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Alienation of Affection Torts: Love 'Em or Leave 'Em?

Elizabeth Ellen Gordon

Kennesaw State University

The alienation of affection tort, which allows a plaintiff to sue a third party for interfering with the plaintiff's marriage, has been disparaged by many as a relic of women's former status as their husband's property. Despite its archaic roots, the tort as it operates today is in many ways quite modern and addresses some of the problems, expectations, and obstacles of modern American marriage. Furthermore, it fits in with developments in tort law toward more actions for nontangible, nonfinancial damages. Given the tort's history, one might assume that it benefits men, but women also benefit from and use this tort, as demonstrated in a case study of North Carolina, a jurisdiction where the tort is frequently pursued. In its current form, the alienation tort can be reconciled with feminist theory and with women's interests, and should not be abolished without reconsideration.

"Those whom God hath joined together let no man put asunder."
Book of Common Prayer 1789

Although marital decay and dissolution can have numerous causes, the negative influence of a third party on a marital relationship is certainly common and has inspired not only literary works but also lawsuits over the centuries. Traditional Judeo-Christian marriage ceremonies hold numerous symbolic messages against third-party interference with a marriage relationship: from the quoted admonition about putting asunder those whom God hath joined, to the "giving away" of the bride and her parents stepping away from the wedding couple, to the warning that those who have cause to oppose the marriage will not have a future opportunity to voice their opposition.

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Legal approaches to the problem of marital interference have varied. At some points in time, adultery was treated as a criminal matter, and the sexual liaison itself was the focus. Similarly, as a tort under common law, criminal conversation focused on the third party's sexual relations with the plaintiff's spouse. But neither of these legal approaches got to the heart of the situation — the damage to the marital relationship wrought by the third party's interference. The common law approach to that issue was the alienation of affection tort. For this claim, no sexual relations had to be proved (though often they were). Generally, the elements included: "(1) wrongful conduct by the defendant that interferes with the plaintiff-spouse's marriage (2) loss of affection or consortium and (3) a legally sufficient causal chain linking elements (1) and (2)" (Greenstein 2004, 732). The defendant did not have to act maliciously, but did need to have knowledge of the marriage. In the classic situation, an alienation of affection defendant is the illicit lover of one spouse; however, actions may be brought against in-laws and others who come between husband and wife in nonsexual ways. Plaintiffs must overcome common law privileges of the alienated spouse's parents, other near relatives, and pastoral counselors by showing that the marital interference was not in consideration of the spouse's welfare, but was instead "prompted by malice or ill will, accompanied by falsehoods, implemented by threats, or motivated by an unlawful, immoral, or improper purpose" (Morgan 1995, 184).

The alienation tort, once a valid claim in 49 states, is going the way of the dodo. Only seven jurisdictions still recognize it: Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah. Even so, the issue is theoretically a national one so long as the tort is viable anywhere, since a defendant need not set foot in an alienation state to be sued by a resident thereof (Cotter 2005). In some of the remaining alienation states, the claim is rarely raised and very rarely successful. In Illinois, for example, the tort has been so strictly defined that it is all but impossible to recover anything through its use. The plaintiff must prove actual damages to recover, but a statute bars the following elements from being considered: "mental anguish, injury to feelings, shame, humiliation, sorrow, mortification, defamation, injury to the good name and character of the plaintiff or dishonor to the plaintiff's family as a result of the alienation of affection" (Clifford 2005, 16). In Hawaii, the plaintiff has to show that the defendant is the sole cause of the alienation, a significant bar to recovery (Wood 1994). Most states abolished

alienation as a cause of action in the twentieth century through statutes or through judicial decisions. Most recently, Missouri judicially abolished the alienation tort in 2003. Part of the Missouri Supreme Court's rationale was to achieve what it saw as consistency with its 1994 abolition of criminal conversation.[1] Countering the trend, the Mississippi Supreme Court abolished criminal conversation in 2001 but explicitly refused in a 7–1 vote to abolish alienation of affection because it did not want to send a signal that the court "was devaluing the marital relationship."[2]

Grouped with other so-called "heart balm torts" (breach of promise to marry, seduction, and criminal conversation), alienation of affection has been unpopular among many groups, including advocates of women's rights. Indeed, all the heart balm torts were originally used by men to protect "property" interests in their wives and female relatives. However, as this article argues, despite its archaic roots, the alienation of affection tort, as it operates today, is in many ways quite modern and addresses some of the problems, expectations, and obstacles of modern American marriage. Furthermore, it fits in with developments in tort law toward more actions for nontangible, nonfinancial damages. Given the tort's history, one might assume that it benefits men, but women also benefit from and use this tort, and in its current form, the alienation tort can be reconciled with feminist theory.

This article is not the first to reconsider the much maligned heart balm torts. Jane Larson (1993) advocates reconfiguring the old tort of seduction as a new tort for sexual fraud, while Mary Coombs (1989) reconsiders feminist efforts to abolish the breach of promise tort. William Corbett (2001) imagines a new tort combining elements of alienation of affection and criminal conversation. Jill Jones (1998) urges another look at alienation in light of the covenant marriage movement, and Rachel Moran (2000) examines the demise of heart balm torts in conjunction with the rise of hate crimes legislation. This article builds on some of these insights and makes new arguments regarding the nature of modern marriage, modern tort law, and modern infidelity. It concludes with a case study of the politics and practice of alienation of affection in North Carolina, where these tort claims are frequently filed.

1. Rebecca Weisser, "Supreme Court Abolishes Alienation of Affection Tort," *St. Louis Daily Record/St. Louis Countian*, 19 June 2003.

2. Barbara Powell, "Mississippi, 6 States Uphold Alienation of Affection Laws," *The Clarion-Ledger*, 10 July 2003.

HISTORY OF THE TORT AND FEMINISTS

One early ancestor of the alienation tort was a Teutonic tribal practice in which a payment for a "lost" wife replaced the husband's right to kill the lover. The idea was that the wife's new beau would bear the cost of the jilted husband "purchasing" a new wife. This practice came to England with the Anglo-Saxons (Nguyen 2003). Another root of the alienation of affection tort is the archaic enticement tort, which analogized the husband–wife relationship to that of master–servant. This principle appears in English cases from the 1700s and became established common law throughout the United States as well, with the exception of Louisiana (Leonard 1985). By the 1860s, a more contemporary alienation of affection tort was recognized, with New York being the first state to embrace it (Leonard 1985). Whereas the enticement tort focused on sexual services, the new alienation tort also included an emotional element, which reflected updated ideas about the role of women in the family. The next step was for wives to qualify as plaintiffs in alienation suits, which was accomplished in the late nineteenth century as states passed Married Women's Property Acts (Leonard 1985). Even so, women's rights advocates were not supportive of this and other torts that were often lumped under the derogatory term "heart balm torts." Women's rights advocates viewed breach of promise as the most egregious, but alienation got swept up in the reformist fervor. Eight states passed anti–heart balm statutes in a wave from 1935 until 1950 (Greenstein 2004). Feminists led campaigns against the heart balm torts in some states, such as Indiana (Corbett 2001). However, Larson (1993, 395) points out that misogynistic arguments in the anti–heart balm torts movement coexisted with women's rights arguments:

> Supporters of the anti–heart balm reform movement put forward three major arguments: first, that seduction and the other heart balm 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.

Feminist reformers' motives were, not surprisingly, different. They saw the heart balm torts as reinforcing Victorian stereotypes of women as dependant, in need of protection, "economically trapped and sexually

passive" (Larson 1993, 398). These old common law torts did not mesh with their progressive goals. This early feminist movement presaged the blossoming of liberal feminism in the 1960s and 1970s and a second wave of abolitions. Liberal feminism values individualism and autonomy, and therefore favors less regulation of sexual behavior generally. Feminists and other political liberals have been leery of legal enforcement of commitment norms in marriage because of their association with gender hierarchy and traditional gender roles (Scott 2000).

While a few feminist writers, like those cited above, have revisited the old heart balm torts, they find themselves with strange political allies — social conservatives with "pro-marriage" agendas (e.g., Buchanan 1997; Rustin and Royall 2002) — although feminists generally have focused on pre-marital conduct, whereas social conservatives support the torts related to married couples (Moran 2000). While this alliance echoes campaigns against pornography and "other commercial sexual abuses of women," Moran (2000, 780) adds this warning: "Importantly, though, the shift to non-commercial settings, especially ones as universal as courtship and marriage, dramatically expands the scope of sexual regulation that these advocates have in mind."

More typically, feminists still argue against the alienation of affection tort. For example, Susan McCooin (1998) conceptualizes the alienation tort as a claim to a monopoly on another's emotions. For her, and for some other feminists, alienation's history cannot be erased by equal opportunity to use this law: "To say that these actions no longer have a sexual property basis is to misunderstand the nature of the claims. Granted, the language no longer states that the husband has a property right in his wife's person, but actions that seek recompense for relational losses still express proprietary interests in another's emotional and physical being. Moreover, the fact that some women sue to recover for loss of proprietary interests in their spouses does not take away from its underlying rationale" (ibid., 1241).

McCooin's argument fails to focus on the relational element that she mentions almost in passing: Contemporary alienation of affection torts do not serve to protect a property interest in one's spouse's body or emotions, but rather an interest in the relationship (Greenstein 2004; Jois 2006). Built and sustained by the couple themselves, supported and recognized by the law, the relationship belongs to the two of them. When someone destroys or purposely reduces the value of a legally recognized relationship, even with the consent and complicity of one party to the relationship, the other party should have some recourse.

Expanding upon this idea, Goutam Jois (2006, 550) explicitly advocates a liberal analysis of marriage as a property interest: "The overwhelming majority of people around the world consider marriage to be one of the most important institutions in their lives. If we are serious about fostering individualism, autonomy, and personal identity, then that subjective and inter-subjective importance should be recognized as a property right." He goes on to argue: "Particularly in American society, private property is seen as a way to foster individual liberty, autonomy, and identity — and what demonstrates these qualities more strongly than one's choice of marriage partner?" (551). Such an analysis supports the logic of the alienation tort.

For liberal feminists, one problem with the alienation of affection tort is that it seems to sidestep the autonomous choice of the "alienated" spouse and to place blame for the alienation not on that spouse but on a third-party defendant. In reality, there is blame enough to go around. The alienation tort recognizes that the third party exercised free will. The defendant was not simply falling into a situation beyond his or her control, but knowingly endangering a vital element of someone else's marriage — the affection and trust built and sustained by husband and wife. Marital relationships are privileged over other intimate relationships in a number of ways supported by society, religion, business, and law. While a particular marital relationship is envisioned, constructed, and nurtured by the couple themselves, marriage as an institution is thought to have societal value (Sherman 2005), and therefore is worthy of protection through public mechanisms. The third party does not have to be solely or primarily responsible to be blameworthy because clearly there is "an emotional harm directly traceable to the acts of the interloper" (Corbett 2001, 1021). Corbett continues: "In cases in which the plaintiff claims that the interloper destroyed the marriage, the causation and degree of fault issues are no more difficult than many other types of tort cases, and they can be addressed through various causation standards (perhaps including lost chance of survival), and if a court so chooses, allocation of fault" (ibid.).

As for "alienated" spouses, nothing in the present argument should be interpreted to denigrate the personhood, autonomy, or free will of these individuals. Of course they were aware of the damage they were inflicting upon their own marriages. Just because the alienation tort does not address their complicity does not mean it will not be addressed in other ways. Realistically speaking, if a marriage survives, repercussions are likely to come in the private accommodations reached by the couple,

with the possibility of legal remedy should those repercussions become abusive. If a marriage dissolves, the straying spouse may be held accountable in the divorce settlement. In 25 states, marital fault is still a factor in determining alimony or spousal support, and 32 states allow traditional fault-based divorce in addition to the no-fault option (Elrod and Spector 2006). Furthermore, recognition of spousal complicity may come in the form of other torts. For example, the willingness of courts to hear intentional infliction of emotional distress cases filed against a plaintiff's spouse is a "national trend." Such torts can be used in the most egregious cases of marital misconduct; the emerging standard for recovery is "outrageous" behavior on the part of the defendant spouse, not mere adultery (Taylor 1997). On a more idealistic level, Barbara Bennett Woodhouse (1994, 2564) proposes a model of family law that would include a new marital tort, perhaps labeled breach of spousal trust, which "would authorize compensation for physical, emotional, and economic injuries flowing from a spouse's misconduct." Arguing from a feminist perspective that privatized marriage is harmful to women's interests, Woodhouse asserts that "[e]nforcing individual responsibility for relational commitments to spouses and children should be part of a network of public and private support for families" (p. 2563). In contrast, she argues against "a system of no-fault, no-responsibility rules that make marriage, as a vehicle of family formation, insanely risky" (p. 2564).

Nothing in the argument advanced here would be inapplicable to same-sex spouses where they are recognized by law. Although some feminists (e.g., Fineman 2006) express concern that law privileges marriage over other forms of intimate or familial relationships, whether marriage *should* be a legally privileged relationship is an important argument beyond the scope of this article. So long as marriage *is* a privileged status, admittance should be extended to same-sex couples, whose relationships serve the same social purposes and share many of the same meanings as marriages between men and women. The fact that nearly all American jurisdictions fail to recognize same-sex marriage is evidence of bigotry, not of the injustice of privileging marriage. Although alienation claims have not been recognized for same-sex couples, at least one jurisdiction could be moving in that direction, even without legalizing same-sex marriage. In *Lozoya v. Sanchez* (2003), the New Mexico Supreme Court articulated rules for extending loss of consortium claims to unmarried couples. By focusing on the quality of the intimacy between the couple, the New Mexico

court moved beyond marriage as a prerequisite to the consortium tort. "In the context of current legal developments favoring same-sex couples in the nation and in New Mexico, it is especially likely that *Lozoya* provides a path for same-sex couples to bring consortium claims," according to Flynn Sylvest (2004, 487). Such a precedent could lay the framework for same-sex applications of related claims, and although Sylvest does not mention it, New Mexico is a jurisdiction that still recognizes the alienation tort.

EMOTIONAL LABOR IN MARRIAGE

Even though feminists were among the leaders in efforts to abolish alienation and the other heart balm torts, contemporary social reality compels feminist reconsideration. As women edge closer to equality with men in the workplace, more marriages become more economically egalitarian. While it is certainly the case that many women rely on their husbands' incomes to wholly or partially support them and their children, in other marriages, the husband's economic contribution may not be the most crucial ingredient for the marriage's health. The reality of the "second shift" no doubt plays a big role in marital division of labor. Marriage research (e.g., Robinson and Godbey 1997) confirms what many women report anecdotally: Husbands perform more of the household and child-care duties than their fathers did, but they still put in far less time on these activities than their wives do. Wives report that their husbands' performance of household and child-related duties is extremely important to their own marital happiness and satisfaction, but at least as important is sharing the emotional labor. Wives do a disproportionate amount of nurturing and care-giving tasks (Moran 2000; Wilcox and Nock 2006), and they do not want sole responsibility for them. Even more than economic and practical household contributions, it is the emotional labor a husband contributes to a marriage that most impacts a wife's happiness (Eriksson 1993; Wilcox and Nock 2006).

Consider how radically different this is from marriage throughout much of American history. Rather than emotional nurturance, the driving forces behind many marriages have been economic support, physical protection, and social acceptance. Far from being old-fashioned, "alienation of affection" suggests that someone else is appropriating the emotional labor that is so vital in marriages. Perhaps someone outside the marriage

is the benefactor of redirected emotional labor (a paramour), or someone else is simply interfering with a spouse's ability to perform his or her share of the emotional labor at all. To the extent that women perceive their husband's emotional labor contribution as inadequate, they experience marital burnout and a decrease of marital satisfaction (Eriksson 1993). Although sexual monogamy and the exclusive intimacy often associated with it are key elements of many marriages, interference with the ability to perform the necessary emotional labor within the marriage need not be in the form of sexual contact. The alienation tort addresses this situation better than criminal conversation, which requires sexual contact but not knowledge of the lover's marital status.

Those who argue that the alienation tort improperly commodifies emotional labor fail to recognize that emotional labor is already heavily commodified in contemporary American society (Moran 2000). Service economy jobs that require women to nurture, care for, and make others feel comfortable and appreciated are analogous to the contributions they make in the home: "Precisely because so much of this emotion work has gone uncompensated and indeed is seen as natural and expected, it often goes unremarked and unrewarded in the workplace" (Moran 2000, 752). Male service workers are also expected to smile and make clients feel good, but such expectations are very high for those people working in traditionally female jobs, such as flight attendants (see Hochschild 1983). Moran (2000, 783) explicitly makes the link between the decline of the alienation tort and the role of emotional labor in the American economy:

> In emphasizing the changing nature of marriage to justify the decline in torts like alienation of affection, legal scholars fail to recognize the links between the refusal to commodify emotion in marriage and the growing post-industrial reliance on women's emotional labor to turn a profit in a service-oriented economy. By declining to recognize the investment that women make in preserving relationships, policymakers need not generate a language that marks and monetizes this contribution. As a result, the sociopolitical economy of emotion, in which skill at creating feelings of comfort and care is regularly bartered for material gain, stays hidden. Standing firm in the claim that emotion cannot be valorized, courts obscure the worth of the very labor that women disproportionately perform.

So, women often find themselves performing emotional labor at home and at work, and being undercompensated in both arenas. Alienation of affection torts not only compensate for a partner's lost emotional

investment when a marriage goes sour but also punish the third party who interferes with one partner's ability and willingness to share the emotional labor in marriage. This seems like a small but real step toward redressing the injustice of the commodification equation.

SO OLD IT IS NEW . . .

The alienation tort fits into the category of so-called ethereal torts, that is, actions based on nonmaterial harm. According to Nancy Levit (1992, 139), ethereal torts are on the rise, with courts granting recognition of causes of action for intangible or emotional injuries, such as "deprivations of expectancy or reliance interests, the privacy torts, infliction of emotional distress, breach of confidence, breach of good faith, interference with economic expectancies, loss of a chance, or loss of choice". Gaining the courts' recognition has been difficult because of the many biases against nonphysical and nonmaterial injury, but this development has been spurred both by the ability of modern psychologists to document mental harms and by the rise of intellectual property law recognizing the more amorphous nature of work products today (Levit 1992). Feminists have good reason to support increasing recognition of ethereal torts, for both theoretical and practical reasons. Levit argues that many varieties of feminist theory have "emphasized the concreteness, or the tangibility, of relational understandings" (ibid., 162). Furthermore, feminists recognize the contingent nature of epistemology, the political implications of personal experience, and the transformative power of including formerly excluded perspectives to challenge traditional discourse. All these ideas pave the way to innovative directions in tort law (Levit 1992) and toward recognition of ethereal torts in particular.

In a practical sense, too, feminists should support the expansion of ethereal torts because traditional tort law has often disadvantaged female plaintiffs as a group. For example, Thomas Koenig and Michael Rustad (1995) demonstrate that capping pain and suffering awards negatively impacts women more than men, since women on average earn less money over a career than men and therefore are entitled to lower awards for lost wages, even when the severity of injury is the same. Martha Chamallas (1998) discusses more generally how the devaluation of actions for emotional or relational harm has a disparate impact on men and women. She offers multiple explanations for this. One is that

women are more likely than men to be caregivers and nurturers, and often engage in these activities full time. Therefore, the loss of a relationship with someone being cared for may be catastrophic for that individual. Second, many scholars from Carol Gilligan (1982) onward have argued that relationships are more central to women's sense of identity and moral code. If this is so, then a woman who defines herself in terms of relationships is more vulnerable to harm when those relationships are compromised, weakened, or destroyed. A third explanation is the discretion exercised by the legal system in defining a harm as emotional, physical, or proprietary. Women's injuries are more likely to be defined as emotional, thereby devaluing them even more. Even the heart balm torts — alienation, loss of consortium, and so on — were originally thought of as property based, not relational. As wives gained the right to file these same torts, the harm was reclassified as relational, and these torts fell out of favor (Chamallas 1998). Moran (2000, 784) further elaborates on the decline of the heart balm torts: "Had these actions persisted, they might have afforded a window into the inequities of a sociopolitical economy of emotion. But redress for such harms seemed beyond the law's purview and threatened central jurisprudential tenets of formality, predictability, and certainty."

In contrast, business relationships are protected through tort law (Vickery 1982), and torts for interference with such relationships are generally more accepted than analogous torts for marriages. For example, Lillian BeVier (1990) argues that an inducement liability regime can have salutary effects on certain kinds of business arrangements, namely, "relational contract" arrangements, and can enhance relationship stability as well as promisor credibility. Why, then, do these business torts remain while marital interference torts retreat? Critiquing the Missouri Supreme Court's rationale for abolishing alienation as a cause of action, Stuart Buck (2003) argues that the court's arguments could as easily apply to the still-favored interference tort in business: "Suing won't *reconcile* the original parties to the business contract, and such a lawsuit might be brought in a spirit of revenge. Yet our legal system thinks that existing business contracts are worthy of at least some minimal protection, and that we should deter people from trying to induce other people to breach a contract. Why not give marriage that same baseline protection?" Part of the reason likely has to do with the private/public dichotomy. From a male perspective, or a public sphere perspective, interference with a business relationship is *real* quantifiable damage. The relationship is valued because its continuance could lead to monetary advantage and its

destruction could lead to monetary disadvantage. In the private sphere, disruption of a relationship can also lead to *real* damage, both monetary and emotional. The monetary is the easier part to argue. Deliberate interference with the marital relationship endangers the continuance of that relationship and exposes the wronged partner to the prospect of marital dissolution. In some situations, the financial cost of losing a marital relationship may be substantial for both partners, or primarily for the husband. But in general, women suffer more financial deprivation in divorce situations than men. Research shows that a woman's standard of living generally goes down following divorce while a man's increases. Many scholars have come to this conclusion, notably Lenore Weitzman (1985). Richard Peterson (1996) replicated Weitzman's study and revised her figures downward, but still found a significant decline in women's standard of living and an increase in men's.

The inherent value of a relationship is harder to quantify, but it is just as real. Even a contractual business relationship exists separate from the contract and the parties to that contract. William Woodward (1996) addresses criticisms of business interference torts coming from contractarians and law and economics scholars by pointing out, among other things, the impact on nonparties to a breached contract. A real loss may be suffered by others when a third party interferes with a business relationship. For example, the workers laid off when the disruption of a business relationship reduces demand for a product are demonstrably hurt, in a sort of collateral damage. In the marriage context, those most immediately suffering the ill effects would be the couple's children, but other family members, friends, and so on would also suffer some loss. And just as society has an interest in the stability of business relationships, it also has an interest — perhaps a greater interest — in the stability of marital relationships. Just as Woodward (1996) argues that an interference tort is necessary to supplement breach of contract actions, so a tort like alienation of affection is needed to supplement divorce law, especially in the no-fault era. The alienation tort represents the community interest in the stability of relationships. A less attractive and more politically problematic way to accomplish the same objective might be to recriminalize adultery, although Thomas Spragens (2001, 47) argues that such a criminal prohibition with token sanctions would be preferable to the alienation tort: "In that way, such suits might not be the morally and evidentially problematic tactic in bitter divorce cases they generally are today while society could nonetheless signal its condemnation of those who actively encourage others to abandon their marital commitments."

NEW FORMS OF INFIDELITY

The modern era offers new ways of committing "emotional adultery" that feminists could not have imagined when they campaigned against heart balm torts in the early twentieth century. Recently, such political leaders as Bill Clinton, Newt Gingrich, and Charles Robb have made it fashionable to limit the definition of "sex" so as to define away their own clearly adulterous conduct (Kirn 1998). Behind their self-serving denials lies a more fundamental question: Must adultery involve actual sexual intercourse? No, argues Brenda Cossman (2005), claiming that legally and culturally, the definition of infidelity has expanded: "This expansion of the legal definition of adultery to include a range of non-penetrative sex reflects the transformation of intimacy in which marriage has become a relationship about both emotional and sexual intimacy. Pregnancy is no longer the central harm of adultery. Rather, adultery is now framed as a violation of the promise of emotional and sexual exclusivity" (ibid., 279). As an example, she cites a 1992 New Jersey case in which the court explained adultery this way: "It is the rejection of the spouse coupled with out-of-marriage intimacy that constitutes adultery" (*S.B. v. S.J.B.*1992). Building on this argument, must infidelity involve physical contact? Psychological research suggests that it does not. People consider infidelity to come in various forms, some physical and some emotional (see Whitty 2003).

With this broader definition in mind, one must consider the impact of the Internet as a venue for infidelity. More than just a more convenient version of the corner porn shop, peep show, and brothel, the Internet is also a place to meet people and engage in intimate communications (which may be of an erotic or emotional nature or both). The Internet has opened up many new opportunities for behavior potentially destructive to romantic relationships in the offline world, from downloading pornography to engaging in sexually graphic communications online with a partner (hot chatting without masturbation or cybersex if masturbation is involved) to using the Internet to arrange in-person meetings with online acquaintances for sex. Although one partner's excessive viewing of online pornography could potentially damage a marital relationship, that is not a situation the alienation tort can address. Commercial online pornography has no individual target, nor do its producers know the viewers' marital status. The alienation tort might, however, address the damage resulting from "computer mediated romantic relationships," which are more akin

to offline affairs in that they consist of private communications between specific individuals. Romantic relationships developed online have the potential to be very destructive of emotional intimacy with one's spouse partly because of these relationships' unique development sequence. In-person relationships tend to originate with physical proximity and physical attraction, and then build up to emotional intimacy, but computer mediated relationships (CMR) typically develop differently (Merkle and Richardson 2000, 189):

> Intriguingly, unlike face-to-face relating, the importance of physical attractiveness in CMR, as a relationship determinant, is minimized by the ability to know someone through intense mutual self-disclosure and intimate sharing of private worldviews. In the end, with the presence of such heightened self-disclosure, these individuals may arrange to meet one another, occasionally with highly sexualized outcomes.

Because of the nature of the medium, self-disclosure can happen sooner and with less inhibition than in offline relationships, and Erich Merkle and Rhonda Richardson (2000, 191) stress that individuals often describe that their CMRs are "extremely intimate and as 'authentic' as any face-to-face relationship".

In general studies of infidelity, researchers (e.g., Buss et al. 1992; Buunk et al. 1996; Cramer et al. 2001) have found that women are more likely than men to regard emotional infidelity more seriously than sexual infidelity. Since online activities in and of themselves do not involve physical sexual contact, the emotional aspects of online "affairs" are the basis of the threat. Therefore, it seems logical that online sexual activities are potentially very damaging to relationships from the female point of view. Monica Whitty (2005) found that when presented with a hypothetical scenario involving people engaging in online sexual activities, both men and women imagined the "wronged" partner being upset, angry, and often revenge seeking. However, women were more likely than men to emphasize emotional betrayal in discussing the likely outcome of the story. Women, too, were more likely to discuss the loss of the unfaithful partner's time and attention in the offline relationship as a serious negative consequence of online activity. This time and attention loss was also found to be more important to women than to men in Michael Wiederman and Elizabeth Allgeier's (1993) study of traditional (i.e., offline) infidelity. Furthermore, Trent Parker and Karen Wampler (2003) found that women tend to take their partners' online sexual activities more seriously than do men. However, men are

more likely than women to engage in online romance (Underwood and Findlay 2004).

Alienation of affection can be distinguished from criminal conversation partly by the fact that no actual sexual contact is required for the former. In alienation, it is relationship damage that has to be proven. Such a tort would seem to apply well to the cybercheating scenario, where a marriage might be severely damaged even though the "unfaithful" spouse never has sex outside the marriage in the traditional sense. Naturally, one of the attractions of cybersex is anonymity, a factor that would tend to minimize abuse of the alienation tort, since fleeting online sexual encounters could not provide the elements of alienation suits. Once anonymity is shed, however, there would seem to be no bar to a suit. Additionally, an online relationship that advances to the level of exchanging authentic identifying information would appear poised to move offline. Moving from an online relationship to a real-world relationship is not uncommon (Whitty and Gavin 2001). Heather Underwood and Bruce Findlay (2004) found that 66% of their respondents — all of whom spent their offline time in a marriage or committed relationship — had extended the relationship with their online romantic partner to other forms of communication (letters, telephone, etc.), and that 34% had met their online romantic partner in person. If a defendant is identifiable, therefore, a tort could be brought that alleges damages beyond (or even without) those inflicted by a rendezvous in the flesh. This would be a more realistic assessment of the wrong committed; the marriage would have suffered damage before the offline sexual encounter occurred. Furthermore, the physical location of the online paramour is irrelevant if the marital damage occurred in a state recognizing alienation as a tort.

NORTH CAROLINA — A CASE STUDY

Beyond theory, how does the contemporary alienation of affection tort actually operate? For answers, the best state to examine is North Carolina, where alienation is alive and well as a cause of action. In a typical year, more than two hundred alienation cases are filed, many coupled with criminal conversation claims. North Carolina's version of the alienation tort requires the plaintiff to show not only that a valid marriage was known to the defendant but also that some degree of love and affection between the spouses existed before third-party

interference. Additionally, the plaintiff has to show that the defendant's conduct was malicious, in that it was intentional and likely to interfere with the marriage, and that such conduct was the proximate cause of spousal affection being diminished or destroyed altogether (*Pharr v. Beck* 2001).

Some judges and legislators have attempted to do away with this action, yet somehow it survives. The nearest of several near-death experiences for alienation of affection in North Carolina came in 1984, when the North Carolina Court of Appeals abolished the action in the case of *Cannon v. Miller*. Here, the appellate court decided that North Carolina should follow the abolition trend and cited four primary reasons: "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" (Leonard 1985, 1323). Shortly thereafter, the North Carolina Supreme Court vacated this decision, without weighing in on the merits of the instant case or the advisability of retaining the alienation tort. Instead, the high court ruled that the Court of Appeals lacked the authority to abolish the action and then remanded the case to the Pitt County Superior Court for trial.

North Carolina also came close to legislative abolition several times in recent years. In April 1999, an abolition bill was defeated by three votes in the North Carolina House of Representatives.[3] In April 2001, the House voted 67–44 to abolish it, and most observers expected the state senate to follow suit. "In the House, where social conservatives have more clout, the argument for repeal prevailed easily. The same is expected in the Senate, but it is hard to predict when a bill's success depends on legislators' gut feelings," prognosticated Paul O'Connor, a local newspaper columnist.[4] Rep. Joe Hackney (D-Chapel Hill), sponsor of the abolition bill, expressed doubt that the action is effective as a deterrent to the breakup of marriages or as a tool to reconcile families.[5] His colleague Bob Hensley (D-Wake County) argued that the deterrent effect was negligible partly to the tort's low profile. "I would argue that probably 99.9 percent of the people in the entire state have no idea that this is a law," he said in response to abolition opponents' argument that it does deter infidelity (*Legislative Week in Review* 2001). Surprisingly, that September, the Senate declined to vote on the bill but

3. Lynn Bonner, "Alienation of Affection Suits Survive," *The News & Observer*, 14 April 1999.
4. Paul O'Connor, "Hackney Leads Effort to Repeal 'Archaic' Law," *Chapel Hill News*, 27 May 2001.
5. Matthew Eisley, "Vote Spells Likely End to 'Alienation of Affections' Suits," *The News & Observer*, 18 April 2001.

instead sent it to a committee from which it was not expected to return. Commenting that he did not know why the majority would "want to postpone the inevitable," Senate Minority Leader Patrick Ballantine (R-Wilmington) said, "I think it's time to vote this bill down so we can finish it off once and for all."; Senator Kay Hagan (D-Greensboro) blamed the Senate's resistance to abolition on the fact that only five of the 50 senators were female.[6] An abolition bill passed the House again in 2003 but went no further.

Legislators' arguments against abolishing the tort vary. Senator Hugh Webster (R-Yanceyville) argued that the tort serves as a legal alternative to violence in such situations. As he explained, one of his distant relatives decapitated his wife's lover in 1957 and was acquitted of the crime. Speaking of the abolition bill, Webster remarked: "This bill will eliminate the only recourse under law for a person who has been wronged."[7] His colleagues Fountain Odom (R-Charlotte) and Dan Robinson (D-Cullowhee) analogized the marriage commitment to a business contract and argued society's interest in preserving contractual agreements.[7]

North Carolina family lawyers are divided on the alienation tort, although the Family Law Section of the North Carolina Bar Association advocates its abolition on the grounds that suits based on alienation are "archaic, sexist, embarrassing and harmful."[8] In coverage of the legislative debate, Raleigh's *The News and Observer* quoted several family law practitioners on the issue. "It is very simplistic to assume that marriages break down because of third-party involvement," said Raleigh lawyer Lynn Burleson. "Is the protection of a bad marriage worthy of our time and resources?" Marcia Armstrong, a lawyer from Smithfield, argued that alienation torts often wind up further hurting the children of these damaged relationships. "A lot of times we think of a love triangle: the husband, the wife and a third party. In the middle are the children," she said.[8]

The alienation tort is often pursued and sometimes lucrative in North Carolina. According to University of North Carolina law professor emerita Sally Burnett Sharp, approximately 20 alienation cases have reached the appellate courts over the past decade.[9] Some of the larger

6. Lynn Bonner, "Bill to End 'Alienation' Suits Probably Dead," *The News & Observer*, 5 September 2001.

7. Matthew Eisley, "Moment of Truth Near for Alienation-Suit Bill," *The News & Observer*, 20 June 2001.

8. Matthew Eisley, "Vote Spells Likely End to 'Alienation of Affections' Suits," *The News & Observer*, 18 April 2001.

9. Benjamin Niolet, "Marital Ties Still Bind – Or Else," *The News & Observer*, 12 May 2005.

jury verdicts include more than $500,000 to a husband in a 2004 Robeson County case and $1 million to a wife in a 1997 Alamance County case.[9] Judges can be generous, too, especially in Guilford County. In that jurisdiction, judges awarded $2 million to a female plaintiff in a 2001 case, and $500,000 to a female plaintiff in a 2006 decision.[10,11]

Who files alienation torts in North Carolina? Male and female plaintiffs file in roughly equal numbers. Data from the North Carolina Administrative Office of the Courts (AOC) on alienation of affection cases filed in superior courts from January 1999 through February 2007 indicated that 758 cases were filed by males and 727 by females. (See Appendix A for discussion of gender decision rule.) Likewise, trial rates were the same for male and female plaintiffs. Thirty-eight cases were listed as superior court jury trials, including 19 with female plaintiffs, 18 with male plaintiffs, and another filed by a plaintiff whose gender could not be determined by given name. Another subset of cases listed as "trial by judge" includes several categories of disposition. In this category, 32 cases were filed by women and 30 were filed by men. A large majority of the cases, not surprisingly, were voluntarily dismissed. Again, no correlation between gender and voluntary dismissal is apparent.

A trip to North Carolina courthouses to view case files allowed a glimpse beyond the raw figures of the AOC database. For a group of cases hereafter called "Piedmont sample" (named after the region of North Carolina from which they were drawn), more detailed data were collected and analyzed. This sample included as many tried cases as possible within a group of 10 counties. (See Appendix B for more information on this sample.) Within the Piedmont sample, 23 cases went to jury trial (representing 61% of all North Carolina jury trials for alienation from 1999 to 2007). Of these, 17 were filed by women, and seven by men. In every one of these cases, the defendant was the spouse's lover; in every case, a criminal conversation claim was also filed. (In addition to cases that went to trial, the Piedmont sample included 55 other randomly selected cases filed in the included counties. In every case for which information was available, plaintiffs alleged a sexual liaison between the spouse and the defendant; none of them named a mother-in-law, best friend, and so on as the primary defendant. It would seem, then, that at least in North

10. Mike Fuchs, "Suit Over Husband's Affair Leads to $2 Million Award," *The Greensboro News and Record*, 10 November 2001.

11. Collins, Eric. 2006. "Women Wins Award in Lawsuit Over Affair," *The Greensboro News and Record*, 10 June.

Carolina, the alienation tort really is reserved for romantic and/or sexual interference, rather than platonic marriage meddling.)

Plaintiffs won an award for either alienation of affection or criminal conversation, or both in nearly all of the jury trials. Of the 23 plaintiffs, only two women and two men were awarded nothing by the juries. The award amounts were extremely varied. For plaintiffs winning awards, total awards (possibly including compensatory damages for alienation and criminal conversation and punitive awards) ranged from a low of $600 to a high of $1.5 million, with a median award of about $15,000. (Both the highest and lowest amounts were awarded to female plaintiffs.)

While the small number of jury trials makes sophisticated data analysis problematic, an inspection of the data on these jury trials yields some pertinent information about the operation of the alienation tort. First, juries appeared to play criminal conversation and alienation off of each other. In some cases, juries awarded nothing for alienation but sizable sums for criminal conversation. In other cases, the two were held to be equally egregious, and the plaintiff received the same amount for each claim. Clearly, alienation claims work better in conjunction with criminal conversation than alone. Second, plaintiffs in jury trials included in the sample were more than twice as likely to be female as male, whereas in the sample of 55 nontried cases and in the overall statewide dataset, women and men filed at roughly equal rates. What this means is not immediately clear except that cases going all the way to trial are presumed to be tough cases, with very persistent parties and/or strong arguments on both sides. Of these jury cases, 15 had reached impasse at a court-ordered mediated settlement conference, one indication that settlement was unlikely to occur. Third, whether or not a couple had minor children at the time of the filing did not appear to be related to the likelihood of winning a jury award. Minor children were mentioned in nine of the jury trial cases. Four male plaintiffs mentioned minor children, including the two who won no jury award. Fourth, defenses to alienation and criminal conversation claims were varied, sometimes focusing on the presented fact pattern (no affair occurred), sometimes on the damages element (no affection existed in the marriage to begin with), sometimes on causality (alienation occurred some other way), and sometimes on jurisdiction (defendant claimed to have had no ties to North Carolina). A few defendants issued answers listing the shortcomings of the tort itself and argued for its abolition.

The Piedmont sample also included 33 cases with the disposition code "Trial by Judge." These were a hodgepodge, including cases ended

through consent orders (based upon an agreement between the parties), default judgments (where the defendant failed to appear), and court dismissals, plus a few transferred to other counties through change of venue orders. While few patterns can be discerned in this group, it is clear that default judgments can be quite costly. Ten plaintiffs (seven men and three women) were awarded default judgments ranging from $42,500 to $730,000.

In short, nothing in the North Carolina data so far should alarm feminists concerning how the tort is being used in that state. Available court data suggest that women take full advantage of the tort's availability and pursue claims with at least as much success as men do. Narratives included in case files are rather similar whether the plaintiff is male or female, with no systematic reliance on gender stereotypes regarding the major parties. In other words, outrage over a straying husband was just as great as over a straying wife, and male and female paramours were equally subjected to excoriation in the complaint narratives. Many kinds of questions still await answers, such as whether female or male plaintiffs do better in negotiated settlement regarding these cases (case files very rarely indicated the deal behind a voluntary dismissal) or whether men or women are likely to feel more satisfaction with the case results. Naturally, other important pieces of information too obscure to be discerned from court records include plaintiffs' motivations to file and the number of these complaints that are factually false. However, on the basis of what is known, there is no reason to think that female North Carolinians regard this cause of action as a man's game.

CONCLUDING DISCUSSION

Among the many purposes of law is the expressive function: "the function of law in expressing social values and in encouraging social norms to move in particular directions" (Sunstein 1996, 953). Laws communicate which behaviors society encourages and discourages, what is valuable and what is not. The argument here to retain alienation of affection as a cause of action rests more on this conception of law than on strict rationalist theory about deterrence through direct imposition of costs. Many critics of alienation torts argue, as the North Carolina Court of Appeals did, that this tort has no deterrent value. This is not exactly the point. No one argues that tort law will put an end to adultery, unsatisfactory marriages, or meddling in-laws. Tort law can, however, reinforce some important norms

that are widely shared, such as the stability of marriages and the wrongfulness of adultery. From a feminist perspective, this need not conjure up Victorian sexual prudishness. Given that the tort recognizes the value in relationships and evidence that women invest a great amount of emotional labor in both their private and public lives, valuation of such work enhances women's status and acknowledges their contributions. Also, as discussed, a husband's sharing of emotional labor is crucial to many women's marital satisfaction; highlighting the value of the male contribution in this way would also seem to be in the interest of married women. To the extent that the alienation tort is sensitive to the kinds of emotional hurts women suffer in greater proportions than do men (such as the emotional infidelity women are more likely to associate with online sexual behaviors), such a tort could be seen as both modern and feminist. It is no more subject to abuse than any other tort, and its continued availability is more likely to benefit women than to harm them.

For both theoretical and practical reasons, feminists need not fear the alienation of affection tort. Neither its past connection to the legal objectification of women nor its current support from social conservatives should overshadow its appropriateness for addressing modern feminist concerns.

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APPENDIX A

The data set analyzed in this article came from the North Carolina Administrative Office of the Courts and included all alienation of affection filings in the state from 1999 through February 2007. It also included motions and filings associated with alienation suits. Plaintiff's gender was not originally coded as a variable, but full names were included in the data set. Retroactive gender coding was based on the following decision rules. Most first names were fairly unambiguous in American usage, and so presented no obstacle to intuitive assignment. Where that was not the case, some could be cleared up through obviously gendered middle names (e.g., Bobbie Ann) or by suffixes (e.g., Jr., III) that are only used for males. For those names where gender was still hard to assign, the website Baby Name Guesser (http://www.gpeters.com/names/baby-names.php) provided a convenient decision rule. Formerly called Geoff's Gender Guesser, the website searches for patterns on the Internet involving the name requested and indicates the ratio of male to female references to that name. The decision rule used for this article was that if the site indicates that a name was at least twice as likely to be one gender than the other, its guess was accepted and coded into the database. Otherwise, the case was thrown out. The 43 thrown-out cases featured plaintiffs with initials only, with truly androgynous names (e.g., Robin, Lee, Pat), or with such unusual names that the Guesser had insufficient data to assign a gender (e.g., Elmerleen, Rissie).

APPENDIX B

Data collection on the Piedmont sample was labor intensive and involved visits to courthouses to pull case files. Because North Carolina is made up of a hundred counties spread across a large area, visiting every county where an alienation case or cases had been filed or had gone to trial was not practical. The 10 counties in the sample (Catawba, Davidson, Forsyth, Gaston, Guilford, Iredell, Mecklenburg, Randolph, Rowan, and Union) were selected on the basis of two major criteria: 1) Each of these had at least two cases that had gone to trial during the time period covered by the AOC data set, and 2) these counties were within reasonable geographic proximity to one another. Within these 10 counties, every case listed by the AOC database as going to trial (either jury or judge) was included in the sample. A few dropped out because files were missing. The sample of tried cases appears to be random, except for the fact that they were all filed in counties with at least one other trial in the Piedmont region of North Carolina (where the bulk of the state's population resides). Otherwise, these counties were diverse in terms of population, rural/urban character, economic well-being, and so on. Beyond the cases labeled as disposed by trial, about 10% of other cases filed in these 10 counties was also selected for data collection.