North Carolina statutes include the basic principles of collaborative law—that divorcing or separating couples shall work together, in a good faith attempt to resolve disputes, with the intention not to use judicial interference to accomplish their goals.²³⁹

The North Carolina statutes include more elaborate provisions and some specifications of the collaborative process that the Texas statute does not.²⁴⁰ For instance, the North Carolina statutes include a set of definitions for “collaborative law, collaborative law agreements, collaborative law procedures, [and] settlement agreements.”²⁴¹ Similar to the Texas statute, the North Carolina statutes provide that once the parties have given notice to the court that they have agreed on collaborative procedures, “the court cannot take action . . . unless the parties fail to reach a settlement agreement.”²⁴² The North Carolina statute, however, goes a bit further than the Texas statute and states that “if the dispute is not resolved through collaborative law procedures, parties can file a civil suit, but only if the collaborative law agreement does not first provide

237. N.C. GEN. STAT. §§ 50-70 to -79 (2007).

238. § 50-71(1).

239. *Id.*

240. Strickland, *supra* note 222, at 991–92.

241. *Id.* at 990; *see also* § 50-71(1)-(4) (providing statutory definitions).

242. Strickland, *supra* note 222, at 991.

for other means of alternative dispute resolution.”²⁴³ The North Carolina statutes include several other provisions that differ from the Texas statute, including guidelines for tolling,²⁴⁴ providing for other methods of alternative dispute resolution,²⁴⁵ and continuing procedures of collaborative law after the death of a deceased spouse.²⁴⁶ Overall, the “North Carolina statute[s are] more complex and detailed than the Texas statute.”²⁴⁷ Thus, North Carolina has enacted collaborative law statutes that reflect not only general collaborative law principles, but also the state’s interest in creating its own system of collaborative law.

The fact that North Carolina was the second state to enact a collaborative law statute, and that it did so with a level of detail and specificity that exceeds the only other collaborative law statute in effect at the time, is evidence of the state’s interest in promoting collaborative procedures. Divorce proceedings are increasingly inappropriate to resolve in the courtroom: “To ask a court and jury to pinpoint, with any degree of accuracy, the cause of a marital breakup is to invite judicial involvement in intimate and complex human relationships to a disturbing degree.”²⁴⁸ The North Carolina legislature has illustrated its agreement. When the House Bill for Collaborative Law Procedures came before the North Carolina House of Representatives in April of 2003, 115 votes were cast, and all 115 were for the passage of the bill.²⁴⁹

243. *Id.*; see § 50-76(a) (“If the parties fail to reach a settlement and no civil action has been filed, either party may file a civil action, unless the collaborative law agreement first provides for the use of arbitration or alternative dispute resolution.”).

244. § 50-73 (2007) (providing that a valid collaborative law agreement tolls all legal deadlines, including statutes of limitation, trial and hearing dates, filing and discovery deadlines, and scheduling orders); see also Strickland, *supra* note 222, at 991 (describing the differences between the Texas and North Carolina collaborative laws and noting the North Carolina tolling provision).

245. § 50-78 (“[N]othing in [the statute] shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternative dispute resolution . . . to reach a settlement on any of the issues in the collaborative law agreement.”).

246. § 50-79 (“[T]he personal representative of the estate of a deceased spouse may continue a collaborative law procedure with respect to equitable distribution that has been initiated by a collaborative law agreement prior to death, notwithstanding the death of one of the spouses.”).

247. Strickland, *supra* note 222, at 991.

248. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 669 (1995).

249. 1 J. OF THE HOUSE OF REPRESENTATIVES OF N.C., H.B. 1126, 1st Sess., at 616 (2003). The bill again passed on July 18, 2003, with 109 votes cast and all voting for passage. See 2 J. OF THE HOUSE OF REPRESENTATIVES OF N.C., H.B. 1126, 1st Sess., at 1332 (2003).

Relating to divorce proceedings, criminal conversation renders collaborative law virtually impossible. Criminal conversation seeks to resolve issues arising out of a troubled marriage entirely in the courtroom. “Adultery may begin in the privacy of the bedroom, but ‘criminal conversation’ ends in the glare of the courtroom. . . . Criminal conversation stories transform intimate experiences of conflict and suffering into public, commercial discourse.”²⁵⁰ The North Carolina collaborative law statutes expressly state that the intention of collaborative law is to keep personal, family disputes arising out of a divorce or separation *outside* of the courtroom.²⁵¹

Criminal conversation inherently generates much litigation, and contradicts the principles of collaborative law. “[C]ourts are far from ideal places to resolve issues surrounding the breakdown and restructure of a family.”²⁵² Particularly, litigation can be “destructive and lead[] to undesirable psychological outcomes for families, especially those with children, who need nurturing during the difficult time of divorce.”²⁵³ Because criminal conversation is a tort action, it takes place in a litigious setting. Additionally, the nature of the criminal conversation action makes it an especially adversarial and destructive process for all parties involved. The process of bringing an action for criminal conversation—from the initial complaint to the complications of discovery—requires families already torn apart to hash out the intimate and painful details of their dissolution as well as crowd already overburdened civil dockets. All of the benefits of collaborative law that lessen the burden on the court system and the financial burdens on the parties are lost when criminal conversation enters the equation. Criminal conversation immediately halts the collaborative law proceedings by taking the dispute to court, meaning the possible benefits of collaborative law are lost.

The continued availability of a criminal conversation action in North Carolina prevents potential participants and the court system from benefiting from the positive effects of collaborative law. As collaborative law grows in popularity, the availability of criminal conversation hinders the ability of collaborative law to reach those parties that might be able to resolve their marital disputes through

250. KOROBKIN, *supra* note 4, at 136.

251. *See* § 50-71.

252. Strickland, *supra* note 222, at 996.

253. *Id.*

collaborative procedures.²⁵⁴ The extent to which collaborative divorce would rise in frequency by the abolition of criminal conversation is unknown. If North Carolina abolished criminal conversation, people involved in divorces or separations might enjoy the benefits of collaborative law that would not have had the chance if the action were available. Additionally, if proponents argue that criminal conversation promotes marriage,²⁵⁵ collaborative procedures might be more conducive to reconciliation than the litigious nature of a criminal conversation suit. Few benefits are derived from an action in criminal conversation aside from the plaintiff's possible financial remedy and a sense of vindication. Considering the state's interest in promoting collaborative divorce, another reason in favor of abolishment of criminal conversation is its frustration of collaborative divorce procedures. Even the small chance that a few more couples might enjoy the benefits of collaborative divorce outweighs many arguments in favor of keeping criminal conversation on the books.

CONCLUSION

It is not only the right, but the duty of the courts to re-examine questions when justice demands it, and to depart from or modify old rules when necessary to bring the law in accord with present-day standards of wisdom and justice [and] to adapt their practice and course of proceeding as far as possible to the existing state of society. . . .²⁵⁶

254. Criminal conversation acts as a hindrance to civil divorce proceedings. *Cf.* 2 KELSO, *supra* note 99, § 18:6, at 171-72 (arguing that North Carolina should reduce its one year of separation requirement before a couple can obtain a divorce). Kelso cites actions in criminal conversation as a potential danger for couples that desire a divorce but must wait for the one-year period to pass before their divorce is final.

The time period while waiting for an artificial one year legal deadline to run can be a source of continuing emotional pain and discord as the parties linger in a state of limbo between not really married, but not yet divorced. Those who cannot wait often strike up a new relationship and often engage in the immoral conduct of adultery and unmarried cohabitation. Such conduct may subject a paramour to a suit for criminal conversation, even though they may have a valid separation agreement.

Id.

255. See Corbett, *supra* note 12, at 998.

256. Cannon v. Miller, 71 N.C. App. 460, 495, 322 S.E.2d 780, 803 (1984) (quoting 1 AM. JUR. 2D. *Actions* § 49 (1962) (alteration in original), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985).

The North Carolina Court of Appeals used these words in its opinion in *Cannon v. Miller*²⁵⁷ in 1984 to describe the duty it felt to abolish criminal conversation in North Carolina. The court's comment summarizes what is perhaps the most troublesome aspect of criminal conversation: it is an ancient tort that is being used in a modern time in an inappropriate way. Plaintiffs sue for criminal conversation not to recover their property rights in their spouse, but to potentially recover millions in damages. Plaintiffs do not sue because they want to prevent adultery in North Carolina; they sue because they want to punish their spouses emotionally and their spouses' lovers financially. Criminal conversation does not promote marriage; it makes the end of a marriage much more painful and costly.

This Comment has described the origins of criminal conversation and its application today in North Carolina. The history of criminal conversation is a principal argument for its abolition. The historic basis of the tort illustrates that criminal conversation is derived from social attitudes about gender and sexuality that are no longer acceptable today.²⁵⁸ From the historic understanding of "coverture" and its elimination of the wife's personal identity to the rapidity with which so many states abolished the action after the Married Women's Property Acts, the history of criminal conversation raises the question of why North Carolina continues to recognize an action so antithetical to our current understanding of marriage, spousal autonomy, and what causes divorce.

Beyond historic justifications, revised and new justifications for criminal conversation do not support retaining the tort. Criminal conversation does not deter adultery. Judges, legal scholars, and very likely the plaintiffs themselves understand that threat of legal liability does little to deter extra-marital relations.²⁵⁹ Additionally, criminal conversation does not deter extra-marital behavior because of widespread ignorance that criminal conversation exists as well as ignorance of what constitutes culpable conduct. A single person who meets another person who appears to be single—he or she lives alone and does not mention a former spouse or a legal separation—unknowingly becomes liable for criminal conversation if he or she begins a sexual relationship with a person whose divorce is not

257. 71 N.C. App. 460, 322 S.E.2d 780 (1984).

258. See *supra* Part III.A.

259. See *supra* Part III.B.

final.²⁶⁰ Situations like this are not uncommon and to impose liability on those defendants is unjust.

Criminal conversation is an open invitation for angry, embittered plaintiffs who seek financial liability from a third party who is, in most cases, not the only reason for the plaintiff's failed marriage. This Comment does not advocate adultery, and plaintiffs who are hurt and humiliated by their spouse's infidelity are deserving of sympathy and compassion. But, to drag a third party through the ordeal of a criminal conversation trial in order to heal the wounds of a broken marriage is not an appropriate use of the North Carolina court system. Furthermore, the vindictive spirit of a criminal conversation action has been used for blackmail and leverage in settlement proceedings. This reason alone has been the catalyst for many states to abolish the action,²⁶¹ and North Carolina should follow suit.

North Carolina has illustrated its interest in promoting collaborative law in this state and criminal conversation frustrates that intent. The state legislature overwhelmingly supported the Collaborative Divorce Act and enacted a statute that offers specific guidance for family law practitioners who want to promote collaborative law in North Carolina.²⁶² In a court system that is consistently overburdened and understaffed,²⁶³ procedures that promote out-of-court dispute resolutions are preferable from an economic perspective as well as a humane one. Collaborative law keeps parties out of the combative courtroom environment and promotes conversation, empathy and healing. Yet, criminal conversation contradicts the very purpose of collaborative law. For the plaintiffs who have the wherewithal to find out about the tort of criminal conversation, or consult an enterprising family law practitioner, an action in criminal conversation—with the potential to get millions for your estranged spouse's infidelity—looks pretty attractive. Suddenly, the idea to try collaborative procedures becomes less attractive for the spouse who has been hurt by the

260. See *supra* Part II.B.

261. See, e.g., *Kline v. Ansell*, 414 A.2d 929, 931 (Md. 1980) ("The action for criminal conversation is notorious for affording a fertile field for blackmail and extortion."); see also *Cannon*, 71 N.C. App. at 483, 322 S.E.2d at 795 n.11 (listing several states in which the concern for blackmail is so serious, it is a crime to file a complaint based on criminal conversation).

262. See *supra* note 249 and accompanying text.

263. See George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIMONIAL L. 429, 430 (2003) (noting that the combination of an increased civil case load and the speedy trial requirement for criminal trials have clogged and delayed the judicial process in state court systems).

other's infidelity. The continued existence of criminal conversation in North Carolina prevents couples that might seek collaborative procedures from exploring the much healthier, more economic and conciliatory divorce process of collaborative law.

Since criminal conversation derives from common law, the Supreme Court of North Carolina has the authority to abolish the action. Yet, the court has relied on the legislature, which has also failed to act.²⁶⁴ Unfortunate defendants and separated couples trying to begin a new life are left unprotected in North Carolina. Again, this Comment does not agree with marital infidelity; it only seeks to illustrate that criminal conversation does not effectively prevent it. There are other, better ways for the State to promote marriage; refusing to abolish an ancient tort subject to widespread abuse is not the answer. Criminal conversation should not be abolished simply because it is outdated, but because it is outdated *and* abused. It is used in a way that not only destroys peoples' lives, but also respect for the North Carolina legal system. It is the duty of the state legal system to promote fairness and justice; keeping criminal conversation alive in North Carolina does neither.

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264. See *supra* Part II.D.