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Two facts were certain: that on October 15, 1979, Haywood Cannon and his wife Rachel were separated, and that on May 20, 1981, they were divorced.[1] The circumstances of Rachel's relationship with Jeffrey Miller were less clear. Few would have approved had it begun before Rachel's separation from Haywood, but perhaps the relationship began innocently after the Cannons' marriage had finally failed. This moral distinction, however, does not make a difference under the tort law of North Carolina. In either event, the law offers "heart balm"[2] to Haywood. If Rachel and Jeffrey had engaged in sexual relations before the divorce, Haywood could recover damages in an action for criminal conversation—despite the couple's separation.[3] If the relationship began before the separation, Haywood was likely to prevail in an action for alienation of affections.[4] These causes of action are ancient and are entrenched in the law of North Carolina.[5] The North Carolina Court of Appeals, however, abolished these causes of action in the recent case of *Cannon v. Miller*,[6] temporarily destroying Haywood's hope of recovery. Haywood's chances for recovery, however, were restored three months later when the North Carolina Supreme Court vacated the court of appeals' decision on procedural grounds and remanded the case for trial.[7] The supreme court made its reversal without reaching the merits of the case and without reviewing the viability of causes of action for alienation of affections and criminal conversation. This Note analyzes the court of appeals' decision in *Cannon* and concludes that, despite the court of appeals' misperception of its ability to abolish the causes of action,[8] the merits of the case were correctly resolved.

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1. Cannon v. Miller, 71 N.C. App. 460, 460-61, 322 S.E.2d 780, 783 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985).

2. "The poetic name 'Heart Balm' refers to a financial soothing of the pocketbook of a victim in compensation for an unfortunate affaire de coeur." K. REDDEN, MODERN LEGAL GLOSSARY 241 (1980). A heart balm action is a legal term of art referring to civil actions for loss of romantic love. *Id.* *See infra* notes 16-50 and accompanying text.

3. *See infra* notes 36-50 and accompanying text.

4. *See infra* notes 18-35 and accompanying text.

5. Bishop v. Glazener, 245 N.C. 592, 595, 96 S.E.2d 870, 873 (1957). The court in *Bishop* stated:

> The existence of a cause of action for damages in favor of a husband against one who wrongfully and maliciously alienates the affections of his wife depriving him of his conjugal rights to her consortium has long been recognized in England and this country. This is a fundamental common law right.

Id.

6. 71 N.C. App. 460, 322 S.E.2d 780 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985).

7. Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 888 (1985). The supreme court allowed plaintiff's petition for discretionary review 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." *Id.* The supreme court stated that the court of appeals had "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." *Id.*

8. *See supra* note 7.

In *Cannon* the North Carolina Court of Appeals abolished the causes of action for alienation of affections and for criminal conversation. Plaintiff husband, acting *pro se*, brought both actions against Jeffrey Miller, a Pitt County attorney, seeking a total of $250,000 in compensatory and punitive damages.[9] In support of his action for alienation, he alleged that his wife had taken a job as deputy clerk at the Pitt County Courthouse in May 1979, that she had become acquainted with defendant that summer, and that by late September or early October defendant had persuaded his wife to have sexual relations. Plaintiff alleged that defendant's activity " 'affected the will' of [his] wife and caused her 'to transfer her love, loyalty, and devotion from this plaintiff to the defendant' " and that "the influence was so strong that plaintiff's wife showed an 'obvious loss' of the genuine love and affection that had existed during the marriage until that time."[10] To support his action for criminal conversation, plaintiff alleged that defendant had engaged in sexual relations with plaintiff's spouse at various times before the divorce.[11]

Defendant responded by filing a motion to dismiss on the grounds that the causes of action were unconstitutional, or, alternatively, were contrary to the public policy of North Carolina. This motion was denied.[12] The court did, however, grant defendant's motion for summary judgment based on affidavits and exhibits (the Cannons' divorce records) which indicated that the marriage had been unhappy and that defendant's relationship with the spouse had begun after the separation.[13] Plaintiff appealed, and defendant cross-appealed the denial of his motion to dismiss. After holding that summary judgment had been improperly granted,[14] the court of appeals agreed with defendant that the actions should have been dismissed. The court based its holding on its conclusion that alienation of affections and criminal conversation are archaic concepts that serve no purpose in modern society.[15]

Criminal conversation and alienation of affections are tort actions that seek to protect the marital relationship against intentional interference by third parties. Along with seduction and breach of promise to marry, they are commonly—and derisively—termed "heart balm" actions since they purport to award money damages for emotional harm.[16] The specific interest protected is one spouse's right to the other's consortium.[17] Though these actions often are brought against the same defendant and arise from the same set of events, they are historically separate and involve different elements of proof.

Actions for alienation of affections evolved from a husband's common-law right to recover from anyone who intentionally "enticed" his wife to leave the

9. *Cannon*, 71 N.C. App. at 460, 322 S.E.2d at 783.
10. *Id.* at 461, 322 S.E.2d at 783.
11. *Id.*
12. *Id.* at 461-62, 322 S.E.2d at 783.
13. *Id.* at 462, 322 S.E.2d at 783-84.
14. *Id.* at 463-70, 322 S.E.2d at 784-88.
15. *Id.* at 497, 322 S.E.2d at 803-04.
16. W. PROSSER & W. KEETON, THE LAW OF TORTS § 124, at 929 (5th ed. 1984).
17. *See infra* notes 18-35 and accompanying text.

home, with the result that he lost his wife's society and services.[18] The action of enticement was based on general common-law rules governing the master-servant relationship and the view that the wife was the husband's servant.[19] This principle was first articulated in the 1745 English case of *Winsmore v. Greenbank*,[20] and was commonly followed in this country,[21] except in Louisiana.[22] North Carolina recognized the action of enticement in the 1849 case of *Barbee v. Armstead*.[23]

Early actions in enticement had little to do with the emotional state of marriage; rather, they sought to protect a husband's right to his wife's consortium. Consortium, in its traditional sense, has been defined as "a bundle of legal rights to the alliterative trio of the services, society, and sexual intercourse of the wife."[24] The wife's duty to the husband derived from her legally inferior position, which essentially made her the husband's servant. One commentator describing the wife's status observed:

> It appears . . . that the foundation of the husband's right of action for the loss of *consortium* is based on the idea that the wife is her husband's servant, since an interference with the service of a servant is an actionable trespass. The wife is *sub virga viri sui*, is classified with the servants, and both wife and servants are considered chattels. The very nature of the relationship and the duties which it imposed on the wife together with her inferiority and subservience easily gave to the husband proprietary interest in her, and in turn led to proprietary actions for the loss of her services.[25]

Actions for enticement, however, have little utility in an age in which the wife is viewed as a partner in marriage rather than as her husband's servant. Thus, enticement gave way to its modern counterpart, the action for alienation of affections. The tort of alienation was first recognized in New York in 1866[26]

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18. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 207, at 553-54 (4th ed. 1980); W. PROSSER & W. KEETON, *supra* note 16, § 124, at 917-18; Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 992-94 (1935).

19. Comment, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 327-28 (1981).

> Originally, a master could recover for physical injury to a servant if loss of services resulted. Since a wife was viewed as a servant, a husband could also sue for the loss of the wife's services when she was injured by the defendant. Later, to meet the labor crisis in fourteenth century England resulting from the Black Death, a remedy was provided against anyone who enticed servants away from their masters. Thus, the sources of the original [action for alienation] had in common either physical injury to the servant or physical removal (enticement) of the servant from the premises of the master.

Id.

20. 125 Eng. Rep. 1330 (1745) (recognized husband's right against one who intentionally "persuaded, procured, or enticed" wife to leave home).

21. *Cannon*, 71 N.C. App. at 470-71, 322 S.E.2d at 788.

22. *See* Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927) (refusing to recognize an action for alienation of affections since damages would be essentially punitive, and such damages are not allowed in civil cases under Louisiana law).

23. 32 N.C. (10 Ired.) 530 (1849).

24. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 916.

25. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930).

26. Heermance v. James, 47 Barb. 120 (N.Y. App. Div. 1866).

and eventually was adopted by all states except Louisiana.[27] The basis of this tort is the deprivation of the wife's affection for the husband, that is, a "loss of love, society, companionship and comfort."[28] Expanding the concept of consortium to include emotional interests was a natural result of the conflict between the older, strictly proprietary basis of enticement and newer, egalitarian ideas about the legal status of women, morality, and the function of the family.[29] A 1919 Colorado decision aptly described the new emphasis on affection rather than on services: "There are two primary rights in the case; one is the right of the plaintiff to the body of his wife and the other to her mind, unpolluted."[30]

The plaintiff is required to establish three elements to sustain a cause of action in alienation of affections:[31] (1) a valid marriage, (2) the loss of affection or consortium,[32] and (3) the wrongful and malicious conduct[33] of the defendant that caused[34] the loss of affection. Adultery is not a necessary element to a cause of action in alienation since the interest protected is a spouse's right to marital affection, not an exclusive right of sexual intercourse. Indeed, one commentator has noted that in-laws are more likely to be defendants than are "wicked lover[s]."[35]

Criminal conversation[36] is simply a civil action for adultery. Like the early action for enticement, criminal conversation was not concerned with emotional damage to a marriage; rather, the interest protected was the "defilement of the

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27. *See supra* note 22.

28. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 918.

29. *See id.* at 916; Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *supra* note 25. *But cf.* 2 R. LEE, *supra* note 18, § 207, at 554 ("the basis of the action is not merely a loss of affections but rather a loss of consortium"); Brown, *The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 472 (1934) ("the gist of [the action] is not the loss of affections but rather the loss of consortium").

30. Sullivan v. Valiquette, 66 Colo. 170, 172, 180 P. 91, 91 (1919).

31. Litchfield v. Cox, 266 N.C. 622, 146 S.E.2d 641 (1966); Bishop v. Glazener, 245 N.C. 592, 96 S.E.2d 870 (1957); Ridenhour v. Miller, 225 N.C. 543, 35 S.E.2d 611 (1945); Hankins v. Hankins, 202 N.C. 358, 162 S.E. 766 (1932).

32. A partial loss of affections is sufficient. 2 R. LEE, *supra* note 18, § 207, at 554.

33. To prove malice it is not necessary to show a "spiteful, malignant, or revengeful disposition"; rather, one need only prove unjustifiable conduct injurious to another. Cottle v. Johnson, 179 N.C. 426, 429, 102 S.E. 769, 770 (1920).

Special rules apply when in-laws are defendants. *See* 2 R. LEE, *supra* note 18, § 207, at 558-59.

> The relation of parent and child justifies the parent in giving counsel and advice in regard to the child's marital affairs so long as the parent acts in good faith. The law recognizes and respects not only the marital relation, but likewise the natural affection between a parent and child. The rights of parents end at the border of good faith. When parents advise and interfere with the marital relations of their children, the presumption is that they have acted in good faith and for the child's welfare. A parent has a privilege which is overcome only by proof of its abuse. The privilege has been extended to other near relatives who are justified in giving advice in personal matters.

Id. at 559.

34. The standard for causation is lenient. A spouse need only demonstrate that the defendant's conduct was the controlling or effective cause even though other causes may have contributed to the alienation. Bishop v. Glazener, 245 N.C. 592, 96 S.E.2d 870 (1957).

35. 2 R. LEE, *supra* note 18, § 207, at 559. *See generally*, Brown, *supra* note 29, at 480-87 (discussion of in-laws as defendants in alienation actions).

36. The term "conversation" probably derives from the action's former status as an ecclesiastical crime. The term "conversation" was used euphemistically for intercourse. *See* W. PROSSER, THE LAW OF TORTS § 124, at 875 n.75 (4th ed. 1971).

marriage bed, the blow to family honor, and the suspicion cast upon the legitimacy of the offspring."[37] Thus, the essence of the criminal conversation action is the husband's exclusive right to sexual relations with the wife, based both on a need to maintain pure bloodlines for inheritance purposes and on principles of morality.[38] To establish a valid claim in criminal conversation, the husband has to prove (1) a valid marriage and (2) sexual intercourse between the defendant and the plaintiff's wife.[39] In modern practice, actions for criminal conversation are functionally indistinguishable from actions for alienation.[40] Each serves as heart balm, and the two are frequently brought together.[41]

Because of the husband's legal superiority to the wife and the proprietary nature of his right to consortium, alienation of affections and criminal conversation were virtually strict liability torts. Consent and connivance of the husband were the only recognized defenses to either tort.[42] A wife's consent was considered irrelevant; because of the fictional legal unity of the spouses, the wife was not legally capable of giving consent to a compromise of her husband's marital rights.[43] The plaintiff's own adultery was not a defense,[44] nor was his subsequent condonation of his wife's behavior.[45] Even a valid separation agreement would not necessarily bar an action for alienation.[46] Similarly, mere separation was no defense to criminal conversation.[47] In modern practice the same rules limiting available defenses apply.

Originally, only the husband could bring an action for alienation or for criminal conversation. His exclusive right was based on the common law's recognition of his—and only his—right to consortium. As a virtual servant, the wife's role in the marriage did not entitle her to a reciprocal interest in the husband's consortium.[48] Even if she had such an interest, she was unable to enforce it; women were not permitted to bring actions independently until passage of the

37. 2 R. LEE, *supra* note 18, § 208, at 567; *see also* Powell v. Strickland, 163 N.C. 393, 403, 79 S.E. 872, 876 (1913) ("the wrong relates to . . . the dishonor of [the] marriage bed, . . . the suspicion cast upon [the] legitimacy of the offspring, . . . [and] the invasion and deprivation of . . . exclusive marital rights and privileges").

38. Lippman, *supra* note 25, at 654-55; Comment, *Piracy on the Matrimonial Seas—The Law and The Marital Interloper*, 25 SW. L.J. 594 (1971).

39. Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938); Cottle v. Johnson, 179 N.C. 426, 428-29, 102 S.E. 769, 770 (1920); Powell v. Strickland, 163 N.C. 393, 402, 79 S.E. 872, 876 (1913).

40. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 919.

41. *Id.*

42. 2 R. LEE, *supra* note 18, § 208, at 571; W. PROSSER & W. KEETON, *supra* note 16, § 124, at 921; *cf.* Barker v. Dowdy, 223 N.C. 151, 25 S.E.2d 404 (1943) (condonation of wife's adultery does not constitute a defense of connivance).

43. Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938); Chestnut v. Sutton, 207 N.C. 256, 257, 176 S.E. 743, 743 (1934); Cottle v. Johnson, 179 N.C. 426, 428-29, 102 S.E. 769, 770 (1920); Scott v. Kiker, 59 N.C. App. 458, 464, 297 S.E.2d 142, 147 (1982).

44. *See* Bryant v. Carrier, 214 N.C. 191, 194, 198 S.E. 619, 621 (1938).

45. Barker v. Dowdy, 223 N.C. 151, 152, 25 S.E.2d 404, 404 (1943).

46. *See* Sebastian v. Kluttz, 6 N.C. App. 201, 213-14, 170 S.E.2d 104, 111-12 (1969).

47. Bryant v. Carrier, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938).

48. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 915-16; Lippman, *supra* note 25, at 654-56.

Married Women's Property Acts.[49] Most states, including North Carolina, now permit women to bring actions for alienation of affections or criminal conversation.[50]

Most commentators view alienation of affections and criminal conversation actions as devices to maintain family harmony and deter wrongful outside interference with the marriage.[51] Few would contend that these are unworthy goals. Yet the actions' effectiveness in achieving the desired ends is at best questionable, and the potential abuses and shortcomings of the actions are real and dangerous. A policy decision to retain these actions must be based on a conclusion that they are sufficiently effective to outweigh their inherent disadvantages. The North Carolina Court of Appeals sided with the majority of jurisdictions and commentators[52] in concluding that the balance of factors demanded abolition:

> Unarguably, the integrity of the marriage relation and the preservation of marital harmony are interests deserving of judicial protection. Yet, we find general agreement among the authorities who have examined the issue that, *on balance*, the social harm engendered by the existence of these torts . . . outweigh[s] the meritorious goals purportedly served by the actions.[53]

Thus, even though the court was willing to concede the existence of cases in which a spouse had suffered genuine wrong, it concluded that "equity to the plaintiff is not the only consideration."[54] The court's decision to abolish these

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49. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 916; Lippman, *supra* note 25, at 656. The wife's incapacity to sue was described bluntly in Hipp v. E.I. DuPont de Nemours & Co., 182 N.C. 9, 12, 108 S.E. 318, 319 (1921):

> At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave or any other property; that is to say by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative and the wife could not maintain an action for injuries sustained by her husband.

Blackstone gave this explanation:

> We may observe, that in these relative injuries notice is only taken of the wrong done to the *superior* of the parties related [husband] by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the *inferior* [wife] by such injuries is totally unregarded. One reason for this may be this: that the *inferior* hath no kind of property in the company, care, or assistance of the *superior*, as the *superior* is held to have in those of the *inferior*; and therefore the *inferior* can suffer no loss or injury.

3 W. BLACKSTONE, COMMENTARIES *143 (emphasis added).

During the latter half of the 19th century all states enacted statutes, generally known as Married Women's Property Acts, which removed much of the wife's legal disability. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.2 (1968). Consequently, married women were allowed to acquire, own, and transfer property, to make contracts, to be employed, and keep their earnings, and to sue and be sued. *Id.*

50. W. PROSSER & W. KEETON, *supra* note 16, § 124, at 916; *see, e.g.*, Townsend v. Holderby, 197 N.C. 550, 149 S.E. 855 (1929); Brown v. Brown, 124 N.C. 19, 32 S.E. 320 (1899).

51. *See, e.g.*, Feinsinger, *supra* note 18, at 988-89; Holbrook, *supra* note 29, at 4-6; Comment, *supra* note 19, at 327; Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?*, 56 N.D.L. REV. 239, 250-52 (1980); Comment, *supra* note 38, at 613; Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585 (1977) [hereinafter cited as Comment, *Alienation of Affections: Flourishing Anachronism*].

52. *See infra* notes 84-93 and accompanying text.

53. *Cannon*, 71 N.C. App. at 491, 322 S.E.2d at 800 (emphasis added).

54. *Id.*

actions was based on its recognition of four significant drawbacks in allowing actions for alienation and criminal conversation: the potential for abuse, the lack of deterrent effect, the difficulty of determining causation, and the inappropriateness of recovery for emotional harm predicated on a property theory.[55]

First, the court stressed the great potential for abuse inherent in the alienation of affections and criminal conversation actions. Because these torts often connote sexual misbehavior, the chance of blackmail always exists, as does the possibility of unfounded claims that will damage reputation.[56] The threat of bringing either action also may induce defendants to accept unfavorable extrajudicial settlements.[57] In the event that such claims go to trial, the tinge of immorality may distort the process of determining damages; connotations of misbehavior may cause " 'emotion and moral indignation to prevail over considerations of private or public injury in the assessment of damages.' "[58]

Second, the court in *Cannon* found no significant deterrent force in alienation of affections or criminal conversation actions. The possibility of an adverse judgment and award does not enter into the minds of transgressors. Nor does the policy of punishing only the outside party correspond to the reality of marital disintegration. The court noted that deterrence rests on the unrealistic assumption of a harmonious husband-wife relationship that is destroyed by a malicious intruder.[59] It is more likely that " '[the] defendant becomes enmeshed with [the] plaintiff's spouse without preconceived design, [and when] there is such design, juries can scarcely be expected to . . . distinguish the pursuer from the pursued.' "[60] Under such circumstances the threat of a civil action can have little deterrent effect.[61] Furthermore, the publicity and stress of litigation associated with the action would destroy any chance of reconciliation.[62] Indeed, the court felt that the practical effect of money damages was to allow a plaintiff a

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55. *Id.* at 491-92, 322 S.E.2d at 800-01.

56. *Id. See* H. CLARK, *supra* note 49, § 10.2, at 267; Feinsinger, *supra* note 18, at 996. Another commentator made this assessment: "[T]he threat of exposure, publicity, and notariety [sic] is more than sufficient to breed corruption, fraud, and misdealings on the part of unscrupulous persons in bringing unjustified and maliicious [sic] suits." Comment, *Criminal Conversation: Civil Action for Adultery*, 25 BAYLOR L. REV. 495, 500 (1973).

57. *Cannon*, 71 N.C. App. at 491, 322 S.E.2d at 800.

58. *Id.* at 481, 322 S.E.2d at 794 (quoting Feinsinger, *supra* note 18, at 1009).

59. *Id.* at 480, 322 S.E.2d at 793; *see also* H. CLARK, *supra* note 49, § 10.2, at 267. Clark states:

> [T]he action for alienation is based on psychological assumptions that are contrary to fact . . . . [V]iable, contented marriages are not broken up by the vile seducer of the Nineteenth Century melodrama, though this is what the suit for alienation assumes. In fact the break-up is the product of many influences. It is therefore misleading and futile to suppose that the threat of a damage suit can protect the marital relationship.

Id.

60. *Cannon*, 71 N.C. App. at 479, 322 S.E.2d at 793 (quoting Feinsinger, *supra* note 18, at 995).

61. *Id.* at 478-79, 322 S.E.2d at 793; *see also* Bearbower v. Merry, 266 N.W.2d 128, 137 (Iowa 1978) (McCormick, J., dissenting). Judge McCormick stated in *Bearbower*

> Many authoritative studies have been made of the nature of marriage and the cause, prevention, and cure of marital failure. I have searched among them in vain for any support for the . . . assumption that the existence of the alienation tort is a deterrent to marital breakdown or a device for protecting the family unit.

Id. (McCormick, J., dissenting).

62. *Cannon*, 71 N.C. App. at 492, 322 S.E.2d at 800-01.

" 'forum for vindictiveness and posturing self-justification.' "[63]

A third flaw of heart balm actions is that the tort concept of causation is too simplistic to reflect the dynamics of the usual marital breakup.[64] In actions for alienation, the plaintiff must establish that the defendant was the controlling cause of the loss of affections.[65] To do so effectively it is necessary to conduct a full inquiry into the marital history, the quality of the couple's relationship, and the couple's deepest motives.[66] Such investigations are difficult to conduct and the results usually are inconclusive. The ability of psychologists to determine the cause of a particular marital breakdown is questionable;[67] moreover, the presence of the third party in a romantic triangle may not be causally related to the decision to engage in extramarital activities.[68] Indeed, the inability to determine causation may tempt juries to resolve the issue on moral grounds.[69]

Last, alienation of affections and criminal conversation actions reflect a property basis for recovery that has no relevance to modern understandings of psychology or social values. The court stated that these actions have never shaken free from their proprietary origins.[70] When the right to bring heart balm actions was extended to women, the actions were not restructured to reflect greater equality between spouses, changes in sexual mores, and newer views of the family's function.[71] The retention of the rule against spousal consent as a defense illustrates this point.[72] The rule is based on the fictional unity of man and wife,[73] and logically cannot be justified since the fiction has been discarded. Nevertheless, the rule against consent as a defense has been extended to both

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63. *Id.* at 487, 322 S.E.2d at 798 (quoting Bearbower v. Merry, 266 N.W.2d 128, 138 (Iowa 1978) (McCormick, J., dissenting)). Clark has characterized these actions, in part, as a "forced sale . . . of affections." H. CLARK, *supra* note 49, § 10.2, at 267.

64. *See Cannon*, 71 N.C. App. at 478-80, 322 S.E.2d at 793-94; Comment, *supra* note 38, at 613-14.

65. *See supra* note 34 and accompanying text.

66. H. CLARK, *supra* note 49, § 10.2, at 265-66; *see also* Feinsinger, *supra* note 18, at 995 ("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.").

67. W. GOODE, THE FAMILY 161-62 (2d ed. 1982).

> From the beginning of divorce research, analysts have tried to pin down the 'causes' of divorce, but with little success. Inquiries have reported what legal grounds the divorcing couple uses, what complaints they make about each other outside that legal action, and many of the factors associated with higher or lower rates of marital dissolution. It seems unlikely that we shall locate any simple set of causes.
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> . . . A few marriages doubtless end because of some single large cause, such as the husband's violence or the wife's neurosis, but very likely most modern divorces are the result of many diverse difficulties. These create a continuing cumulative process of conflict during which both spouses gradually come to reject both the relationship and each other.

Id.

68. A. FROMME, THE PSYCHOLOGIST LOOKS AT SEX AND MARRIAGE 207-25 (1950).

69. Comment, *supra* note 38, at 614.

70. *Cannon*, 71 N.C. App. at 492, 322 S.E.2d at 801; *see also* Brown, *supra* note 29, at 472 ("Consortium is a property right, and it would seem to follow that the action for alienation of affections is to be treated as one for a tort to property; even though . . . the damages are based primarily upon personal injuries to the plaintiff.").

71. *See supra* notes 30-34 and accompanying text.

72. *See supra* note 43 and accompanying text.

73. *Id.*

husband and wife. Many commentators have noted that after the legal inferiority of women—the very basis for alienation and criminial conversation—had been eliminated by the Married Women's Property Acts, the courts could easily have abolished the actions as unwarranted.[74] Instead, the courts chose to extend the actions to women on a theory of the wife's equal interest in the marriage.[75] The effect was to grant a proprietary interest in consortium to the wife as well as the husband.[76]

The court of appeals in *Cannon* was offended by the notion of a proprietary interest in love or affection: "common sense dictates that by definition these are 'rights' which can only be voluntarily given to one spouse by the other."[77] Since "spousal love and all its incidents do not constitute property that is subject to 'theft' or 'alienation,' "[78] the court concluded that actions for alienation of affections and criminal conversation have become "removed from the realm of social reality."[79]

It is difficult to quarrel with the court of appeals' conclusion in *Cannon* that actions for alienation of affections and for criminal conversation should be abolished. The ubiquitous possibilities for abuse, the absence of deterrent force, the difficulty in assigning blame, and the patent backwardness of permitting a proprietary interest in a spouse's affections clearly outweigh any utility these actions may have in protecting the interests of the rare, totally innocent party who has suffered a bona fide wrong. Nor would any measure short of eliminating both actions have been meaningful. Retaining alienation of affections or criminal conversation actions while allowing for a defense of consent would have been tantamount to abolition given the consensual nature of the torts.[80] A decision to retain alienation of affections while eliminating criminal conversation would have amounted to preserving a civil action for adultery, with the added element of lost affections;[81] problems with abuse, causation, and deterrence would have remained. Conversely, retention of only the emotionally neutral action of criminal conversation would have required a proprietary approach to spousal relations that few would accept. Such an approach would have had the advantage of ending questionable actions against meddlesome in-laws,[82] but would not have resolved questions of abuse, deterrence, causation, and the property basis for recovery. Finally, limiting recovery to actual damage only could have protected a defendant from an irrational jury and could not have afforded protection

74. Feinsinger, *supra* note 18, at 990; Lippman, *supra* note 25, at 662; Comment, *supra* note 19, at 328-30.

75. *See, e.g.*, Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947).

76. *Cannon*, 71 N.C. App. at 476-77, 322 S.E.2d at 791.

77. *Id.* at 477, 322 S.E.2d at 792.

78. *Id.* at 492, 322 S.E.2d at 801.

79. *Id.* at 477, 322 S.E.2d at 792.

80. *See* Comment, *supra* note 19, at 339-40.

81. *See* Note, *Hunt v. Hunt: The Status of the "Heartbalm" Torts in South Dakota*, 27 S.D.L. REV. 160, 169 (1982) (criticizing South Dakota Supreme Court's decision to abolish criminal conversation but to retain alienation of affections).

82. *See* Comment, *Alienation of Affections: Flourishing Anachronism*, *supra* note 51, at 599-600.

against the other shortcomings of the action described above.[83]

The court of appeals' decision is in accord with the current national trend away from heart balm actions. To date, twenty-seven states and the District of Columbia have either abolished alienation actions by statute or have prohibited monetary recovery in such suits,[84] while two states have reduced the statute of limitations to one year[85] and another state has eliminated punitive damages.[86] Twenty-one states and the District of Columbia have legislatively abolished actions for criminal conversation or have prohibited monetary recovery in such suits;[87] four states have shortened their statutes of limitations,[88] and at least three others have limited the amount of damages recoverable.[89] In eight states it is a crime even to file a complaint alleging one or both causes of action.[90] Other states have judicially abolished criminal conversation and alienation.[91] The

83. *See id.* at 600.

84. ALA. CODE § 6-5-331 (1975); ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1984-85); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572b (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); FLA. STAT. ANN. § 771.01 (West 1984) (monetary damages not permitted); GA. CODE ANN. § 51-1-17 (1982); IND. CODE ANN. § 34-4-4-1 (Burns 1973 & Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 167 (1964); MD. FAM. LAW CODE ANN. § 3-103 (1984); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MINN. STAT. ANN. § 553.02 (West Supp. 1985); MONT. CODE ANN. § 27-1-601 (1983); NEV. REV. STAT. § 41.380 (1979); N.H. REV. STAT. ANN. § 460.2 (1983) (monetary damages not permitted); N.J. STAT. ANN. § 2A:23-1 (West 1952) (monetary damages not permitted); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page 1981); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1984-1985) (with insignificant exceptions); OR. REV. STAT. § 30.840 (1983); PA. STAT. ANN. tit. 48, § 170 (Purdon 1965) (with insignificant exceptions); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1984) (monetary damages not permitted); VA. CODE § 8.01-220 (1984); W. VA. CODE § 56-3-2a (Supp. 1984); WIS. STAT. ANN. § 768.01 (West 1981); WYO. STAT. § 1-23-101 (1977) (monetary damages not permitted).

85. ARK. STAT. ANN. § 37-201 (Supp. 1981); R.I. GEN. LAWS § 9-1-14 (Supp. 1984).

86. ILL. ANN. STAT. ch. 40 ¶¶ 1901-07 (Smith-Hurd 1980) (limited to actual damages).

87. ALA. CODE § 6-5-331 (1975); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572f (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); FLA. STAT. ANN. § 771.01 (West 1984) (monetary damages not permitted); GA. CODE ANN. § 51-1-17 (1982); IND. CODE ANN. § 34-4-4-1 (Burns 1973 & Supp. 1983); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MINN. STAT. ANN. § 553.02 (West Supp. 1984); NEV. REV. STAT. § 41.380 (1979); N.J. STAT. ANN. § 2A:23-1 (West 1952) (monetary damages not permitted); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page 1981); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1983-1984) (with insignificant exceptions); OR. REV. STAT. § 30.850 (1983); TEX. FAM. CODE ANN. § 4.05 (Supp. 1985); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1984) (monetary damages not permitted); VA. CODE § 8.01-220 (1984); WIS. STAT. ANN. § 768.01 (West 1981); WYO. STAT. § 1-23-101 (1977) (monetary damages not permitted).

88. ARK. STAT. ANN. § 37-201 (Supp. 1981) (one year); KY. REV. STAT. § 413.140(1)(c) (1972 & Supp. 1984) (one year); MO. ANN. STAT. § 516.140 (Vernon 1952 & Supp. 1984) (two years); TENN. CODE ANN. § 28-3-104 (1980) (one year).

89. ILL. ANN. STAT. ch. 40 ¶¶ 1951-57 (Smith-Hurd 1980) (limited to actual damages); S.C. CODE ANN. § 15-37-50 (Law. Co-op 1976) (limitation on recoverable costs); WASH. REV. CODE ANN. § 4.84.040 (1962) (limitation on recoverable costs).

90. FLA. STAT. ANN. §§ 771.01 to -.05 (West 1964); IND. CODE ANN. §§ 34-4-4-1 to -3 (Burns 1973 & Supp. 1984); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1980) (alienation only); MONT. CODE ANN. §§ 27-1-601 to -604 (1983); N.J. STAT. ANN. §§ 2A:23-1 to -3 (West 1952); N.Y. CIV. RIGHTS LAW §§ 80-a to 81 (McKinney 1976); WIS. STAT. ANN. §§ 768.01 to -.03 (West Supp. 1981); WYO. STAT. §§ 1-23-101 to -103 (1977).

91. Four state supreme courts have abolished criminal conversation: Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980); Fadgen v. Leyker, 469 Pa. 272, 365 A.2d 147 (1976); Hunt v. Hunt, 309 N.W.2d 818 (S.D. 1981).

Two courts have eliminated actions in alienation of affections: Funderman v. Mickelson, 304

supreme courts of four states, although disapproving of these actions, have left the question of abolition to the legislatures.[92] The trend away from heart balm actions is also reflected among the commentators. Indeed, it is difficult to find recent commentary that advocates the retention of alienation or criminal conversation.[93]

The importance of the *Cannon* decision, however, goes beyond the narrow issues of alienation of affections and criminal conversation. It reflects a trend in North Carolina's domestic relations law toward removing fault as an element in the dissolution of marriage. With insignificant exceptions, divorce is available to either spouse regardless of fault.[94] Equitable distribution of marital property proceeds on the presumption that an equal division is fair unless certain factors relating to the needs or contribution of one spouse are present;[95] fault is not among the factors.[96] Similarly, although a showing of fault is a prerequisite to alimony,[97] the award is limited to dependent spouses[98] and the amount is governed by need.[99] Adultery, however, is still a bar to alimony,[100] and a trial judge may reduce an award in light of a dependent spouse's fault.[101] Even so, these recognitions of fault constitute only a limitation on the supporting spouse's obligations and not a remedy for marital misconduct.

Because of the decreased role of fault in the dissolution of marriage and its attendant economic consequences, the maintenance of actions for alienation of affections and for criminal conversation seems incongruous. If the aggrieved spouse has few rights against the offending spouse arising from marital fault, clearly the aggrieved spouse should have fewer rights against a third party. The court of appeals' decision in *Cannon*, therefore, could have harmonized North

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N.W.2d 790 (Iowa 1981); Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980). *But see* Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983) (affirming cause of action but requiring plaintiff to show that the causal effect of defendant's conduct outweighed all other causes, including conduct of plaintiff and spouse).

92. Gorder v. Sims, 306 Minn. 275, 237 N.W.2d 67 (1975) (alienation retained); Kremer v. Black, 201 Neb. 467, 268 N.W. 582 (1978) (criminal conversation retained); Dube v. Rochette, 11 N.H. 129, 262 A.2d 288 (1970) (alienation retained); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973) (criminal conversation retained).

93. *See, e.g.*, H. CLARK, *supra* note 49, § 10.2; Comment, *supra* note 19; Note, supra note 51; Note, *supra* note 81; Comment, *supra* note 38; Comment, *Alienation of Affection: Flourishing Anachronism*, *supra* note 51. *But see* Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAWYER 426 (1972) (author advocates elimination of criminal conversation but retention of alienation of affections with adultery as an element).

94. N.C. GEN. STAT. § 50-6 (1984) (providing for divorce after one year's separation); *see also id.* § 50-5.1 (special provision for divorce based on a spouse's insanity).

95. *Id.* § 50-20(c).

96. *Id.* The North Carolina Court of Appeals recently has ruled that marital fault is not a proper consideration under section 50-20(c)(12). *See* Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984). For a discussion of *Hinton*, see Note, Hinton v. Hinton—*Equitable Distribution Without Consideration of Marital Fault*, 63 N.C.L. REV. 1204 (1985).

97. N.C. GEN. STAT. § 50-16.2 (1984).

98. *Id.*

99. *Id.* § 50-16.5 (1985); *see also* Lemons v. Lemons, 22 N.C. App. 303, 206 S.E.2d 327 (1974) (alimony awarded not as punishment for broken marriage, but for demonstrated need).

100. N.C. GEN. STAT. § 50-16.6(a) (1984).

101. *Id.* § 50-16.5(b).

Carolina's tort law with the state's policy of deemphasizing fault in divorce if it had been allowed to stand. Because of the supreme court's summary reversal of *Cannon*, however, actions for alienation of affections and criminal conversation are still part of the law in North Carolina. Thus, a spouse is given an acknowledgment of fault in tort that the divorce statutes deny.

Similarly, the decision could have eliminated an unfair disparity in the law of interference with family relationships. Unlike a spouse, a child has no cause of action against a third party who causes the alienation of a parent's affections. In the 1949 case of *Henson v. Thomas*,[102] the North Carolina Supreme Court ruled that since a parent is under no legal obligation to love his or her children, a child could not hold a third party liable for the parent's withdrawal of affections. The court distinguished between the parent-child relationship and a marriage, noting that a spouse's right to maintain actions for alienation and criminal conversation was recognized only because of the "common law conception of the husband's property right in the person of his wife."[103] Unquestionably, the parent-child relationship is as important to society as the marital relationship. It is illogical to allow a cause of action in one situation and to withhold it in another.

Cannon was not a subtle decision, nor was it a difficult one. The court of appeals may have misperceived its authority to change the law, but it did not fail to recognize the need to do so. Alienation of affections and criminal conversation originate from the need to discourage or vindicate violations of proprietary interests that no longer exist; these actions are ill-suited to protecting the emotional interests that characterize the ideal modern marital relationship. Marriages must stand or fall according to their own strengths and weaknesses. There is no reason for the state to provide a forum in which the estranged spouse can bitterly assign fault for a failed marriage. *Cannon*, nevertheless, has been remanded to Pitt County Superior Court for trial. There the parties will litigate the complex questions of marital breakdown in a tort action rooted in the medieval concept that a wife is her husband's chattel. Eventually the North Carolina Supreme Court will be able to decide *Cannon* or a similar case on the merits of abolishing actions for alienation of affections and criminal conversation. When that opportunity arises, the court of appeals' decision in *Cannon* should be persuasive in closing North Carolina's courts to disputes such as the one between Haywood Cannon and Jeffrey Miller.

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102. 231 N.C. 173, 56 S.E.2d 432 (1949).
103. *Id.* at 174, 56 S.E.2d at 433.