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Adultery as Tort

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North Carolina is one of the last remaining states to recognize tort claims arising from adultery. Ignoring criticism of this position, the appellate courts of the state have consistently and steadfastly refused to abandon adultery-based actions, despite many high-profile opportunities to do so. Traditional torts such as alienation of affections and criminal conversation thus retain their viability. Not everyone is pleased with North Carolina's isolation in this regard. Attempts in the North Carolina legislature to repeal these perceived legal relics have increasingly gained traction in recent years. With the future of these torts in North Carolina in doubt, the time is ripe to assess whether any compelling reasons exist to preserve them.

In this vein, this Article offers a countercultural defense of North Carolina's continuing embrace of adultery as tort. First, as the ongoing debate over gay marriage demonstrates, citizens of all political stripes look to government to validate marriage as an institution. Gay marriage advocates see state licensing as an essential step in elevating the status of same-sex couples. Gay marriage opponents, on the other hand, look to the state as the decisive authority for protecting the traditional view of marriage as being between one man and one woman. But if the state is the proper vehicle for legitimizing the marriage bond, as all sides seem to agree, then it follows that the state should have a prominent role in protecting that bond. Second, the tort system presently offers robust protection to victims injured when their business or contractual relationships suffer sabotage from third-party tortious interference. Marriage, as a relationship of demonstrably greater importance, deserves the same level of legal respect. Third, through loss of consortium claims, the law already offers strong protection of the marital bed against intrusions by third-party tortfeasors. The ubiquity of loss of consortium claims shows both tort law's desire to protect marriage from the actions of third parties and its willingness to

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intrude into the most private of personal details to effectuate this desire.

By contrasting adultery as tort with these other areas of legal interest, I hope to demonstrate that adultery-based torts are not as far out of the legal mainstream as is commonly assumed, perhaps paving the way for a wider acceptance of claims such as alienation of affections once again.

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INTRODUCTION

American Idol winner Fantasia Barrino made an unwelcome return to the headlines in August 2010 when court documents alleged that she engaged in "illicit sexual behavior" with Antwaun Cook, a married man.[1] Celebrity sex scandals, of course, are nothing new,

1. *See* Complaint for Child Custody, Child Support, Postseparation Support, Alimony, Equitable Distribution, and Attorney's Fees at 1, 5, Cook v. Cook, No. 10-CVD-16371 (N.C. Dist. Ct. Aug. 4, 2010), *available at* http://media.syracuse.com/entertainment/

especially ones that involve allegations of adultery. Yet Fantasia's liaison with a married man had a distinguishing characteristic that separated it from the typical Hollywood scandal of the week. The wrinkle: Fantasia's indiscretions occurred in the State of North Carolina.

Traditionally, through the "heartbalm" torts, the common law took active measures to protect the sanctity of marriage from third-party interference.[2] Comprised of four separate causes of action, these torts covered a range of conduct deemed harmful to both present and prospective marriage relationships:

> (1) alienation of affections (a third party causes estrangement between spouses); (2) criminal conversation (a third party's adulterous relationship with a plaintiff's wife, usually); (3) seduction (an unmarried woman's father and the woman herself could make a claim for injury resulting from premarital sex or unwed motherhood); and (4) breach of marriage promise (a promise of future marriage induced a woman to engage in sexual behavior that she would not have but for the promise and expectation of marriage).[3]

Courts, legal scholars, and state legislatures have long contemplated whether tort law should continue to play this marriage-regulating role.[4] The general consensus that emerged beginning in the

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other/Fantasia+documents.pdf. Fantasia later admitted to the affair when questioned about it under oath. *See* Shirea L. Carroll, *Fantasia Admits to Terminating Cook's Baby*, ESSENCE (Nov. 29, 2010), http://www.essence.com/2010/11/29/fantasias-courtroom-shocker/.

2. *See* Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 251 n.265 (2010) (citations omitted) (arguing heartbalm torts are not a proper means of protecting marriage).

3. *Id.*

4. *See* Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 979 (1935) ("[T]he social cost of such protection by means of an action for damages may exceed its worth."). *See generally* Frederick L. Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63 (1936) (examining New York legislation that abolished remedies for heartbalm torts); Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COLUM. L. REV. 242 (1952) (critiquing the theory that anti-heartbalm statutes could be easily avoided by use of other tort remedies, and concluding that "[o]n the whole, forecasts that anti-heartbalm legislation would be easily subverted have not been realized"); William M. Kelly, Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME L. REV. 426 (1972) (analyzing the policies behind heartbalm torts, and suggesting "the revitalization of the body of tort law dealing with intentional interference with the marital relationship"); Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583 (1998) (analyzing the inconsistencies between anti-heartbalm laws and the common law's approach to broken engagements).

1930s is no.[5] The result is that adultery-based claims such as alienation of affections and criminal conversation face near extinction across the country.[6] One court captures the prevailing mood by noting that these torts "have outlived any usefulness they may have possessed" once upon a time.[7] This feeling is widespread, as all but seven states have joined this abolition movement.[8]

Unfortunately for Fantasia, North Carolina stands as one of these last remaining holdouts.[9] Despite many high-profile opportunities to do so, the appellate courts of the state have consistently and steadfastly refused to abandon the adultery-centered torts.[10] Perhaps the most famous case involves wronged wife Dorothy Hutelmyer, whose story made national news—and eventually became a Lifetime movie—when a jury awarded her one million dollars against her husband's former secretary for alienation of affections and criminal conversation.[11] The North Carolina Court of Appeals

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5. *See* Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 406–430 (2008) (describing history of opposition to heartbalm torts).

6. *Id.*

7. Russo v. Sutton, 422 S.E.2d 750, 753 (S.C. 1992).

8. *See* Fitch v. Valentine, 2005-CA-01800-SCT (¶ 15) (Miss. 2007) (noting that as recently as 2007, Mississippi, Illinois, Hawaii, New Mexico, North Carolina, South Dakota, and Utah were the only states to recognize these torts).

9. *See* Graham, *supra* note 5, at 430.

10. One notable exception to this steadfast support is the case of *Cannon v. Miller*, 71 N.C. App. 460, 322 S.E.2d 780 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985), in which the Court of Appeals of North Carolina tried to abolish the torts of alienation of affections and criminal conversation. *Id.* at 497, 322 S.E.2d at 804. The Supreme Court of North Carolina summarily reversed this ruling in a direct and concise manner:

> It appearing that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court. It is therefore ordered that the petition for discretionary review is allowed for the sole purpose of vacating the decision of the Court of Appeals purporting to abolish the causes of action for Alienation of Affections and Criminal Conversation.

Cannon, 313 N.C. at 324, 327 S.E.2d at 888.

11. *See, e.g.*, Lloyd Ferriss, *House Cleaners Want Sun to Set on Archaic Laws Forbidding the Burning of Bricks and Requiring the Whitewashing of Jails Are Among the Laws Whose Time Has Come and Gone, The Group Says*, ME. SUNDAY TELEGRAM, Aug. 31, 1997, at 1B, *available at* NewsBank, File No. 9708310386 (noting that the Hutelmyer "case has become the subject of talk show hosts from Oprah Winfrey to Ricki Lake"); *see also The Price of a Broken Heart* (Lifetime television broadcast Aug. 16, 1999). The verdict was an unpopular one in legal circles. *See* Terry Carter, *'She Done Me Wrong:' A Jury Agrees, Awarding a Jilted Wife $1 Million in an Alienation of Affection Suit Against the 'Other Woman,'* A.B.A. J., Oct. 1997, at 24 (explaining the difficulty of finding any legal expert to defend the verdict and the law that supported it).

subsequently affirmed the jury's work.[12] Hutelmyer's success is not unique, as Anne Lundquist—like Fantasia, the proverbial "other woman"—learned to her chagrin in 2010.[13] When Cynthia Shackelford sued Lundquist for breaking up her thirty-three-year marriage, the jury hit Lundquist with a crushing $9 million verdict, including $4 million in punitive damages.[14] There have been several other seven-figure results, although the majority of awards are of much smaller amounts.[15] One attorney estimated that overall, North Carolina sees approximately 200 new alienation of affections cases each year.[16] Even though the heartbalm torts technically remain on the books in six other states, "North Carolina is just about the only bright spot for these claims."[17]

Not everyone is pleased with North Carolina's ongoing isolation and notoriety in continuing to embrace these torts. As one divorce lawyer reportedly observed: "There's often bad conduct. Adultery is not uncommon, but an alienation-of-affection case just polarizes everyone and devastates everything in its path including the children and both spouses . . . ."[18] Because of this and similar opposition, unsuccessful attempts in the North Carolina legislature to statutorily repeal these perceived legal relics were, until recently, an annual

12. Hutelmyer v. Cox, 133 N.C. App. 364, 366, 514 S.E.2d 554, 556 (1999).

13. *See* Alice Gomstyn, *Wife Wins $9 Million from Husband's Alleged Mistress*, ABC NEWS (Mar. 22, 2010), http://abcnews.go.com/Business/wife-wins-million-husbands-alleged-mistress/story?id=10151957&singlePage=true. Interestingly, Allan Shackelford, the third party of this love triangle, came to his mistress's defense by arguing that Lundquist could not be the cause of the deterioration of his relationship with his wife since "he had had numerous affairs going back to the first two years" of his thirty-three-year marriage. *Id.* (internal quotation marks omitted).

14. *Id.*

15. *See* G. Edgar Parker, *Alienation of Affections and Criminal Conversation*, FAM. F. (N.C. Bar Ass'n Family Law Section) Mar. 2, 2011, at 11, 12, *available* at http://familylaw.ncbar.org/media/11481991/flmar11.pdf (describing North Carolina verdicts of $1.1 million and $1.41 million and noting that most verdicts have ranged from $60,000 to a nominal amount); Fred Taylor, *Divorce Lawyers Want Alienation-of-Affection Law Dropped*, WRAL.COM (Apr. 23, 2004), http://www.wral.com/news/local/story/105127/ (describing $2 million verdict awarded to Christine Cooper in 2001); Paul Thompson, *Spurned Wife Sues Her Husband's Mistress – and WINS $5.8million* [sic], MAILONLINE.COM, http://www.dailymail.co.uk/news/article-1310322/Spurned-wife-Lynn-Arcara-sues-husbands-mistress-WINS-3-75m.html (last updated Sept. 9, 2010, 7:47 AM) (describing Chapel Hill case of Dr. Lynn Arcara against Susan Pecoraro).

16. *See* Gomstyn, *supra* note 13. The basis for this attorney's estimate is unclear.

17. Graham, *supra* note 5, at 430 (also describing North Carolina as "virtually the only place in which heartbalm suits (most often, alienation of affections claims) could be described as common enough to have developed a substantial body of modern case law").

18. Taylor, *supra* note 15.

tradition.[19] In 2009, however, both the House and Senate passed for the first time legislation, entitled "Procedures in causes of action for alienation of affection and criminal conversation," recognizing the existence of the adultery-based torts:

> (a) 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 the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.
>
> (b) An action for alienation of affection or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.
>
> (c) A person may commence a cause of action for alienation of affection or criminal conversation against a natural person only.[20]

Because the new law places restrictions on when civil liability shall arise, one observer of the adultery-centered torts sees this legislation as the first step in the long-anticipated repeal of these laws.[21] Supporters of these claims, on the other hand, see section 52-13 as both offering explicit statutory validation that these torts remain viable and adding modest language that "merely cleared up a few issues that many practitioners, whether representing Plaintiffs or Defendants, had struggled with in prosecuting and defending against these actions over the years."[22] Whatever the ultimate signal intended by the new law's passage, it seems fair to say that North Carolina's singularity as "the only bright spot" for adultery-focused torts means that the continued existence of such claims will likely continue to rest on shifting ground. With the future of these torts at continued risk, and with recent high-profile cases once again placing North Carolina's unique stance in the national consciousness, the time is ripe to assess whether any compelling reasons exist to preserve them.

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19. *See* Caroline L. Batchelor, Comment, *Falling Out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. REV. 1910, 1924–25 (2009) (discussing failed legislative attempts); Parker, *supra* note 15, at 11 (describing annual ritual).

20. Act of Aug. 3, 2009, § 1, 2009 N.C. Sess. Laws 780, 780 (codified at N.C. GEN. STAT. § 52-13 (2011).

21. *See* Batchelor, *supra* note 19, at 1925 (describing legislation as "significantly limit[ing] actions in criminal conversation and alienation of affection").

22. Parker, *supra* note 15, at 11.

In this vein, this Article offers a countercultural defense of North Carolina's continuing embrace of tort claims arising from adultery. Three components comprise this defense. First, as the ongoing debate over gay marriage demonstrates, citizens of all political stripes look to government to validate marriage as an institution. Gay marriage advocates see state licensing as an essential step in elevating the status of same-sex couples.[23] Gay marriage opponents, on the other hand, look to the state as the decisive authority for protecting the traditional view of marriage as being between one man and one woman.[24] But if the state is the proper vehicle for legitimizing the marriage bond, as all sides seem to agree, then it follows that the state should have a prominent role in protecting that bond.

Second, the tort system presently offers a robust remedy to victims injured when their business or contractual relationships suffer sabotage from third-party tortious interference.[25] The reasons behind these torts center on the important role contracts play in the functioning of a well-ordered society. Marriage, as a relationship of demonstrably greater importance, deserves the same level of legal respect and protection. The message to third parties sent by both economic and matrimonial anti-interference torts is substantially the same: "Stay away." While a claim such as alienation of affections may not be perfect, it nevertheless furthers the function of tort law by

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23. *See, e.g.*, David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 928 (2001) ("Civil marriage is a unique symbolic or expressive resource, usable to communicate a variety of messages to one's spouse and others, and thereby to facilitate people's constitution of personal identity.").

24. *See An Argument Against Same-Sex Marriage: An Interview with Rick Santorum*, THE PEW F. ON RELIGION & PUB. LIFE (Apr. 24, 2008), http://pewforum.org/Gay-Marriage-and-Homosexuality/An-Argument-Against-Same-Sex-Marriage-An-Interview-with-Rick-Santorum.aspx. In this interview, former Senator Rick Santorum explicitly articulates the idea that it is the role of the state through the force of law to give voice to moral values:

> [T]he laws in this country are built upon a certain worldview, and it is the Judeo-Christian worldview. And that worldview has been expressed in our laws on marriage for 200-plus years. Up until 25 years ago, we would never have sat here and done this interview. It would have been beyond the pale. And so it is clearly a dramatic departure from the Judeo-Christian ethic that is reflected in our laws that say marriage is a sacred union between a man and a woman.

Id.

25. *See* John Danforth, Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1491 (1981).

guarding that which is valuable from those who intentionally seek to destroy that value for their own selfish ends.

Third, through loss of consortium claims, the law already offers strong protection of the marital bed against intrusions by third-party tortfeasors. These claims, which compensate for a "loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations,"[26] often turn on many of the same issues as heartbalm cases—such as the state of the parties' marriage prior to the tortious conduct, the sexual intimacies of the marriage, and the causal link between the tortious conduct and the state of the parties' marriage post-injury.[27] The ubiquity of loss of consortium claims shows both tort law's desire to protect marriage from the actions of third parties and its willingness to intrude into the most private of personal details to effectuate this desire. These twin impulses generate little, if any, objection from courts and scholars as loss of consortium is a common, non-controversial part of American tort law.[28] The same impulses, however, generate "scorn" when analyzed in the context of the heartbalm torts.[29] By highlighting this dichotomy in treatment, this Article attempts to demonstrate that adultery-based torts are not as far out of the legal mainstream as is commonly assumed, perhaps paving the way for a wider acceptance of claims such as alienation of affections once again.

Part I of this Article details the bill of particulars scholars and courts have lodged against the heartbalm torts for nearly a century. Understanding the historical distrust shown to claims such as alienation of affections provides a useful foundation for looking at the utility of the heartbalm torts with fresh eyes. I argue that the original grounds for jettisoning the adultery torts no longer retain their initial force. Part II continues the argument raised in the previous three paragraphs by relying on the gay marriage debate, the similarities between tortious interference with commercial relationships and

26. BLACK'S LAW DICTIONARY 1031 (9th ed. 2009).

27. *See, e.g.*, Michael Sanders, *How Much Is Your Marriage Worth?*, THE EYE OPENER (June 10, 2011), http://medicalmalpracticeblog.nashandassociates.com/2011/06/10/how-much-is-your-marriage-worth (providing examples of questions asked in connection with loss of consortium claims).

28. *See* MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 486 (3d ed. 2010) (describing loss of consortium claims as "[a] well-established item of tort damages").

29. *See* Sherry Honeycutt Everett, Recent Development, *The Law of Alienation of Affections After* McCutchen v. McCutchen*: In North Carolina, Breaking Up Just Got Harder to Do*, 85 N.C. L. REV. 1761, 1762 (2007) ("Alienation of affections claims have generated scorn from judges, legislators, and academics virtually since their inception.").

alienation of affection claims, and the law's treatment of loss of consortium claims. This reasoning-by-analogy approach contends that the premises supporting the current approach to gay marriage, tortious interference, and loss of consortium supports North Carolina's continuing willingness to provide tort relief to spouses injured by the actions of ill-motivated third parties. In particular, the law's interest in defending marriage, protecting relationships from outside interference, and compensating spouses for the tortious loss of marital benefits aligns squarely with the purposes behind allowing claims for alienation of affections. The closeness between these other areas of law and alienation of affections demonstrates that tort remedies are properly employed as adultery-remedying tools.

Part III proposes modest changes to North Carolina law designed to address some of the valid concerns others have raised about the operation of heartbalm claims in practice. Most significantly, I advocate for the abolition of the tort of criminal conversation. Unlike alienation of affections claims, criminal conversation does not rest on a showing of a preexisting happy marriage or third-party wrongdoing.[30] The absence of these elements increases the possibility of imposing liability in circumstances where tort liability is not warranted. For reasons such as this, I argue that the continuing existence of alienation of affections claims in North Carolina renders criminal conversation counterproductive and unnecessary. Finally, in the Conclusion, I return to the Fantasia imbroglio that began the Article. Assuming the factual issue of whether the Cooks had a good marriage pre-Fantasia, the case of Fantasia seemingly presents a textbook example of the very conduct that adultery-based torts seek to deter—that of a rich, famous, and attractive third party seducing an otherwise happy spouse away from the marriage bed.[31] But in the twenty-first century, can a third party

30. *See* Laufer-Ukeles, *supra* note 2, at 251 n.265 (describing alienation of affections and criminal conversation).

31. Fantasia is not the only example of alleged celebrity involvement in the break-up of a non-celebrity marriage. Jerry Seinfeld began dating future wife Jessica Sklar in August 2008, approximately one month after she returned from a two-week honeymoon with her new husband Eric Nederlander. *See* Allen Salkin, *How I Met Jerry Seinfeld, Scene 1, Take 2*, N.Y. TIMES, Nov. 4, 2007, at I1; *see also* Shannon Donnelly, *Weddings/Celebrations: Vows; Lindsey Kupferman and Eric Nederlander*, N.Y. TIMES, Nov. 28, 2004, at ST21 (including Nederlander's description of the break-up of his first marriage as "extremely difficult" and "not something you forget easily, if you ever do"). Not surprisingly, Sklar and Nederlander's accounts of the end of their marriage differed considerably. Sklar claimed that two days after returning from her honeymoon with Nederlander, she began moving possessions out of their apartment because the marriage was already over; Nederlander countered that Sklar was "trying to make the past look like

like Fantasia truly be said to be the legal cause of alienating the affections between husband and wife? This paper concludes that, when analyzed in the context of tort law as a whole, the answer is yes.

I. THE CASE AGAINST ADULTERY AS TORT

The law represents a means for society to express its collective disapproval toward conduct deemed worthy of reprobation.[32] And American society, even at the beginning of the twenty-first century, continues to agree: adultery is bad.[33] Given this low standing that adultery occupies in the public consciousness, it would seem

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it never existed . . . so people don't look at her anymore as a bad person." Salkin, *supra*. Similarly, Julia Roberts began dating future husband and cameraman Daniel Moder on the set of the movie *The Mexican*. At the time, Moder was married to Vera Steinberg and reportedly left his wife to be with Roberts. *See* Stephen M. Silverman, *Julia: A 'Smiling,' 'Beautiful' Bride*, PEOPLE (July 8, 2002), http://www.people.com/people/article/0,,624299,00.html. The celebrity angle is particularly interesting because such relationships contain the allure of a fairy tale that contrasts very favorably—if not accurately—with the sometimes mundane realities of family life.

32. Although "[c]riminal law is often viewed as the ideal space in which the state expresses the social norms it seeks to promote and conveys that the norms are public values," it remains the case that tort law "can also be crafted as a venue for the state to use the expressive function of the law." Tanya Katerí Hernández, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. J. INT'L L. 805, 839 (2011); *see* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 6 (1994) (noting that "widespread moral disapproval is not always a legitimate basis for law" and the need to differentiate between "contexts in which moral disapproval is legitimate from those in which it is not").

33. *See* Eric Widmer, Judith Treas & Robert Newcomb, *Attitudes Toward Nonmarital Sex in 24 Countries*, 35 J. SEX RES. 349, 354 (1998). Indeed, the United States, perhaps because of its rate of church attendance, views non-marital sex much more negatively than most of its European peers:

> The United States is distinctive—markedly more conservative than most European nations in its sexual attitudes. In fact, American attitudes toward nonmarital sex class it with Ireland, Northern Ireland, and Poland—three nations associated with conservative Catholic populations. Other nominally Catholic countries (e.g., Italy) do not fall in to this cluster, so the common denominator of the Sexual Conservatives is not religion per se. An analysis of . . . data on church attendance, however, does show that the countries grouped as Sexual Conservatives are those where people report attending church frequently.

See id. at 356. In response to specific questions about adultery, 94% of Americans answered that adultery is "always wrong" or "almost always wrong" (80% and 14%, respectively). *See id.* at 351. Church attendance itself cannot entirely account for the almost universal disapproval of adultery, as only roughly 42% of Americans regularly attend church. *See* Frank Newport, *Americans' Church Attendance Inches Up in 2010*, GALLUP.COM (June 25, 2010), http://www.gallup.com/poll/141044/americans-church-attendance-inches-2010.aspx. Rather, there appears to be something ingrained in the American character that rejects the idea of adultery as morally or socially acceptable.

appropriate for tort law to reflect society's values by holding to account third parties who invade the marital relationship and commit adultery with someone else's spouse. Except in North Carolina and a few other states, however, this is not the case. Professor William Corbett captures this perplexity when he asks a series of questions about the demise of the heartbalm torts:

> What has changed in American law and American society that has caused the eradication of these torts? Is adultery no longer considered a devastating injury to a spouse? Do social mores and public policy no longer support attempting to prevent people from interfering with exclusive sexual relations in marriage? Are the torts simply ineffective to redress the injury or effect the public policy?[34]

The majority view would answer, "all this and more." Writing in 1935, when the first wave of anti-heartbalm feeling began in earnest in state legislatures across the country,[35] Professor Nathan Feinsinger described the array of reasons—both stated and unstated—that led many states to conclude that the heartbalm torts were simply not worth the effort:

> The surface explanation of this unusual legislative receptivity is a reaction against the prevalence of blackmail peculiar to these actions, the incongruity of applying the damage remedy to injured feelings, and the perversion of that remedy by courts and juries to express their emotional sympathy and moral indignation. The underlying explanation is probably a realization of the failure of these actions to accomplish their original social purposes, and their non-conformity with changed mores concerns sex morality, the status of women, and the functions of the family. While the importance of the affectional relations of husband and wife may still justify their legal

34. William 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, 999 (2001) (footnote omitted).

35. The death of the heartbalm torts in the United States occurred in two waves: one in the 1930s, when many states responded to a perceived litigation explosion in heartbalm cases by barring the claims legislatively, and the other in the late 1960s and beyond, when the rise of the women's movement and the sexual revolution spurred legislatures and courts to remove whatever remaining viability the torts still retained. *See* Graham, *supra* note 5, at 406–30 (providing a detailed timeline of how and when the heartbalm torts were eliminated). By the 1970s, "a near-consensus emerged that [heartbalm] claims were somehow categorically deficient—that is, that the torts implicated no injury that was properly compensable in tort, served no deterrence function, or were completely out of tune with modern values." *Id.* at 428 (emphasis omitted).

> protection, the social cost of such protection by means of an action for damages may exceed its worth.[36]

Feinsinger's list of reasons demonstrates the comprehensive nature of the case against the heartbalm torts. It also shows that perhaps the answer to many of Corbett's questions is yes; perhaps adultery does not carry the devastating sting it once did, perhaps it is the case that society does not blame adultery on third-party interference but instead on the cheating spouse, and perhaps these torts are in fact poorly constructed.

My task here is to analyze the critiques of Feinsinger and others from the perspective of the twenty-first century. Even if these concerns were valid once upon a time, it does not follow that they still possess the same force today. Analyzing adultery as tort with fresh eyes and an open mind, including the reasons typically offered for its demise, paves the way for its rehabilitation. I begin with the torts' disreputable genesis.

A. Ignoble Origins

One of the chief criticisms against the heartbalm torts is their admittedly sexist beginnings as a means to compensate men for damage to their property: their wives.[37] In 1997, a North Carolina jury awarded Dorothy Hutelmyer one million dollars against a third party who destroyed her marriage. As the torts of alienation of affections and criminal conversation were originally conceived, however, Hutelmyer's claim would never have seen the inside of courtroom simply because she was a woman. Even though this gender inequality has long since been abolished,[38] the original basis for the heartbalm torts as a whole is enough for many to continue to conceptually

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36. Feinsinger, *supra* note 4, at 979. Feinsinger uses "heartbalm" to describe all four traditional torts under the heartbalm umbrella: breach of promise to marry, seduction, alienation of affections, and criminal conversation. *Id.* at 980, 986, 988. For a brief description on the differences between these torts, see *supra* text accompanying note 3.

37. *See, e.g.*, Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 341 (1998) (noting that these torts descend 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 husband's sexual and emotional needs"); Corbett, *supra* note 34, at 1013 (describing historical basis); Feinsinger, *supra* note 4, at 990 (noting that wives were not permitted to bring criminal conversation claims in England); Graham, *supra* note 5, at 407 (explaining that one historical reason for heartbalm claims centered on compensating a husband "for any genealogical uncertainty that might surround the offspring of his adulterous wife").

38. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 916 (5th ed. 1984).

dismiss the appropriateness of adultery as tort—a form of the "fruit of the poisonous tree" rationale that forever damns the torts to extinction.

While this discomfort with the law's shameful view of women is understandable, it is also irrelevant. The fact that adultery-centered causes of action originate from offensive attitudes about women should not automatically sound their death knell. The historical basis for the torts does nothing to answer the normative question of whether sound reasons exist to keep the torts today. Rape laws represent a case in point. These laws suffer from the same dubious historical pedigree as the adultery torts—the idea that damage to women constitutes a property harm to the "owner" of the property damaged.[39] In fact, the Latin form of the word "rape" actually connotes a form of property crime.[40] Yet no one would ever suggest that rape laws are outdated because the original rationales supporting such laws have long been discredited. Why? Because rape is morally abhorrent and should—indeed, must—be prohibited in any civilized society. Loss of consortium damages, too, arose from the premise that the wife was an "asset" of her husband for which he deserved compensation when damaged.[41] Nevertheless, over time loss of consortium damages departed from their sexist conception and are now a standard feature of modern-day tort law.[42]

The examples of rape and loss of consortium show that a law's ignoble origins do not confine that law to forever death. Adultery-based torts clearly operate differently in North Carolina today than they did when originally conceived, and they should only be judged on that basis—what they are now, not what they were then.

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39. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975) (providing broad history of rape and rape laws).

40. *See* Melisa J. Anderson, Note, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 GA. J. INT'L & COMP. L. 139, 141 (1998) (noting that rape laws were born out of a desire to provide restitution to wronged men and that the term "rape" itself derives from the Latin word "raptus," a form of property crime).

41. JOHN L. DIAMOND, LAWRENCE C. LEVINE & ANITA BERNSTEIN, UNDERSTANDING TORTS 160 n.56 (4th ed. 2010).

42. *Id.* at 161 ("States not only broadened *what* could be recovered under the consortium label, but also *who* could recover. Most significantly, they expanded the scope of recovery by permitting a wife to recover for loss of consortium when her husband was tortiously injured. Virtually all states now permit either spouse to recover for loss of consortium, and recovery is largely for such intangible harms as loss of companionship, affection, and society." (citation omitted)); *see also* Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir. 1950) (landmark case extending loss of consortium claims to wives).

B. *The Threat of Blackmail*

The legislative push in the 1930s to ban the heartbalm torts derived in large part from the belief that the torts were "strongly conducive to extortion, blackmail and public scandal."[43] Professor Jane Larson describes the legislative scene of the time:

> The greater sexual openness of the Progressive and New Deal eras in the United States intensified men's fears that they could be manipulated by women's power to grant or deny sexual favors. In the popular culture of the period, women were portrayed as dominating men sexually through their power to say "no"—tricking men into marriage by conditioning consent to sex upon promises of engagement, and once married, withholding sex to extort money and other privileges from their husbands. Common stereotypes were those of the "gold digger," who married for money, and the "seductress," who lured wealthy men into sexual liaisons and then threatened them with lawsuits aimed at extorting hefty settlements. Supporters of the anti-heartbalm reform movement put forward three major arguments: first, that seduction and the other heartbalm actions were tools for blackmail in the hands of undeserving women; second, that even in a genuine claim for seduction, an award of money damages could neither reverse the loss of physical virginity nor mend emotional injury; and finally, that the public airing of an illicit sexual relationship was itself evidence of the complaining woman's lack of modesty and morality, exposing her as an unworthy plaintiff. . . . Legislators were outraged that a sexually active woman could exploit conventional morality for her own profit.[44]

Three points jump out from this description about the role fear of blackmail played in the demise of the heartbalm torts. First, this prominent rationale for the abolition of the heartbalm torts applied primarily to breach of promise to marry and seduction claims and had little to do with the adultery-centered torts of alienation of affections and criminal conversation.[45] Second, while the sexist origins of the heartbalm torts are often cited as a reason for their abolition, it is

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43. Feinsinger, *supra* note 4, at 996.

44. Jane Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit' ": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 394–95 (1993) (footnotes omitted).

45. *See* Corbett, *supra* note 34, at 1012 (noting that "remarkably," the fear of blackmail "still is given as a reason for abrogating alienation and criminal conversation" even though this fear never arose in connection with these torts); Larson, *supra* note 44, at 394 n.85.

equally clear that the motives behind the abolition movement were often no better and reflected the sexist and misogynistic views of male legislators about the nature and character of women.[46] Third, and most important in assessing the normative value of the torts today, the operation of the heartbalm torts in 1920s and 1930s bears no resemblance whatsoever to how adultery-based torts work in North Carolina in 2012.[47] If the blackmail factor is a real risk arising from the existence of alienation of affections and criminal conversation claims, we should see some evidence of this fear materializing in North Carolina, especially in the fifteen-year aftermath of some of the high-dollar verdicts since the *Hutelmyer* case. But we do not.

Accordingly, despite its former prominence, the fear of blackmail fails today to constitute a reason for eliminating the heartbalm torts. Even if extortion were a bona fide concern in the 1930s,[48] it has no contemporary credence and cannot stand as a reason for North Carolina to now abandon alienation of affections.

C. *The Lack of Deterrent Effect*

A particularly weak argument advanced by anti-heartbalm critics centers on the ineffectiveness of the torts at deterring adultery.[49] The answer to this argument is twofold. First, the assertion that alienation of affections and criminal conversation have no deterrence value is just that—an assertion. This claim, so confidently stated, has never

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46. *See* Larson, *supra* note 44, at 397 ("[L]atently misogynistic rhetoric fueled the anti-heartbalm reform . . . .").

47. The closest example of purported blackmail in North Carolina case law arises in *Ward v. Beaton*, 141 N.C. App. 44, 539 S.E.2d 30 (2000), where the defendant asserted fraud on the following grounds:

> [T]he defendant submitted evidence of a consent order entering a divorce from bed and board between the plaintiff and her husband on 5 August 1998, the same day the complaint in this action was filed. This consent order relieved Mr. Ward of payment of alimony, post-separation support and child support. Defendant asserts on appeal that the findings in the consent order alleviating Mr. Ward of these responsibilities evidence a fraudulent scheme on the part of plaintiff and her husband in filing this claim for alienation of affections. Defendant contends the fraud indicated by the consent order required the trial court to direct a verdict in defendant's favor.

Id. at 49, 539 S.E.2d at 34. The probable lack of strength of this claim lies in the fact that the defendant never pleaded fraud in her answer nor asserted the theory at trial. *See id.*

48. *See* Corbett, *supra* note 34, at 1012–13 (casting doubt on whether extortion fears were ever a real problem on any meaningful level).

49. *See* Nehal A. Patel, *The State's Perpetual Protection of Adultery: Examining* Koesteler v. Pollard *and Wisconsin's Faded Adultery Torts*, 2003 WIS. L. REV. 1013, 1045–46 (2003); Batchelor, *supra* note 19, at 1934–38.

been empirically demonstrated.[50] Perhaps a vibrant and well-publicized push to litigate adultery-based cases would convince some number of third parties to refrain from dalliances with those married to another. The second response to the argument is blunter: so what? The idea that tort claims must prove their deterrent value to assure their survival is a strange one. Professor Corbett ably demonstrates why this proffered reason against the adultery as tort is really no reason at all:

> [C]omplete deterrence has never been required by tort law to justify the existence of a tort. As I have suggested earlier, I think that tort law often recognizes theories of recovery as a reflection of society's values and for other reasons, even when the deterrent effect may be minimal. What conduct is deterred, for example, by the tort of intentional infliction of emotional distress?[51]

The crowded nature of the nation's criminal and civil court dockets is a testament to the limits of law's ability to deter disfavored conduct.[52] Law's function, and the function of torts in particular, encompasses far more than deterrence; it is also about righting wrongs and providing redress to a person injured by the wrongful conduct of another.[53]

D. Opening the Floodgates

Another critique asserts "that allowing adultery-based torts will overburden the courts."[54] Criticism of this sort arises as part of a larger battle between tort restrictionists and tort expansionists over whether America is in the midst of a tort crisis or not.[55] Regardless of the outcome of this broader debate, the North Carolina experience belies any claim that the existence of the adultery torts leads to a rush of litigants hurrying toward the courthouse doors. A Westlaw search

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50. Corbett, *supra* note 34, at 1016 (noting that the deterrence claim "is a matter of opinion" and that "there is no empirical evidence to support it").

51. *Id.* at 1055 n.365.

52. *See, e.g.*, Lance McMillian, *Atticus Finch as Racial Accommodator: Answering Malcolm Gladwell*, 77 TENN. L. REV. 701, 717 (2010) (discussing law's inability to motivate personal changes of heart).

53. *See* WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS xlvii (2d ed. 2009) (noting that a "large branch of torts scholarship views the law of torts as a moral enterprise, the purpose of which is to produce justice between plaintiff and defendant").

54. Patel, *supra* note 49, at 1048; *see also* Batchelor, *supra* note 19, at 1938–42.

55. *See* Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 229 (2007).

of North Carolina appellate opinions reveals that the term "alienation of affections" appears only eighty-eight times from 1913 to 2012.[56] Like the blackmail rationale that continues to be offered in support of the abolition of the heartbalm torts, the idea that allowing adultery-based claims will produce a litigation explosion lacks any relationship to what is actually happening in a jurisdiction where the torts continue to exist.[57]

E. Love, Marriage, and Money

A related concern centers on the inadequacy of economic damages to compensate for the harms for which the adultery torts allow recovery. Under this line of thinking, money is not a good reward for a broken heart; indeed, the very act of seeking compensation for such a harm sparks suspicion.[58] This idea, known as anticommodification, asserts that the value of marriage is "incapable of measurement in monetary terms."[59] In this view, tort law cannot put back together that which has already been destroyed:

> Once the love that bound [spouses] together is gone, the marriage has lost its purpose, and there is no point in trying to compensate monetarily for the loss of affection. Love cannot be commodified, and marriage is not a market exchange. People are seeking a soul mate, not a financial windfall.[60]

This type of assessment is both right and wrong at the same time. It is certainly the case that money is an imprecise and poor substitute for the damage to a wronged spouse left in adultery's wake. But this truth is a common one in tort and fails to satisfactorily explain why compensation should be withheld for what is a real harm. Pain and suffering is notoriously difficult to calculate, but we still allow juries to take their best shot.[61] Tort damages for the death of a child cannot

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56. WESTLAW, http://westlaw.com (searching the database "North Carolina State Cases" with term "alienation of affections").

57. The floodgate fears also seem disingenuous in that the story of tort law in the second half of the twentieth century is one of rapidly expanding liability in a whole host of different areas. *See* Corbett, *supra* note 34, at 1024.

58. Tushnet, *supra* note 4, at 2616–17.

59. *Id.* at 2588.

60. Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 781–82 (2001).

61. In tort law, for example, proof of noneconomic damages is ethereal as there exists no objective measurement for how such damages should be calculated:

> It is also contended that the 'sentimental' damages such as the diminution of the value of her husband's society and affection and the deprivation of sexual relations

bring that child back to life, but they are nevertheless appropriate, and no one says otherwise. The whole point of loss of consortium is to compensate for things lost in a marriage through the actions of a third party. These examples show that the inherent problem of anticommodification affects the tort system as a whole. Although imperfect, money remains the best means we have for compensating injured parties, including plaintiffs who assert claims for damages arising from the injuries left in adultery's wake.

F. "Outdated"

The evolution of liberalized sexual norms clearly has played a role in the near extinction of the heartbalm torts, leading to the claim that these torts are "outdated" for modern times.[62] Most prominently, the tort of seduction, with its emphasis on protecting female virginity, harkens back to an age much different than our own.[63] Consequently, a movement to revitalize seduction claims is rightly unthinkable. But what about adultery? Even though the overwhelming majority of Americans say they still disapprove of adultery,[64] there arguably exists a divergence between what we say about adultery and what we really think. Shauna Deans—a defender of adultery-based torts—explains:

> In light of this current state of family affairs, one has to ask whether adultery has become one of the trademarks associated with America, similar to ideals of capitalism and pastimes like baseball and baking apple pies? The breadth of sociological studies on marriage and intimate relationships suggest that many, if not most American marriages are touched by adultery.

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and the attendant loss of child-bearing opportunity are too personal, intangible, and conjectural to be measured in pecuniary terms by a jury. This argument has no merit. The logic of it would also hold a jury incompetent to award damages for pain and suffering.

Millington v. Se. Elevator Co., 239 N.E.2d 897, 902 (N.Y. 1968). When lawyers do try to quantify these damages before the jury, their efforts are usually rejected as improper. *See, e.g.*, Ferry v. Checker Taxi Co., 520 N.E.2d 733, 751–52 (Ill. App. Ct. 1987) (rejecting per diem argument); Faught v. Washam, 329 S.W.2d 588, 601–02 (Mo. 1959) (rejecting job offer argument); Red Top Cab Co. v. Capps, 270 S.W.2d 273, 275 n.2 (Tex. Civ. App. 1954) (rejecting "Golden Rule" argument).

62. *See, e.g.*, Chamallas, *supra* note 37, at 341 (arguing that torts originate from an "outmoded hierarchical image of husband and wife"); Batchelor, *supra* note 19, at 1910 (arguing for abolition of criminal conversation because it is "outdated").

63. *See* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 465–66 (2000) (noting that "[l]oss of virginity is no longer objectively harmful" today in the same way it was in times past and that, as a result, seduction claims are now rarely pursued).

64. *See supra* note 33.

> Another mark of the pervasive nature of adultery and infidelity is evidenced by its popular treatment in American literature and the media. Currently, some of the most popular daytime television shows are solely centered on the drama of establishing paternity when people stray outside of their intimate relationships. These references paint a dismal picture of the current state of intimacy in our modern relationships. Regardless of what side one may take, the proposition that American culture has increasingly adopted a complacent attitude toward adultery is undeniable. Adultery has evolved from a taboo that was once criminalized and enforced in every jurisdiction, to a topic that currently provides the bread and butter for many talk show hosts and more recently, has provided some of the most salacious headlines in the news. Moreover, Americans have become so jaded about the frequency of infidelity that the reaction to such scandal is nothing more than a raised eyebrow or at most, several days' worth of gossip at the water cooler. Without question, it seems that the repugnance toward adultery has died along with the heartbalm torts.[65]

Is Deans correct in her assessment that people no longer see fidelity in marriage as a virtue, much like they no longer value female virginity? Perhaps. At a minimum, Blackstone's observation that adultery counts as the greatest form of civil injury seems outdated for modern times.[66]

The recent success of alienation of affections suits in North Carolina, however, shows that the adultery torts still speak to commonly-shared views of right and wrong.[67] The experience of actual cases represents a better barometer of where the community stands than the mere assertions of anti-heartbalm scholars that the torts lack a purpose in today's climate.[68] Juries matter because they

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65. Shauna M. Deans, *The Forgotten Side of the Battlefield in America's War on Infidelity: A Call for the Revamping, Reviving, and Reworking of Criminal Conversation and Alienation of Affections*, 53 HOW. L.J. 377, 379–81 (2010) (footnotes omitted).

66. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 140 (1768) ("Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by an action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary.").

67. *See supra* text accompanying notes 9–14 (detailing plaintiffs' recent successes in adultery cases in North Carolina).

68. For some, "punishing" adultery through the imposition of tort liability likely conjures up the image of Hester Prynne wearing her scarlet "A" in Nathaniel Hawthorne's classic *The Scarlet Letter*. *See* Larson, *supra* note 44, at 377 & n.10 (alluding to perceptions

are a "significant and reliable objective index of contemporary values."[69] And when given the opportunity, juries routinely give voice to the position that third-party interference with marriage is wrong, suggesting that—in North Carolina, at least—adultery-based torts are not as outdated as many claim.[70]

G. *Misplaced Blame*

Alienation of affections and criminal conversation claims focus on the conduct of a third party—the stranger to the marriage who "steals" the affections of the plaintiff's spouse.[71] Placing legal responsibility on this third party for the disintegration of a marriage in such circumstances strikes many as a terrible misallocation of

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of Prynne as a "sexual criminal"). This viewpoint—which does not necessarily sanction adultery as something morally or socially acceptable—sees government involvement in matters of sex as troublesome. Camille Paglia, for example, argues that the nature of sexual relations makes them inherently unsuited to regulation:

> Sexuality is a murky realm of contradiction and ambivalence. It cannot always be understood by social models, which feminism, as an heir of nineteenth-century utilitarianism, insists on imposing on it . . . . It cannot be "fixed" by codes of social or moral convenience, whether from the political left or right. For nature's fascism is greater than that of any society. There is a[n] . . . instability in sexual relations that we may have to accept.

CAMILLE PAGLIA, SEXUAL PERSONAE 13 (1991), *cited in* Larson, *supra* note 44, at 452; *see also* Corbett, *supra* note 34, at 994 (describing position of heartbalm critics as anti-regulation and pro-free market). This categorical hands-off approach to matters of sex can lead to results that many may find undesirable. For instance, courts formerly refused to entertain claims of marital rape. One of the reasons for this reluctance stemmed from discomfort at the idea of delving into such intimate questions as consent in the context of sex between husband and wife. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1486 (2000) ("The first prominent modern argument for the marital rape exemption, the claim from privacy, posits that there is something inherent in the nature of the relationship between husband and wife that makes legal intervention inappropriate, misguided, and ultimately self-defeating. It contends that the marital relation depends on intimacy protected from outside scrutiny, intimacy that could not survive if the law intervened to investigate and prosecute marital rape charges."). This same type of hesitancy to become involved in issues of marital drama represents a key aspect of the resistance to heartbalm laws. Eventually, though, every state rightly abolished its prohibition against marital rape. *See* Thomas L. Hafemeister, *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 975 (2011). Despite the discomfort with asking intimate sexual questions, when the perceived stakes are high enough, courts have willingly explored the most private areas of the marital relationship. *See infra* note 123 and accompanying text.

69. Gregg v. Georgia, 428 U.S. 153, 181 (1976) (citation omitted).

70. *See supra* text accompanying notes 11–18 (describing jury verdicts and criticism of those verdicts).

71. *See* Laufer-Ukeles, *supra* note 2, at 251 n.265 (listing and describing claims).

responsibility.[72] As The Eagles sang in their classic song *Peaceful, Easy Feeling*:

> And I found out a long time ago
> What a woman can do to your soul.
> Oh, but she can't take you any way,
> You don't already know how to go.[73]

The idea here is that a stranger to the marriage lacks the power to induce the cheating spouse to do anything the cheating spouse did not already want to do.[74] Responsibility, therefore, should rest with the wayward spouse and not the co-participating adultery defendant. There are several answers to this. Initially, in the analogous realm of tortious interference with contracts, this same type of reasoning fails to hold sway. That a party in a committed relationship—be it a marriage or a contract—may be susceptible to straying should not give a stranger to the relationship free rein to act as the tipping point in pushing that party over the edge to unfaithfulness.[75] Next, in alienation of affections cases at least, one of the required evidentiary showings is that the "defendant's wrongful and malicious acts brought about the alienation of such love and affection" that forms the basis of the suit.[76] Under this standard, not every instance of adultery will form the basis of a claim; rather, only when the facts support a finding that responsibility for alienation *does* lie with the third-party

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72. *See* Corbett, *supra* note 34, at 1019–22 (explaining this anti-heartbalm argument).

73. THE EAGLES, *Peaceful, Easy Feeling*, *on* EAGLES (Asylum Records 1972).

74. In essence, this is a question of causation. *See* Corbett, *supra* note 34, at 1020. A feminist variant of this critique argues that the harm of adultery to the victimized wife comes from within and cannot fairly be set at the feet of the third-party facilitator of the husband's adultery:

> As for women who have been betrayed by their husbands, the gendered script—if indeed there is one—reads quite differently. There is no precise female counterpart to the emasculation said to be experienced by men, perhaps because women do not possess a privileged gender status. Depriving a woman of her femininity has a different meaning than depriving a man of his masculinity and is not invariably associated with loss of status. Instead, I suspect that the dignitary harm many traditionally-minded women experience when they discover their husband's adultery is related to a sense of inadequacy—that they question why their husband was "forced" to look to someone else to fulfill his needs. This lowering of self-worth is a status harm, to be sure, but unlike emasculation, the cause is likely not to be located in the predatory behavior of a third party, but in the victim's own perception of her loss of value as a sexual object.

Chamallas, *supra* note 37, at 341 (footnotes omitted).

75. *See infra* Part II.B (describing elements required to prove tortious interference with contract claims).

76. Heller v. Somdahl, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010).

defendant will liability attach. Finally, the blanket notion that third parties cannot uniquely influence an otherwise committed spouse from betraying the marriage seems to be a terrifically unrealistic assessment of the power of temptation.[77]

The facts of the *Hutelmyer* case are instructive here. By all accounts, Joseph and Dorothy Hutelmyer had a wonderful marriage, one where he would write her love poems and she would accompany him on his business trips.[78] Then one day, Mr. Hutelmyer's secretary of six years, Margie Cox, separated from her husband. The North Carolina Court of Appeals describes what followed:

> According to her co-workers, [Cox's] demeanor when she began her employment was "matronly." She wore predominantly dark clothing and long skirts. Then, in May of 1992, [Cox] separated from her husband, and she, thereafter, became openly flirtatious and spent increasingly more time alone with Mr. Hutelmyer. [Cox's] co-workers testified that she changed her appearance. She cut and dyed her hair and wore short skirts, low-cut blouses, and tight clothing to the office. At or near the same time, defendant and Mr. Hutelmyer began to arrive at work together or within minutes of each other, to dine together alone, and to work late hours at the office. Many nights, [Cox] and Mr. Hutelmyer were the only employees working late. The testimony of [Cox's] co-workers also revealed that although defendant rarely traveled in connection with her employment prior to 1990, in 1992, she began accompanying Mr. Hutelmyer on business trips.
>
> [Mrs. Hutelmyer's] evidence further showed that beginning in 1993, Mr. Hutelmyer began to spend a considerable amount of time at [Cox's] home. [Cox's] former neighbor testified that she frequently saw Mr. Hutelmyer's vehicle parked at defendant's home overnight, from approximately 9:00 p.m. until

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77. Professor Corbett captures the risks that face any married person, even those dead-set on remaining faithful to his or her spouse:

> I think these torts are based on the presumption that marriages are delicate relationships, which often teeter in the balance. It is often said that marriage is hard work. That belief recognizes that spouses have to deal with many matters that are not always fun, including balancing budgets, making decisions about children, caring for aging parents and in-laws, and so forth. A third person, who offers the fun and excitement of sexual relations unencumbered by these other weighty matters, might be an attractive diversion, or more.

Corbett, *supra* note 34, at 1019.

78. Hutelmyer v. Cox, 133 N.C. App. 364, 367, 514 S.E.2d 554, 557 (1999).

> 5:30 a.m. the following morning. In addition, a co-worker of [Cox] and Mr. Hutelmyer testified that when she visited her parents, who resided near [Cox], she observed Mr. Hutelmyer's car at defendant's house at all hours of the day and night.
>
> Co-workers of [Cox] and Mr. Hutelmyer also testified that the couple flaunted their familiarity with one another. The lovers would hold hands at the workplace, and defendant would sit in Mr. Hutelmyer's office in a dress with her legs thrown sideways across the chair.[79]

Mr. Hutelmyer betrayed his wife. He is morally and legally accountable for his actions. But does Mr. Hutelmyer's own blame absolve Margie Cox of all fault? Cox knowingly and intentionally engaged in a series of choices that she knew would cause Dorothy Hutelmyer great harm and pain.[80] Every day, there are tort cases in America that hold defendants liable for a lot less than that.[81]

II. MAINSTREAMING ADULTERY AS TORT

Critics of the adultery-centered torts frame the torts as being far outside the mainstream of American law. The low standing of these torts in the national legal community has precluded a serious look at the continuing merits of these adultery-based actions. North Carolina's stubborn willingness to continue to entertain alienation of affections and criminal conversation claims proves mystifying to most interested observers, which explains the contempt from the legal community directed toward North Carolina in the wake of the *Hutelmyer* case and others like it.[82] For those convinced that all of the

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79. *Id.*

80. *See* Gray v. Hoover, 94 N.C. App. 724, 730–31, 381 S.E.2d 472, 475 (1989) (detailing "defendant's phone calls in which defendant told plaintiff he was having sex with plaintiff's wife" and "the defendant's act of driving up in front of plaintiff's business, blowing the horn, and then in the presence of plaintiff kissing plaintiff's wife, unbuttoning her blouse and then putting his hand inside").

81. Consider, for example, a garden-variety car wreck caused by a driver's negligence. These cases are commonplace and can rest on nothing more than a moment of inattention that causes a breach of reasonable care. Now compare this everyday car wreck with a tort claim arising from adultery. If Steve seduces Susie for the sole purpose of alienating her from her husband John, the prevalent position denies John a recovery against Steve for John's loss of companionship, comfort, and sexual relations. Yet if Steve negligently hurts Susie in a car wreck and causes the exact same losses, John does have a claim. The inconsistency of these outcomes cannot be blamed on the relative culpability of Steve in each scenario; he is clearly more blameworthy for intentionally interfering with John and Susie's marriage than he is for his accidental bad driving. Margie Cox's blameworthiness stands in similar stead.

82. *See supra* notes 11 and 19 (describing criticism of North Carolina law).

heartbalm torts are beyond redemption, North Carolina's position seems awfully archaic and backwards.

The defense mounted in this Article confronts and rejects this claim of outdated isolation. Far from being some strange relic from another time, adultery as tort—both in terms of its goals and mechanics—is well within the bounds of conventional legal doctrine. In support of this argument, I juxtapose adultery-based torts with three areas of discrete legal interest: the gay marriage debate, claims for interference with commercial relationships, and claims for loss of consortium. The comparisons that follow highlight that the premises underlying adultery-focused torts—when applied to other legal issues—find great support from courts and scholars alike. These areas of support include the role of the state in the formation and protection of marriage, the interest of tort law in protecting relationships from third-party interference, and the law's willingness to compensate injured tort plaintiffs for damage to the marital bed. By placing the adultery torts in this broader context, the door opens for claims such as alienation of affections to once again join the ranks of respectable legal discourse.

A. The Relationship Between Marriage and the State: Why the Gay Marriage Debate Supports Continuation of Adultery as Tort

The national debate over gay marriage has produced a deep and sustained fissure in American society over the last ten years.[83] Both sides of this divide—those who cast marriage equality as the moral equivalent of the civil rights struggles of the 1960s and those who think acceptance of gay marriage heralds the end of civilization—place enormous importance on the ultimate outcome of this question. But why? For the past forty years, certain churches have performed services where gay couples come together to form a marriage bond in a religious ceremony.[84] This longstanding and increasingly common practice has never generated the intensity that characterizes the marriage wars of today. Rather, it is only when the dimensions of gay

83. *See, e.g.*, David Masci, *The Gay Marriage Debate: Where It Stands*, PEW RES. (July 10, 2009), http://pewresearch.org/pubs/1279/gay-marriage-debate-2009 (describing the growth of the controversy).

84. *See* Mary Ann Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1763 (2005) (describing marriage of gay couple in 1971 by Methodist minister); Troy D. Perry, *Whose God Do You Serve?*, WHOSOEVER.ORG (Mar. 2004), http://whosoever.org/v8i6/perry.shtml (where Perry notes that "[i]n 1969, [he] performed the first same-sex church wedding in the U.S. at the predominantly gay Metropolitan Community Church of Los Angeles").

marriage transformed from a religious ceremony issue to a civil ceremony issue that the battle lines became drawn.

What accounts for this metamorphosis whereby gay couples feel compelled to seek recognition at both the civil and religious level while opponents of gay marriage, largely indifferent to gay marriage inside of churches, see government licensing of same-sex couples as a civilization-defining issue? Part of the answer to this question is that civil recognition of gay marriage allows same-sex couples to enjoy a number of benefits and privileges that accrue only to married couples. This special treatment of married individuals—by both governmental and non-governmental actors—encompasses a number of economic areas of life such as inheritance rights, property privileges, tax breaks, insurance policies, and even rental car agreements.[85]

This aspect of the gay marriage issue, however, does not adequately account for the passions exhibited by all the players in this ongoing national dialogue. Something else is at work. For example, the anti-gay marriage side does not base its opposition on the possibility that gay couples will have access to tax breaks and the like once married. Similarly, while gay couples who want to marry naturally have an interest in enjoying the same economic advantages of the marriage institution as their heterosexual counterparts, the fight for gay marriage is not primarily a fight for these financial benefits. This point is highlighted by what happened in early 2004 when San Francisco Mayor Gavin Newsom decided to issue marriage licenses to same-sex couples. In just a month, the "Winter of Love" witnessed thousands of gay couples flock to San Francisco to get married, including couples from "at least 20 U.S. states and numerous foreign countries."[86] This willingness of same-sex couples across the country—and the world—to travel to California to get married, even though the marriages would not be recognized back home and thus not change the legal status of these same-sex couples, demonstrates that emotional fulfillment, not rational self-interest, serves as the engine that drives many gay couples seeking matrimonial equality.[87]

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85. Case, *supra* note 84, at 1771.

86. Mark Morford, *San Francisco's Winter of Love*, MOTHER JONES (Mar. 1, 2004), http://motherjones.com/politics/2004/03/san-franciscos-winter-love.

87. That the act of marrying has a greater meaning apart from simply entering a legal transaction is shown by the nature of marriage ceremonies (inviting family and friends) and the celebrations that typically follow (the wedding cake, etc.). When people sign a will, they do not invite everyone they know over to witness the occasion and celebrate joyously afterward. Marriage, however, is different. The joy expressed during the Winter of Love reflects the profound meaning that marriage has in American culture:

The gay marriage controversy, therefore, is not mainly about economic rights; rather, it is about recognition—and not just any recognition. Gay marriages that occur under the auspices of a church already receive recognition "as old as the book of Genesis."[88] But being God-ordained is not enough. The linchpin of the gay marriage debate—the thing that gay marriage proponents strive for and the thing that gay marriage opponents most resist—centers on this: recognition of same-sex marriage by the *state*. The conflict is not about marriage per se, but about licensing of marriage by the government, which is a different thing, as the institution of marriage existed long before state licensing of marriage.[89] Both sides of the gay marriage divide have thus become invested in the idea that "[c]ivil marriage is a unique expressive resource used by people to express themselves and to constitute their identities."[90] Judge Posner captures the implications of this realization and in so doing identifies what is at stake for supporters and defenders of gay marriage alike: "To permit persons of the same sex to marry is to declare, or more precisely to be understood by many people to be declaring, that homosexual marriage is a desirable, even a noble condition in which to live."[91] The

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> The City by the Bay has been momentarily revitalized, reinvented, our freshly minted young mayor unexpectedly thrusting us into the international limelight and slapping our collective face with the leather glove of change and calm, deliberate, uncharted ideological disobedience. That and lots of giddy happy homosexual couples in love, smooching on the steps of city hall.

Id.; *see also* Marisa Lagos et al., *Same-Sex Weddings Start with Union of Elderly San Francisco Couple*, S. F. CHRON., JUNE 16, 2008, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/17/MNPQ11A3VF.DTL (describing the ceremony of Phyliss Lyon, 83, and Del Martin, 87, who were legally wed in 2008 after being a couple for 50 years); Angela Macropoulos, *Gay Marriage: After a Battle, a Celebration*, N. Y. TIMES, July 24, 2011, http://cityroom.blogs.nytimes.com/2011/07/24/gay-marriage-after-a-battle-a-celebration (reporting one gay man's reason for marrying his long-time partner as "[w]hy not do this to feel great about having a 28-year relationship?" (internal quotation marks omitted)).

88. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." (citing Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942))).

89. *Id.*; *see also* Case, *supra* note 84, at 1766 ("The state has been a relative latecomer in the regulation of marriage.").

90. Cruz, *supra* note 23, at 933.

91. RICHARD A. POSNER, SEX AND REASON 312 (1992); *see also* Case, *supra* note 84, at 1795 ("Opponents of state recognition for same-sex marriage often insist that such recognition would undercut their own, heterosexual marriages . . . ."); Vincent J. Samar, *Privacy and the Debate over Same-Sex Marriage Versus Unions*, 54 DEPAUL L. REV. 783, 784 (2005) (explaining the view of gay marriage opponents that gay marriage bans are

battle over state-licensing of same-sex marriage has essentially become a tug-of-war over whether the government will or will not make the declaration that Posner here identifies—that gay marriage is "a noble condition in which to live."[92]

That this declaration hangs in the balance rests on two widely-shared assumptions. First, the word "marriage" contains great meaning and power.[93] The force of the word can be measured by the tenacity with which each side of the marriage debate claims ownership over it. Both gay activists and traditional marriage defenders rightly realize the significance of nomenclature when it comes to "marriage":

> [W]ords do matter. Words can insult, degrade, shame, and hurt. Moreover, words shape reality. A rose by any other name might smell as sweet, but if we artificially give different names to two varieties of roses, over time we would come to think of them quite differently. And in the same-sex marriage context, there can be no mistaking the implication of the use of a different word. It is, and is meant to be, insulting, degrading, shameful, and hurtful.[94]

"necessary to defend marriage as a relationship between one man and one woman from what is perceived to be a pernicious and immoral attack from outside the institution").

92. *Compare* Case, *supra* note 84, at 1775 ("Withholding from same-sex couples the opportunity to marry devalues their unions both symbolically and practically."), *with* William J. Bennett, *But Not a Very Good Idea, Either*, WASH. POST, May 21, 1996, at A19 ("Recognizing the legal union of gay and lesbian couples would represent a profound change in the meaning and definition of marriage. Indeed, it would be the most radical step ever taken in the deconstruction of society's most important institution.").

93. *See* Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 433–34 (1998) ("[T]he word 'marriage' carries a uniquely intense, resonant, and emotional force in our language and culture.").

94. Geoffrey R. Stone, *Same-Sex Marriage and the Meaning of Words*, HUFFINGTON POST (Nov. 5, 2009, 5:15 PM), http://www.huffingtonpost.com/geoffrey-r-stone/same-sex-marriage-and-the_b_347593.html. For this reason, any compromise that grants same-sex couples the right to form state-recognized "civil unions" likely will fail to deliver the stamp of legitimacy that these gay couples seek:

> First, civil unions do not carry the same social meaning as marriage, nor are they intended to imbue such social meaning. In fact, marriage itself will undergo a change in its social meaning once same-sex couples are admitted into it, which is what the President and some others are worried about. Second, treating the two institutions as if they were the same overlooks important ways that culture shapes self-esteem and regulates the development of individual identities, and along with that, impedes or promotes true human autonomy. Finally, equality requires giving same-sex couples the same opportunities to marry as opposite-sex couples and not channeling them into a less-regarded institutional status. Here it is also worth noting that affording same-sex couples the right to marry is likely to reconstruct

Second, the combination of the word "marriage" with the perceived legitimacy supplied to relationships stamped by the imprimatur of the state necessitates the conclusion that declaring same-sex marriages to be legal is to also declare that they are normatively good.

This near-universal consensus that the government occupies the preeminent role in the construction and sanction of the marriage relationship carries with it certain implications. If state involvement is so critical in supplying marriage with its modern meaning, then it follows that the state should be empowered to protect that which it has birthed. The contrary position—that the state's place is essential on the front end but weak and powerless after that—is strikingly inconsistent. In any licensing regime, the state's interest in that which it licenses remains ongoing.[95] Marriage, a "potentially dangerous, heavily regulated activit[y],"[96] should be no different. And this is where adultery-centered torts such as alienation of affections come in.

There exists great discrepancy between how the conventional wisdom views the gay marriage issue (state involvement is good) and how that same conventional wisdom views adultery as tort (state involvement is bad). Perhaps the reason for this uneven outlook is historical happenstance. The heartbalm torts have been disfavored for such a long time that it is likely that many courts and scholars dismiss them without pausing to consider whether any of the torts

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> the institution of marriage so as to move it away from its historical connection to gender roles and female subservience and towards close-to-equal partnership.

Samar, *supra* note 91, at 785 (footnotes omitted) (internal quotation marks omitted).

95. Lawyers, for example, face continuing regulation from the state even after they pass the bar and become licensed. *See* N.C. GEN. STAT. §§ 84-1 to 84-38 (2011). This regulation includes comprehensive annual training requirements to ensure ongoing professional competence:

> The annual [Continuing Legal Education] requirements in North Carolina are 12 hours of approved CLE. Of these 12 hours, 2 must be in the area of professional responsibility or professionalism or any combination thereof.... At least once every three calendar years, each lawyer must complete an additional hour of professional responsibility devoted exclusively to instruction in substance abuse awareness or debilitating mental conditions, and a lawyer's professional responsibilities.... The CLE rules also require every active lawyer, regardless of exempt status, to file an annual written report of his/her CLE activity for the preceding year.... All active members admitted to the North Carolina State Bar after January 1, 2011, must complete the New Admittee Professionalism program in the year the member is first required to meet CLE requirements.

CLE Requirements in North Carolina, N. C. CONTINUING LEGAL EDUC. (May 7, 2012), http://www.nccle.org/atty/a_requirements.aspx.

96. Case, *supra* note 84, at 1770.

possess any modern utility. Or perhaps the marriage-protecting torts—alienation of affections and criminal conversation—have effectively become indistinguishable from the more questionable claims of breach of promise to marry and seduction.[97] The gay marriage debate underscores the importance of marriage and the state's role in managing marriage. We know, too, that tort law is a common tool of government regulation.[98] There should be nothing unusual, therefore, in using the law of torts to protect marriage from one of its greatest threats: adultery. The tort of alienation of affections—designed to protect from third-party interference the integrity of the marriage bonds that mean so much to so many—respects and reinforces values shared across the ideological spectrum, in terms of both its purpose (protecting marriage) and its means (tort law).[99] From this perspective, North Carolina's continuing embrace of the adultery-centered torts is not as out of step as it seems.

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97. *See supra* Parts I.B, I.F.

98. *See* Kyle D. Logue, *Coordinating Sanctions in Tort*, 31 CARDOZO L. REV. 2313, 2314 (2010) ("Viewing tort law as a system of deterrence or regulation is now standard within the legal literature.").

99. This defense of the heartbalm torts succeeds only if one accepts the premise shared by gay marriage advocates and gay marriage opponents that the state should be in the business of regulating marriage in the first place. It is not readily apparent that this should be the case. For instance, there exist significant differences in the level of interference with the institution of marriage between the United States (heavy state involvement including the conflation of civil and religious marriage) and Europe (strict separation of civil and religious marriage). *See* Case, *supra* note 84, at 1793 ("It may seem a paradox that the United States, with a much greater commitment to separation of church and state, conflates civil and religious marriage to a far greater extent than some continental European countries in which church-state cooperation is constitutionally secured."). Additionally, as the marriage wars have waged in America over the last decade, a number of scholars have concluded that government should extricate itself from the marriage business altogether. *See* Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221, 1222 (2006) (arguing that from the Judeo-Christian perspective "marriage is the province of religious communities, and not the state, and empowering the state to define marriage uniformly not only profanes a holy institution but threatens the ultimate autonomy and authority of religious communities with respect to marriage"); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 672 (2010) ("[I]t would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business, leaving the expressive domain to religions and to other private groups, and offering civil unions to both same- and opposite-sex couples."); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) ("The law should not define, regulate, or recognize marriage. Marriage—the structured, publicly-proclaimed, communally-supported relationship of mutual commitment—should become solely a religious and cultural institution with no legal definition or status.").

B. *The State as Relationship Defender: The Striking Similarity Between Business Torts and Adultery as Tort*

Calvin Coolidge famously said that "[t]he chief business of America is business."[100] For commercial activity to flourish, economic actors need to be confident in the validity and stability of the agreements in which they enter. Toward this end, the law of contracts enforces mutual promises between parties that result from a "meeting of the minds."[101] Accordingly, when a party breaches its promise to another, it must pay damages for harm occasioned by the breach.[102] Despite the universal availability of this remedy against the breaching party under the rules of contract, tort law offers additional relief in certain situations: tortious interference with contracts, which is recognized in every state.[103] Such a tort's existence cannot be even close to fully explained by economic reasoning, as contract law adequately protects a party's financial interest in the performance of a given promise. The origin instead revolves around protecting the integrity of relationships and is "one part of a larger body of tort law aimed at protection of relationships, some economic and some personal."[104]

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100. President Calvin Coolidge, Address to the American Society of Newspaper Editors: The Press Under a Free Government (Jan. 17, 1925), *in* CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC: SPEECHES AND ADDRESSES 187 (1926).

101. *See* Tal Kastner, *"Bartleby": A Story of Boilerplate*, 23 LAW & LITERATURE 365, 368 (2011) (describing history of contract law and concept of "meeting of the minds").

102. *See* Weyerhauser Co. v. Supply Co., 292 N.C. 557, 560–61, 234 S.E.2d 605, 607 (1977) ("Damages are allowed for breach of contract as may reasonably be supposed to have been in the contemplation of the parties when the contract was made or which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed." (citations omitted) (internal quotation marks omitted)).

103. *See* Corbett, *supra* note 34, at 1030.

104. KEETON ET AL., *supra* note 38, at 978. The relationship-protecting function of the tort benefits society because it fosters stability in relationships that need stability in order for society to function:

> By expressing society's interest in the integrity of contract, and by making contracts marginally more reliable, the tort implicitly encourages strangers to a given contract to plan their own commercial activity by relying on the terms of that contract. Thus, the tort facilitates the ability of contracts to stabilize commercial activity—to provide economic predictability not only for the parties to a contract but also for strangers. In an interdependent, industrial economy without central planning, this attenuated effect of contracts is arguably crucial for a coordinated allocation of future resources. Thus, society's interest in the formal integrity of contract, per se, is quite distinct from any interest society may have in the most efficient allocation of the goods and services underlying a particular contract. Formal contracts, because they embody binding promises of future performance, are key structural elements for the organization of a market economy. Contractual

Comparing the respective elements and interests underlying tortious interference with contracts and alienation of affections reveals a number of close parallels. In North Carolina, five elements are required to prevail on a tortious interference claim:

> To establish a claim for tortious interference with contract, a plaintiff must show: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.[105]

A review of the elements of alienation of affections shows the same type of considerations at work:

> The elements of an alienation of affections action are: (1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage's love and affection; and (3) a showing that defendant's wrongful and malicious acts brought about the alienation of such love and affection.[106]

In both torts, the central issues to be decided are: (a) whether the relationship was a functioning one; (b) whether the relationship is destroyed; (c) whether the defendant is responsible for this destruction; and (d) whether the defendant acts with the requisite intentionality. The overlap between the two torts continues when one considers that the relevant state interests—protecting family relationships and protecting business relationships—would at least seem equivalent.

While North Carolina stands essentially alone in sustaining tort actions arising from adultery, it is not alone in protecting contractual relationships from third-party interference. This dichotomy in treatment is actually heightened because the protection against third-

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> obligations can be seen as intertwining and forming a grid-like foundation of economic predictability upon which other forms of commercial activity may build.

Danforth, *supra* note 25, at 1513–14. This same type of stability-enhancing reasoning supports the tort of alienation of affections as well. *See* Corbett, *supra* note 34, at 1033–34.

105. United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 386 (1988). One scholar helpfully explains the tort in this way: "Notice of Promisee's contract rights is not enough by itself, nor is notice combined with persuasion of Promisor by Inducer not to perform. The inducement tort requires the conjunction of notice, persuasion by the offer of better terms, and receipt of benefits by Inducer." Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877, 885 n.25 (1990).

106. Heller v. Somdahl, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010).

party contractual interference throughout the United States also extends to prospective relationships that have not even formally reached the agreement stage.[107] The strange result is that in most jurisdictions courts are more willing to use tort law to protect the *possibility* of a prospective commercial relationship than the *reality* of an ongoing marital relationship.[108]

I argue that North Carolina's recognition of both sets of torts is a more consistent position than the majority view that distinguishes between marital and business relationships. Nothing in standard tort doctrine suggests why these two types of torts deserve different treatment.[109] Nor can the state's interest in promoting the possibility of business relationships reasonably be considered greater than its interest in promoting stable marriages. In fact, the reverse is true as the marriage relationship stands as the proverbial "building block" of society.[110] In the words of the Supreme Court, marriage is an "institution [in which] the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[111] Language such as this, long part of the conversation of political and legal discourse in America, would suggest a much more vigorous role for tort law in the protection of

107. *See* DIAMOND, LEVINE & BERNSTEIN, *supra* note 41, at 338–39 (describing the tort of intentional interference with prospective economic relations which "allows recovery when the defendant intentionally and unjustifiably disrupts the victim's economic expectations not embodied in an actual contract"). In North Carolina, this additional layer of commercial protection takes the form of tortious interference with business relations and tortious interference with prospective economic advantage. *See* MLC Auto., LLC v. Town of Southern Pines, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010) ("To establish tortious interference with prospective economic advantage, a plaintiff must show that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference."), *aff'd*, 365 N.C. 211, 710 S.E.2d 23 (2011); Market Am., Inc. v. Christman-Orth, 135 N.C. App. 143, 157–58, 520 S.E.2d 570, 581 (1999) ("As a general proposition any interference with free exercise of another's trade or occupation, or means of livelihood, by preventing people by force, threats, or intimidation from trading with, working for, or continuing [her] in their employment is unlawful." (citations omitted)).

108. *See* KEETON ET AL., *supra* note 38, at 978 (describing how courts have "continually expanded the tort" of commercial tortious interference over time).

109. On this point, some have concluded that both sets of torts should be extremely limited. *See, e.g.*, Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 336–37 (1980) (arguing against a rule of "universal liability" for lines of torts).

110. *See* Amy L. Wax, *The Family Law Doctrine of Equivalance*, 107 MICH. L. REV. 999, 1012 (2009) (noting "[m]arriage's long track record as a building block for families and a foundation for beneficial relations between the sexes").

111. Maynard v. Hill, 125 U.S. 190, 211 (1888).

marriage than in the protection of contractual or prospective business relationships.[112] But instead we see the opposite state of affairs.

The reason for the differential treatment of marriage and economic torts very likely goes back to the enduring prejudice held by the majority of the legal community against the heartbalm torts. This bias means that the similarity between the adultery-based torts and business interference torts simply does not matter because the heartbalm torts are so disfavored. As demonstrated earlier, however, the case against the heartbalm torts was never as strong as generally believed, even more so when contrasted with the way the torts presently operate in North Carolina.[113] Alienation of affections, in particular, deserves a fresh look from scholars, courts, and legislatures. Such an open-minded assessment of this tort, including its close symmetry with the widely-accepted business interference torts, would reveal that this claim sits comfortably within the mainstream of American tort law.[114] As evidenced by the treatment of economic torts, the state has an active interest in using tort law to protect relationships deemed critical to the functioning of a well-ordered society. In this role as relationship defender, tort law should protect from third-party interference society's most important relationship of all: marriage.

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112. Professor Case, however, questions the degree to which the state really is invested in the promotion of marriage:

> We ask little more of . . . couples marrying than that they comply with otherwise applicable law. To the extent that anything remains of government promotion of "human goods" through marriage . . . it is the assumption that the social good is likely to be promoted when government facilitates people working together to achieve joint ends. Perhaps at some extremely high level of generality this accords with the scriptural injunction that "two are better than one, because they have a good reward for their labor," but it is hardly a thick and rich ethical vision that is presently being given state sponsorship.

Case, *supra* note 84, at 1782 (quoting *Ecclesiastes* 4:9).

113. *See* Corbett, *supra* note 34, at 1011 (doubting that "reasons articulated thus far" adequately explain why heartbalm torts should not exist).

114. *See* KEETON ET AL., *supra* note 38, at 915 ("[T]he law of torts is concerned not only with the protection of interests of personality and of property, tangible or intangible, but also with what may be called 'relational' interests, founded upon the relation in which the plaintiff stands toward one or more third persons. An interference with the continuance of the relation, unimpaired, may be redressed by a tort action; and of this *the relations of the family are a conspicuous example*." (emphasis added) (footnotes omitted)).

C. *Deposing the Marriage Bed: Loss of Consortium and Adultery as Tort*

The close nexus between alienation of affections and prevailing tort doctrines is not limited to the law's treatment of third-party interference with existing or prospective commercial relationships. There is also significant common ground between alienation of affections and loss of consortium, the latter of which is a "well-established item of tort damages" designed to compensate spouses for a loss of "intangible family relations."[115] Loss of consortium arises when a third-party tortfeasor disrupts the relationship between the plaintiff and plaintiff's spouse—typically by negligently inflicting an injury upon the plaintiff's spouse that prevents the spouse from fulfilling his or her pre-injury marital role.[116] Still, these claims are not limited to physical injuries that make consortium physically difficult; they also arise when "one spouse is subjected to false imprisonment or malicious prosecution, libel or slander, or intentional infliction of mental distress, provided an actual loss of consortium results to the other spouse."[117]

In essence, claims for alienation of affections and loss of consortium seek recovery for the very same loss. As Professor Robert

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115. SHAPO, *supra* note 28, at 422.

116. *See* DIAMOND, LEVINE & BERNSTEIN, *supra* note 41, at 160 (providing an example of a loss of consortium claim arising from a car wreck). Initially, the law only allowed husbands to assert claims for loss of consortium for the usual property-based justifications discussed earlier. *See supra* Part I.A. Over time, this discriminatory application of loss of consortium went away. One early case explains:

> The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband, and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right, arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects.

Bennett v. Bennett, 23 N.E. 17, 18 (N.Y. 1889).

117. KEETON ET AL., *supra* note 38, at 932. This allowance of recovery for economic and non-economic intangible harms—of which "affections" is certainly a species—is a common feature of tort law. *See, e.g.*, RICHARD A. EPSTEIN, TORTS 31 (1999) ("[T]he scope of conversion . . . covers not only ordinary goods but a wide range of documents, such as insurance policies, bills of lading, checks and other forms of negotiable instruments, where the value of the thing is lodged in the intangible right, not the paper itself.").

Brown explained in 1934, "[d]espite the name which is universally given to [alienation of affections], it is almost universally agreed that the gist of it is not the loss of affections but rather the loss of consortium—a concept of very much broader content."[118] The North Carolina experience with both claims dovetails with this observation. The Supreme Court of North Carolina described the value of an alienation of affections claim as originating from the "conjugal rights to the society, affection and assistance" of one's spouse.[119] Using similar language, the North Carolina Court of Appeals explained that a claim for loss of consortium permits recovery for a spouse's loss of "service, society, companionship, sexual gratification and affection."[120] Given that alienation of affections and loss of consortium seek compensation for the same loss, one of the chief critiques of the heartbalm claims—that they "implicate[] no injury that was properly compensable in tort"[121]—is dubious on its face. In light of the common acceptance of loss of consortium claims, if there is a problem with adultery as tort, it cannot be grounded on the claim that the damages a plaintiff seeks are improper. In everyday tort litigation, these damages are routine.

As in alienation of affections claims, proving loss of consortium also requires delving into many of the sexual matters that traditional heartbalm critics claim should be off-limits. Consider that any claim of personal injury—emotional or physical—carries with it the potential to seek relief for loss of consortium.[122] Objections to the adultery torts based on discomfort with prying into the secrets of the marital bed fail to recognize the pervasive role such questions already play in tort cases. Suppose the case of a wife who seeks loss of consortium damages after her husband is injured in a car wreck caused by the defendant's negligence. During the wife's deposition, any competent and thorough defense lawyer will ask the wife a series of embarrassing questions:

118. Robert C. Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 472 (1934); *see also* Hitaffer v. Argonne Co., 183 F.2d 811, 814 (D.C. Cir. 1950) (noting loss of consortium "includes love, affection, companionship, sexual relations, etc.").

119. Chestnut v. Sutton, 207 N.C. 256, 257, 176 S.E. 743, 743 (1934).

120. Keys v. Duke Univ., 112 N.C. App. 518, 521, 435 S.E.2d 820, 822 (1993).

121. Graham, *supra* note 5, at 428.

122. This is true even beyond garden-variety tort suits such as accident claims; loss of consortium is often invoked in employment discrimination cases. *See, e.g.*, Jones v. Southcorr, L.L.C., 324 F. Supp. 2d 765, 783 (M.D.N.C. 2004) (discussing loss of consortium claim).

- How often did you and your husband have sex before the accident?
- How would you describe the quality of that sex?
- What sexual positions did you and your husband use during sex prior to the accident?
- How often do you and your husband have sex since the accident?
- How would you describe the quality of that sex?
- Are there sexual positions that you no longer use due to your husband's injury?[123]

Questions such as these pierce the sexual intimacy that exists between husband and wife. They are awkward and uncomfortable for the witness under oath to have to answer in front of a room full of strangers at either deposition or trial. The nature of loss of consortium claims, however, requires that these questions be asked about the state of the plaintiff couple's sexual relationship both before and after the accident to determine the level of damages caused by the defendant's tortious conduct. The key point is that no one points to the embarrassing aspects of these inquiries as a reason for abolishing loss of consortium claims. Rather, such questions are accepted as necessary given the relationship between the type of damages being sought and the intimate quality of the proof necessary to show those damages. This realistic understanding as to how tort law often operates in the trenches should put to bed any question as applied to adultery-focused claims that marital issues are too delicate a subject for judicial resolution. The bottom line is that courts hear these issues all the time.[124]

Finally, loss of consortium damages affirm the worth of adultery actions in tort in one other way. Typically, loss of consortium damages are only available to married individuals.[125] As a result,

123. *See, e.g.*, Sanders, *supra* note 27 ("If you are bringing a lawsuit, you have to understand that when you allege loss of consortium, you are opening up the door on the most intimate parts of your life. Defense attorneys will often ask highly personal questions—how often did you have sex before the injury, how often do you have sex now, how exactly does the injury make sex more difficult, have either of you ever strayed from the marriage, etc.").

124. *See* 11 DAMAGES IN TORT ACTIONS § 1.02[1] (Matthew Bender & Co. ed., 2011) (noting that consortium cases are "widely recognized" and listing cases).

125. *See* Alisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 393 (2005) ("[T]he great majority of courts have clung to a bright-line no marriage/no recovery rule which has

"[c]ohabitants, including 'significant others' and 'life companions,' have been refused consortium rights, with courts expressing concerns about expansive liability, fraudulent claims and *a purported state interest in marriage*."[126] Children, too, are routinely denied the right to recover for consortium damages.[127] The bright-line rule that loss of consortium is marriage-dependent underscores the broad recognition that promoting marriage is an important role for tort law to play. The relationship between alienation of affections and loss of consortium, therefore, extends beyond the fact that the two claims seek to compensate plaintiffs for identical harms. Both claims also vindicate the same important state interest, which again represents a manifestation of how the adultery-based torts naturally fit within the broader context of American law. Alienation of affections remains a sound cause of action because marriage is a socially valuable institution that should be guarded against the injurious actions of third parties.

III. IMPROVING ADULTERY AS TORT IN NORTH CAROLINA

North Carolina's almost singular embrace of adultery-remedying torts should be a source of commendation, not condemnation. Tort law is injury law, and few things produce as devastating an injury as adultery:

> Adultery is almost always debilitating for victimized spouses. They can suffer tremendous emotional damage, loss of trust, troubling mental insecurities, decreased job performance, and financial insecurity (especially when adultery leads to divorces involving children). What is even more tragic is that currently, most law in the United States does little to remedy the mental damage caused by unfaithful spouses.[128]

Because of adultery's terribly high costs, because of the state's role in managing marriage, because of the law's broader interest in protecting relationships from third-party interference, and because tort doctrine already seeks to vindicate the very same interests protected by alienation of affection claims, North Carolina's

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excluded nonmarried cohabitational partners."). As recently as 1996, no state recognized loss of consortium for unmarried couples. *See* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1146 n.161 (1996).

126. DIAMOND, LEVINE & BERNSTEIN, *supra* note 41, at 162 (emphasis added).

127. *Id.* at 161.

128. Patel, *supra* note 49, at 1013–14.

recognition of adultery-centered causes of action, unusual as it is, constitutes sound public policy.

This does not mean, however, that North Carolina is perfect. In this Part, I offer a number of suggestions to improve the operation of adultery as tort in North Carolina while still remaining true to the interests that adultery-based torts are designed to serve. I start with a reconsideration of the tort of criminal conversation.

A. Abolish Criminal Conversation

Unlike alienation of affections, liability for criminal conversation does not turn on evidence that a third party disrupted an otherwise happy marriage. Indeed, there is no requirement that a third party even know that a marriage exists.[129] Instead, the only real question is whether the defendant in a criminal conversation case had sex with a person who was at the time married to someone else:

> Criminal conversation is adultery. The cause of action is based on the violation of the fundamental right to exclusive sexual intercourse between spouses .... [T]he gravamen of the cause of action ... is the defilement of plaintiff's wife by the defendant. The elements of the tort are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture.[130]

This type of standard, divorced from any conception of fault, is a species of strict liability in that liability flows merely from the act itself.[131] Consequently, under criminal conversation, "it [is] irrelevant whether the adulterous spouse initiated the relationship, whether the adultery occurred while the spouses were living apart, whether the defendant was unaware of the marriage, or whether the adulterous spouse misrepresented his or her marital status."[132]

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129. Moran, *supra* note 60, at 775.

130. Johnson v. Pearce, 148 N.C. App. 199, 200–01, 557 S.E.2d 189, 190 (2001) (alternation in original) (citations omitted) (internal quotation marks omitted).

131. Moran, *supra* note 60, at 775. One North Carolina practitioner provides a hypothetical demonstrating the potential harshness of the criminal conversation rule: "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!" Mary Nell Craven, *Teutonian Triangles: Practical Pointers in the Defense of Heartbalm Actions*, FAM. F. (N.C. Bar Ass'n Family Law Section) June 2007, at 1, 1.

132. Moran, *supra* note 60, at 775; *cf.* Pharr v. Beck, 147 N.C. App. 268, 272 n.2, 554 S.E.2d 851, 854 n.2 (2001) (quoting DAVID A. LOGAN & WAYNE A. LOGAN, NORTH CAROLINA TORTS § 20.30[4] (1996)) ("There is no liability for alienation of affection if the defendant is ignorant of the existence of the marriage."), *overruled on other grounds by* McCutchen v. McCutchen, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

Criminal conversation is not needed anymore in North Carolina.[133] Two scenarios will always be present in criminal conversation cases: either a viable alienation of affections claim will also exist, or the facts giving rise to criminal conversation will fail to show an intention to tortiously interfere with a marital relationship (i.e. the defendant did not know the cheating spouse was even married or the marriage at issue was already broken). In the former instance, criminal conversation is unnecessarily duplicative.[134] Alienation of affections will suffice. In the latter instance, there is a serious question whether the defendant should even be liable at all: if the point of adultery-based torts is to protect marriage from the wrongful acts of third parties, then it makes little sense to treat adultery in the same way we treat statutory rape, where only the sex itself—and nothing else—matters.

Abolishing criminal conversation as I propose would strengthen adultery-based tort actions in North Carolina because it would put alienation of affections on a much surer footing. As long as criminal conversation exists, potential remains for the unfair results it produces to lead many observers to throw the baby out with the bath water and conclude that all of the heartbalm torts should be jettisoned.[135] Moreover, alienation of affections—because of its close kinship to tortious interference with contracts and loss of consortium—stands on legal ground that is much more solid than the shaky footing of criminal conversation. By focusing adultery cases on the three elements that govern alienation of affections—a happy marriage, the death of this happy marriage, and attribution of the end of the marriage to the acts of a malicious stranger—North Carolina would strike the right balance between substantive adultery that destroys a family and formalistic adultery that exists in name only.[136]

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133. *See* Batchelor, *supra* note 19, at 1912 (arguing for abolition of criminal conversation "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").

134. *See* Gray v. Hoover, 94 N.C. App. 724, 731, 381 S.E.2d 472, 476 (1989) (holding that damages for alienation of affections must be reduced by amount of criminal conversation damages awarded).

135. The same type of "guilt by association" with the torts of seduction and breach of marriage promise has long lowered public support for maintaining alienation of affections and criminal conversation as causes of action. *See supra* Parts I.B, I.F.

136. Professor Corbett, conversely, proposes a hybrid intentional interference with marriage tort, the elements of which "would be the existence of a valid marriage, defendant's knowledge of existence of marriage, and sexual relations between the defendant and the spouse." *See* Corbett, *supra* note 34, at 1054. Although Professor Corbett's proposal would be an improvement in those states that have abolished the

B. *Abolish Iago Liability*

Iago stands as one of Shakespeare's most diabolical villains. He is also one of the most unique. In the tragedy *Othello*, Iago excels at manipulating people into doing things they otherwise would not do, ultimately driving Othello to strangle his beloved wife Desdemona.[137] One example of Iago's cunning is this conversation where he slyly raises doubts about Desdemona's fidelity:

> Iago: Ha! I like not that.
> Othello: What dost thou say?
> Iago: Nothing, my lord; or if—I know not what.
> Othello: Was not that Cassio parted from my wife?
> Iago: Cassio, my lord? No, sure, I cannot think it,
> That he would steal away so guilty-like,
> Seeing your coming.
> Othello: I do believe 'twas he.[138]

Through exchanges like this one, Iago plants seeds of distrust that shake Othello's faith in his marriage. In tort terms, Iago alienates the affections that Othello has toward his wife.

Should Iago be liable? North Carolina says yes. In *Heller v. Somdahl*,[139] the North Carolina Court of Appeals faced a claim of a plaintiff-husband who alleged that defendant, Mary Jones, played the role of Iago and alienated the affections of the plaintiff's wife, Barbara Heller, by "encouraging" Mrs. Heller, via "intoxication, coercion, and persuasion,"[140] to engage in an adulterous relationship with another man, Russell Somdahl.[141] Affirming the jury's verdict against Jones, the court ruled that the evidence supported a finding that all the elements of alienation of affections had been satisfied.[142]

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heartbalm torts, this Article argues that alienation of affections better captures the wrongdoing of third parties upon which tort liability should be based.

137. WILLIAM SHAKESPEARE, OTHELLO act 5, sc. 2.

138. *Id.* at act 3, sc. 3.

139. 206 N.C. App. 313, 696 S.E.2d 857 (2010).

140. *Id.* at 314, 696 S.E.2d at 859–60.

141. *Id.*

142. *Id.* at 318, 696 S.E.2d at 862. The court summarized the evidence documenting Mary Jones' role in the break-up of the Heller marriage as follows:

> Plaintiff presented evidence that defendant arrived at the marital home and '[tried] to drag [Ms. Heller] off.' Defendant called plaintiff's home and told plaintiff that it was 'none of [his] business what his wife did' and that Ms. Heller was 'a grown woman.' Plaintiff also presented evidence that defendant threatened Ms. Heller. Ms. Heller testified that 'if I broke Mr. Somdahl's heart, [defendant and defendant's spouse] were going to break my legs, make sure my children were hurt, [and] my husband would find

This result is a bridge too far. It is one thing to hold liable in tort a third party who consummates a sexual affair with someone else's wife and breaks up that marriage as a result; it is another thing entirely to attach liability to someone who is not even involved in the adulterous acts. In both cases, "interference" exists. But, unlike the sexual interloper, the interference of the meddling interloper typically "lacks the quality of a moral 'wrong.' "[143] This insight is not universal, as the example of Iago demonstrates. On average, however, friends and family who meddle into another person's marriage likely do so out of some selfless concern, even if misguided, about their friend and family member. Sexual interlopers, conversely, invariably lack this motive of looking out for the best interests of others. Their interference is inherently selfish, designed either to fill some relationship hole in their own lives or to satisfy their own sexual desires. This focus on self at the expense of an otherwise functioning relationship makes the interference of the sexual interloper qualitatively different than the interference of the meddler, and the law should recognize this distinction.

Moreover, line drawing is a perennial problem in law, no less so in claims asserting alienation of affections where the vagaries of causation always persist. One bright line that can help bring stability and greater certainty to alienation of affections claims seems obvious: sex. Consider the sister who never approved of her brother's choice in a spouse. Over the course of the marriage, she never forgets to let her brother know of her disapproval. After years of ignoring his sister, one day the brother starts to listen. Divorce follows. Should the sister be liable to the hated sister-in-law? North Carolina has not foreclosed the possibility of liability for these Iago-type torts.[144] The better view,

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out about it.' Ms. Heller testified that defendant prevented plaintiff from talking with Ms. Heller by '[moving] [her] phone around the house so [Ms. Heller] would get bad reception.' Ms. Heller testified that Somdahl purchased a ring for her, but defendant took the ring from Ms. Heller, 'put [it] on . . . and said [Ms. Heller] wasn't going to get it until [she] was separated and divorced from [plaintiff].' Evidence also indicated that defendant '[arranged] all sorts of activities . . . to keep [Ms. Heller] away from [her] husband.' Defendant testified that she allowed Ms. Heller, who she knew did not drink alcohol responsibly, to attend defendant's party at which alcohol was served.

Id. at 317, 696 S.E.2d at 861.

143. Dobbs, *supra* note 108, at 344 n.43.

144. *See* Corbett, *supra* note 34, at 991 (noting claims "against parents or other close relatives of the spouse who sought to persuade the spouse to leave the plaintiff or otherwise interfered in the marriage"). *See generally* Bishop v. Glazener, 245 N.C. 592, 96 S.E.2d 870 (1957) (allowing possibility of alienation of affections claim against father-in-law although finding that evidence was insufficient in this particular case); Ridenhour v. Miller, 225 N.C. 543, 35 S.E.2d 611 (1945) (claim against sister-in-law requires showing of

however, is that liability for alienation of affections should not reach third parties who do not engage in adulterous relations with the plaintiff's spouse.[145] Otherwise, frank discussions with family and friends about troubled marriages could flower the seeds of an alienation of affections complaint. Does the rule that this Article proposes mean that scoundrels like Iago (and perhaps Mary Jones) sometimes escape liability? Yes, but this happens all the time. The reality remains that the line of liability must be drawn somewhere, and sex—or at a minimum, advanced romantic relations—should be the line.[146]

C. Expand the Separation Safe Harbor

In *Nunn v. Allen*,[147] the plaintiff filed claims for both criminal conversation and alienation of affections. Complicating the plaintiff's position was that many of the allegations giving rise to his claims occurred after he and his wife executed the following separation agreement:

> 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.[148]

The key phrase in this excerpt is the freedom given to the plaintiff and his wife to live "fully as if each party were unmarried." Does language such as this protect the defendant from post-separation liability based on the argument that the plaintiff consented to any adultery after the signing of the agreement? The North Carolina Court of Appeals said no, reasoning that post-separation conduct was relevant to assessing pre-separation conduct and that "a claim for criminal conversation may be based solely upon post-

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malice); Townsend v. Holderby, 197 N.C. 550, 149 S.E. 855 (1929) (discussing standards for holding in-laws liable for alienation of affections).

145. *See* Corbett, *supra* note 34, at 991 (noting discomfort with alienation of affections liability for " 'mere' persuasion"); Dobbs, *supra* note 109, at 343 (suggesting that wrongful conduct is not present in a situation where a person "persuades [his] young nephew to leave a very bad marriage").

146. But what constitutes "sex?" Where, for example, do "telephone sex" and "cyber sex" fit? *See* Corbett, *supra* note 34, at 1023. This Article leaves these questions for others.

147. 154 N.C. App. 523, 574 S.E.2d 35 (2002).

148. *Id.* at 535, 574 S.E.2d at 43.

separation sexual relations."[149] The court's decision aligned with North Carolina precedent on this question.[150]

In the 2009 legislation that statutorily recognized alienation of affections and criminal conversation for the first time, North Carolina changed the law to better protect defendants faced with post-separation claims as in *Nunn*:

> 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 the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.[151]

This provision, while an improvement over *Nunn*, does not go far enough to exclude liability for post-separation conduct. The linking of the post-separation safe harbor to the issue of the intent accompanying the separation creates questions of fact that will be difficult to resolve short of a jury trial, forcing affected defendants to still vigorously defend these types of claims. This result is unfortunate because the husband and wife's separation is conclusive evidence that the affections between them have already been alienated before a third party arrives on the scene post-separation. Further, in terms of blameworthiness, the defendant who initiates a relationship with the plaintiff's spouse after the spouse has separated from the plaintiff stands in a much different position than the defendant in a case like *Hutelmyer*. Alienation of affections requires a showing of "wrongful and malicious acts,"[152] and any adultery between the defendant and the plaintiff's spouse while plaintiff and spouse are living apart would not seem to rise to this high level. For all these reasons, the better course would be to create a true safe harbor by adopting a bright-line rule that post-separation conduct cannot serve as the predicate for either an alienation of affections or criminal conversation claim.

CONCLUSION

What should courts do when faced with the allegation that a rich, famous, and beautiful celebrity has "stolen" the affections of another

149. *Id.* (citing Johnson v. Pearce, 148 N.C. App. 199, 557 S.E.2d 189 (2001)).

150. *See* Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938) (noting that the "mere fact of separation does not preclude an action for criminal conversation"); *Johnson*, 148 N.C. App. at 200, 557 S.E.2d at 191 (same).

151. Act of Aug. 3, 2009, § 1, 2009 N.C. Sess. Laws 780, 780 (codified at N.C. GEN. STAT. § 52-13 (2011).

152. Heller v. Somdahl, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010).

person's spouse? Back to Fantasia. Assume the allegations to be true. Should Fantasia be held accountable in tort? Or does legal responsibility—in tort terms, proximate cause—rest solely with Antwaun Cook for leaving the marital bed on his own volition? Proximate cause "is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible."[153] This determination is notoriously elusive as "both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[154] Even if Fantasia's actions were a but-for cause in the breakup of the Cook marriage, it does not necessarily follow that her actions constituted a legal cause upon which liability could be based. The test in alienation of affection cases is whether "the wrongful acts of the defendant were the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the alienation."[155] For critics of the heartbalm torts such as Professor Feinsinger, such a standard remains woefully insufficient:

> [J]uries can scarcely be expected to proceed on any objective basis to distinguish the pursuer from the pursued. Frequently the marital relationship has previously been openly disrupted, and it is safe to assume that in most cases internal disintegration has already commenced when defendant appears on the scene. An expert social scientist would scarcely undertake to designate any one cause of disorganization as "controlling" in a given case, yet the law confidently relies on the jury to make such a selection.[156]

Professor Feinsinger, however, wrote from the perspective of the 1930s when tort law was much different. Professor Corbett, supplying a contemporary viewpoint, is surely correct when he notes: "In the difficult causation and allocation of fault issues they may present, [the heartbalm] torts are no different from many others that modern tort law does recognize."[157]

Recognizing this close fit between alienation of affections and other areas of tort described by Professor Corbett paves the way for

153. KEETON ET AL., *supra* note 38, at 273.

154. *Id.*

155. Hutelmyer v. Cox, 133 N.C. App. 364, 369, 514 S.E.2d 554, 559 (1999) (internal quotation marks omitted).

156. Feinsinger, *supra* note 4, at 995.

157. Corbett, *supra* note 34, at 1021.

rehabilitating adultery-based torts in the eyes of the legal community. Third-party adulterous interference with a functioning marriage is at least as great a wrong as third-party interference with contractual relations or prospective business relations. The same causation issues inherent in analyzing the unique dynamics of any relationship are also present in both sets of torts. Similarly, intentionally disrupting the bonds of consortium between a married couple is at least as great a wrong as negligently disrupting those bonds. The law's inconsistent treatment of these different situations makes little conceptual sense, especially in modern times when tort liability has continually expanded to afford greater relief for those injured by the wrongful acts of another. Juries routinely make the type of judgment calls about which Professor Feinsinger warned in the 1930s. While alienation of affections is regularly derided as a legal outlier, this characterization is more reputation than reality. Adultery as tort is not out-of-step with American law; rather, it is the treatment of alienation of affections by most states that is out of step with the rest of tort law.