Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment

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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.[1]

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.[2]

The torts of alienation of affections and criminal conversation both involve interference with the marital relationship[3] and often arise out of the same set of events. Indeed, the actions frequently are brought against a defendant in a single suit by an aggrieved spouse.[4] The actions, however, are independent,[5] each purporting to protect a different interest and each involving different items of proof and defense.[6]

This Note will explore the elements of the two causes of action and the recognized defenses to each. Next, justifications for and modern treatment of the actions will be examined. The modern justification for the action will be analyzed and criticized in light of the legal changes

1. Sullivan v. Valiquette, 66 Colo. 170, 172, 180 P. 91, 91 (1919), *cited in* McMillan v. Felsenthal, 482 S.W.2d 9, 11 (Tex. App. 1972), *aff'd*, 493 S.W.2d 729 (Tex. 1973).

2. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

3. Skaggs v. Stanton, 532 S.W.2d 442, 443 (Ky. 1975) (holding there is only one tort—interference with marriage); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 876-77 (4th ed. 1971); Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAW. 426, 426-29 (1972).

4. *See, e.g.*, Bearbower v. Merry, 266 N.W.2d 128, 129 (Iowa 1978); Giltner v. Stark, 219 N.W.2d 700, 703 (Iowa 1974); Kremer v. Black, 201 Neb. 467, 477, 268 N.W.2d 582, 587 (1978) (McCown, J., dissenting) (jury rejected plaintiff's claim for alienation of affections but allowed recovery for criminal conversation).

5. Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978). ("While both criminal conversation and alienation of affections belong to the same class, arise from the marital relationship, and seek damages for loss of consortium, they are separate and distinct," *quoting* Giltner v. Stark, 219 N.W.2d 700, 704 (Iowa 1974); Tarquino v. Pelletier, 28 Conn. Supp. 487, 488, 266 A.2d 410, 411 (1970) (construing Connecticut's statute abolishing alienation of affections as leaving intact the action for criminal conversation); *accord*, Kromm v. Kromm, 31 Md. App. 635, 637, 358 A.2d 247, 249 (1976). *Contra*, Skaggs v. Stanton, 532 S.W.2d 442, 443 (Ky. App. 1975) (only one tort—interference with the marital relationship).

6. *See* text & notes 7-24 *infra*.

that have occurred since the origins of the torts. It will be demonstrated that the historical bases for the actions no longer exist, and that attempts to articulate a modern legal basis for the actions have failed. In conclusion, it will be suggested that the tort actions be abolished in jurisdictions that have not already done so.

Elements and Defenses to the Actions

The action for criminal conversation protects a plaintiff's interest in exclusive sexual intercourse with his or her spouse,[7] while the action for alienation of affections protects the interest in the affections and mental attitude of the other spouse.[8] Each is an intentional tort.[9]

The action for criminal conversation is established upon proof of sexual intercourse between the participating spouse and the defendant,[10] and may be established through circumstantial evidence.[11] A de-

7. " 'Criminal' because it was an ecclesiastical crime; 'conversation' in the sense of intercourse." W. PROSSER, *supra* note 3, § 124, at 875 n.75. *See* Comment, 13 WAKE FOREST L. REV. 585, 586 (1977).

8. Sullivan v. Valiquette, 66 Colo. 170, 172, 180 P. 91, 92 (1919), *cited with approval* in McMillan v. Felsenthal, 482 S.W.2d 9, 11 (Tex. Civ. App. 1972), *aff'd*, 493 S.W.2d 729 (Tex. 1973).

For purposes of clarity, the complaining spouse will be referred to as the "plaintiff spouse," and the spouse whose affections have been alienated or with whom the defendant has allegedly committed adultery will be referred to as the "participating spouse."

The actions for criminal conversation and alienation of affections originally were available only to the husband, but in most states they were extended to the wife as a result of the Married Women's Property Acts, *see* text & notes 45-52 *infra*. There existed no common law right of action for a child for alienation of a parent's affections, nor by a parent for alienation of a child's affections. Gleitz v. Gleitz, 88 Ohio App. 337, 338, 98 N.E.2d 74, 74 (1951). Plaintiffs have attempted to recover for alienation of the affections of a child or parent in many states, however, and courts have divided over the issue. The majority of jurisdictions reaching the issue have refused to recognize a child's action for alienation of a parent's affections. Hunt v. Chang, 594 P.2d 118, 125 (Hawaii 1979) (surveying the cases). A small minority have recognized such an action. *Id.* As to a parent's action for alienation of the affections of a child, Washington has recognized such a right in Strode v. Gleason, 9 Wash. App. 13, 20, 510 P.2d 250, 253 (1973). *But see* Bock v. Lindquist, 278 N.W.2d 326, 327 n.3 (Minn. 1979) (where court notes that Washington alone has recognized such a right and declines to recognize such a right in Minnesota).

Many of the issues raised in the parent-child cases are similar to those involving the alienation of affections of a spouse. There are significant differences, however, particularly where a parent is suing for the alienation of affections of a child whose capacity for independent judgment has not fully matured. This Note will focus on the actions of criminal conversation and alienation of affections as they relate to spouses and not to the action by a parent or child for alienation of affections. The arguments developed in this Note, then, should be applied to the parent-child actions with caution. For a discussion of the child's action, see Note, *Torts: Alienation of Affections: A Child's Right to Seek Damages for Alienation of His Parent's Affection*, 28 OKLA. L. REV. 198 (1975).

9. Rank v. Kuhn, 236 Iowa 854, 857, 20 N.W.2d 72, 74 (1945) (alienation of affections an intentional tort). Consistent with general tort standards of intent, an actual intent to alienate or cause damage is not required. Giltner v. Stark, 219 N.W.2d 700, 704-05 (Iowa 1974); Roach v. Roach, 4 Wash. App. 586, 587, 484 P.2d 447, 448 (1971) (intention may be established by conduct since persons are deemed to intend the natural and probable consequences of their voluntary acts); W. PROSSER, *supra* note 3, § 124, at 877-78.

10. Bearbower v. Merry, 266 N.W.2d 128, 129-30 (Iowa 1978); Kremer v. Black, 201 Neb. 467, 469, 268 N.W.2d 582, 583 (1978); Sebastian v. Kluttz, 6 N.C. App. 201, 209, 170 S.E.2d 104, 108 (1969).

11. Vaughn v. Blackburn, 431 S.W.2d 887, 889 (Ky. 1968); Sebastian v. Kluttz, 6 N.C. App.

fendant's belief, however reasonable, that the participating spouse is unmarried is not a defense, nor is the fact that the participating spouse initiated or consented to the adulterous conduct.[12] Once sexual intercourse has been demonstrated, only the defendant's denial, the plaintiff's consent, and the statute of limitations can be raised in defense.[13] Consequently, criminal conversation has been aptly called a strict liability tort, with damages presumed upon proof of the offending conduct.[14]

While the gist of the action for criminal conversation is adultery,[15] the action for alienation of affections does not require proof of adulterous conduct. Rather, such actions have been predicated upon any intentional interference with the marital relationship.[16] Actions for alienation of affections have been brought as often against close relatives[17] as against accused lovers[18]—often with success.[19] Several spouses have even attempted to recover from religious groups for interference with the marital relationship, but with little success.[20]

201, 209-10, 170 S.E.2d 104, 109 (1969) (uncontroverted testimony amounting to circumstantial evidence establishes prima facie case of criminal conversation).

12. Kremer v. Black, 201 Neb. 467, 469-70, 268 N.W.2d 582, 585-86 (1978) (McCown, J., dissenting); Fadgen v. Lenkner, 469 Pa. 272, 277, 365 A.2d 147, 150 (1976); Felsenthal v. McMillan, 493 S.W.2d 729, 731 (Tex. 1973).

13. Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978), *citing* Stumm v. Hummel, 39 Iowa 478 (1874) (two defenses are plaintiff's consent and statute of limitations); Fadgen v. Lenkner, 469 Pa. 272, 277, 365 A.2d 147, 149 (1976) (two defenses: denial by defendant and plaintiff's consent).

14. Fadgen v. Lenkner, 469 Pa. 272, 277, 365 A.2d 147, 149 (1976).

15. *See* cases cited in note 10 *supra*.

16. *See* text & notes 17-19 *infra*.

17. *See* text & cases listed in Bearbower v. Merry, 266 N.W.2d 128, 132-33 (Iowa 1978); Poulos v. Poulos, 351 Mass. 603, 605, 222 N.E.2d 887, 889-90 (1967); Hafner v. Hafner, 135 N.J. Super. 328, 334, 343 A.2d 166, 167 (1975) (action for intentional infliction of emotional distress by widow against son-in-law held barred because gist of action, alienation of affections, prohibited by New Jersey Heart Balm Statute, N.J. STAT. ANN. § 2A:23-1 (1952), *id.* at 334, 343 A.2d at 169; but portion of claim relating to defendant's wrongful deprivation of support payments independent of barred actions and stated a claim, *id.* at 336, 343 A.2d at 170).

18. *See* Breiner v. Olson, 195 Neb. 120, 124, 237 N.W.2d 118, 121-22 (1975); Dube v. Rochette, 110 N.H. 129, 130, 262 A.2d 288, 289 (1970); Sebastian v. Kluttz, 6 N.C. App. 201, 209-10, 170 S.E.2d 104, 106 (1969).

19. Glatstein v. Grund, 243 Iowa 541, 557-59, 51 N.W.2d 162, 172-73 (1952); Wairich v. Wairich, 232 Iowa 762, 771, 6 N.W.2d 107, 111 (1942); Harlow v. Harlow, 152 Va. 910, 939-40, 143 S.E. 720, 728 (1928).

20. *See* Radecki v. Schuckhardt, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976) (plaintiffs' wives and children were involved in church activities resulting in friction between plaintiffs and their wives; *Id.* at 93, 361 N.E.2d at 544; defendant's alleged misconduct was teaching that a person should leave a spouse who interfered with the practice of religion; *Id.* at 94, 361 N.E.2d at 544; held that such advocacy of religious tenets is not illegal). *Id.*; Bradesku v. Antion, 21 Ohio App. 2d 67, 255 N.E.2d 265 (1969) (plaintiff claimed that his wife's affections were alienated as a result of her listening to defendant's radio broadcasts and speaking with defendant about her marriage, *id.* at 70, 255 N.E.2d at 266; held that defendant's publication and broadcasting of religious views well within constitutional rights and thus not grounds for an action. *Id.* at 74, 255 N.E.2d at 269).

But see Carrieri v. Bush, 69 Wash. 2d 536, 545, 419 P.2d 132, 137 (1966) (court found prima facie case of alienation of affections from evidence which, if true, showed that defendant advised plaintiff's wife to divorce plaintiff, stated that plaintiff was "full of the devil," and which in fact resulted in alienation of the wife's affections; held, protection of exercise of religious beliefs not license for wrongful interference with family relationships. *Id.* at 544-45, 419 P.2d at 135-37). *See*

The essential elements of the claim of alienation of affections are wrongful conduct by the defendant, loss of affection, and a causal connection between the two.[21] Courts generally require proof that the defendant was the controlling cause of the loss of affections,[22] but do not require proof that the defendant was the "sole" cause of the loss.[23] This rule is reflected in the defense, recognized in some jurisdictions, that the plaintiff had already lost the affections of the participating spouse.[24] Other courts allow such proof only in determining damages and not as a defense. These courts reason that even if the spouses are estranged, the possibility of reconciliation is present, and the defendant's conduct has lessened that possibility.[25] Other defenses to the action vary from jurisdiction to jurisdiction.

In contrast to the action for criminal conversation, in some states a defendant is allowed the defense that the participating spouse was the pursuer or initiator.[26] In others, such proof merely bears on the damages issue but will not defeat a plaintiff's claim.[27] Also unlike the ac-

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also Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975) (defendant church ordered all members of the church, including plaintiff's wife and children, to shun plaintiff, as a result of which plaintiff's wife and children had no social or physical contact with him, *id.* at 332-33, 341 A.2d at 106; held that under some circumstances, interests in maintaining family ties may override first amendment protections of religious practices, and plaintiff might be able to recover. *Id.* at 334, 341 A.2d at 108).

21. Bearbower v. Merry, 266 N.W.2d 128, 129-30 (Iowa 1978); Allen v. Lindeman, 259 Iowa 1384, 1388, 148 N.W.2d 610, 613 (1967); Sutton v. Sutton, 567 S.W.2d 147, 148 (Mo. App. 1978).

22. *See* Hunt v. Chang, 60 Hawaii 608, 616-17, 594 P.2d 118, 124 (1979); Long v. Fisher, 210 Kan. 21, 24-26, 499 P.2d 1063, 1067 (1972); Lueg v. Tewell, 572 S.W.2d 97, 102 (Tex. Civ. App. 1978); Feinsinger, *Legislative Attack on "Heart Balm"* 33 MICH. L. REV. 979, 995 (1935) ("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").

23. Poulos v. Poulos, 351 Mass. 603, 607-08, 222 N.E.2d 887, 891 (1967) (plaintiff not required to show that defendant's actions were sole cause of separation); Carrieri v. Bush, 69 Wash. 2d 536, 544, 419 P.2d 132, 137 (1966) (unnecessary for defendant's conduct to be the sole cause).

24. Landholm v. Webb, 69 Idaho 204, 207, 205 P.2d 507, 508 (1949) (court approved instructions stating that if alienation of affections was brought about not by defendant but by plaintiff's mistreatment of spouse, defendant not liable); Reynolds v. Jobes, 565 S.W.2d 690, 698 (Mo. Ct. App. 1978) (instruction directing jury to find for defendant if it found that plaintiff's wife left because of plaintiff's conduct approved, though only the form and not the substance of instruction was challenged).

In New Mexico, the burden is on the plaintiff to show that the participating spouse in fact had love and affection for the plaintiff. Thompson v. Chapman, 93 N.M. 356, 600 P.2d 302 (Ct. App. 1979), *cert. denied*, 92 N.M. 675, 593 P.2d 1078 (1979) (since nothing in plaintiff's complaint or affidavits showed that plaintiff's wife loved him, grant of defendant's motion for summary judgment affirmed. *Id.* at 358, 600 P.2d at 304); *accord*, Trainor v. Deters, 22 Ohio App. 2d 135, 138, 259 N.E.2d 131, 134 (1969).

25. Gibson v. Gibson, 244 Ark. 327, 331-32, 424 S.W.2d 871, 874 (1968); Moranz v. Schiller, 525 S.W.2d 785, 786 (Mo. App. 1975); Donnell v. Donnell, 220 Tenn. 169, 175-77, 415 S.W.2d 127, 130-31 (1967).

26. *See* Trainor v. Deters, 22 Ohio App. 2d 135, 138, 259 N.E.2d 131, 134 (1969) (not clear, but burden of proof may be on plaintiff to prove that defendant was the aggressor; evidence here showed participating spouse was aggressor); Donnell v. Donnell, 220 Tenn. 169, 174, 415 S.W.2d 127, 130 (1967) (defense recognized, but defendant failed in this case to establish it); McQuarters v. Ducote, 234 S.W.2d 433, 435 (Tex. Civ. App. 1950).

27. Comte v. Blessing, 381 S.W.2d 780, 784 (Mo. 1964) (defendant argued that plaintiff's wife was the aggressor but court held that where defendant is not without fault, causation is issue for jury and relevant on issue of damages).

tion for criminal conversation, the action for alienation of affections is defeated if the defendant can prove ignorance of the marital relationship.[28] But as in the action for criminal conversation, consent of the plaintiff spouse to the behavior resulting in the alienation is a complete defense.[29] In addition, when the defendant is involved in a familial or professional relationship with the participating spouse, most courts recognize a limited privilege to give advice.[30]

Justifications for the Actions

Today, supporters of the tort actions are apt to claim that the actions vindicate the interests of a spouse and society in preventing outsiders from tampering with the marital relationship.[31] It is generally acknowledged that recovery in an alienation of affections action is for less of consortium, including the "right of one spouse to the conjugal fellowship of the other, to the other's company, cooperation, and aid in the conjugal relation."[32] Damages in an action for criminal conversation, on the other hand, cover injury to the plaintiff's social position, disgrace in the community, and dishonor to the plaintiff and the plaintiff's family.[33]

An examination of the torts' origins reveals that significantly different interests were originally advanced as justification for the actions. The origins of the torts of criminal conversation, enticement, and alienation of affections can be traced to the interest a master had in the services of servants.[34] Originally, a master could recover for physical injury to a servant if loss of services resulted.[35] Since a wife was viewed as a servant, a husband could also sue for the loss of the wife's services

28. Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978); Bresch v. Wolf, 243 Mich. 638, 645-47, 220 N.W. 737, 739-40 (1928); Loper v. Askin, 178 App. Div. 163, 164, 164 N.Y.S. 1036, 1036-37 (1917).

29. Nulsen v. Nulsen, 3 Cal. App. 2d 407, 408-09, 39 P.2d 509, 509-10 (1934); Fuller v. Robinson, 230 Mo. 22, 55, 130 S.W. 343, 353 (1910); Reynolds v. Jobes, 565 S.W.2d 690 *passim* (Mo. Ct. App. 1978).

30. Poulos v. Poulos, 351 Mass. 603, 606, 222 N.E.2d 887, 890 (1967) (parents have limited advice privilege so long as primary purpose is to benefit child); Carrieri v. Bush, 66 Wash. 2d 536, 543, 419 P.2d 132, 136 (1966) (advice defense recognized for parents, close relatives, and those in professional or semi-professional relationship to participating spouse).

31. Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978); Note, *supra* note 3, at 431; W. PROSSER, *supra* note 3, § 124, at 873, 887-88.

32. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923). *See also* Walter v. Wilson, 228 So. 2d 597 (Miss. 1969); Bearbower v. Merry, 266 N.W.2d 128, 133 (Iowa 1978).

33. Karchner v. Mumie, 398 Pa. 13, 18, 156 A.2d 537, 539 (1959) ("injury to wife's social position, disgrace in the community . . . and dishonor to herself and her family"); Vaughn v. Blackburn, 431 S.W.2d 887, 889 (Ky. 1968) ("humiliation, mortification, disgrace, and shame"); Sebastian v. Kluttz, 6 N.C. App. 201, 220, 170 S.E.2d 104, 115-16 ("loss of consortium, mental anguish, humiliation, injury to health, and loss of support by the wife").

34. W. PROSSER, *supra* note 3, § 124, at 873; Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651, 653-54 (1930).

35. Lippman, *supra* note 34, at 655-56.

when she was injured by the defendant.[36] 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.[37] Thus, the sources of the original actions had in common either physical injury to the servant or physical removal (enticement) of the servant from the premises of the master.

In neither of the original actions for criminal conversation or alienation of affections, however, were physical injury or physical removal of the spouse from the home necessary elements. Rather, from its beginning criminal conversation was seen as an action of trespass to the husband.[38] This was so despite the wife's consent, since a wife was legally incapable of consenting to adultery, however voluntary her conduct may have been.[39] Similarly, alienation of affections, first recognized in the United States in 1866 in New York,[40] has never required actual physical removal from the home.[41]

Although a husband could sue for his loss, a wife was without a remedy for alienation of affections or criminal conversation because of her inferior status.[42] Her role in the marriage did not carry a cognizable interest in the services of her husband,[43] nor did she have the same legal capacity to enforce her interests.[44] Not until the passage of the Married Women's Property Acts, which removed the incapacity of married women to sue for enforcement of their rights, were women permitted to maintain the actions in most states.[45] The precise reasoning of the courts in extending the actions to wives, however, is not always clear. Some courts seemed to interpret the Acts as permitting wives to enforce rights they had at common law but were merely unable to enforce because of the disability of married women to sue in their own

36. *Id.* 34, at 653, 655-56.

37. W. PROSSER, *supra* note 3, § 129, at 929.

38. Oppenheim v. Kridel, 236 N.Y. 156, 160, 140 N.E. 227, 228 (1923).

39. Kroessin v. Keller, 60 Minn. 372, 374, 60 N.W. 438, 438 (1895). *See also* Lippman, *supra* note 34, at 653 (quoting Holdsworth, 8 HISTORY OF ENGLISH LAW (3d ed. 1923) at 429-30 ("It was the incapacity of the wife to consent, which was the principle upon which the husband was allowed to bring the particular form of action . . . against one who had committed adultery with his wife")).

40. *See* W. PROSSER, *supra* note 3, § 124, at 876.

41. Heermance v. James, 47 Barb. 120, 123-27 (1866) ("The case before us differs from the cases cited, not in principle, but only in the fact that there was no actual departure of the wife from the husband's house, in the case before us." *Id.* at 125).

42. Lippman, *supra* note 34, at 654-56; W. PROSSER, *supra* note 3, § 124, at 881.

43. Lippman, *supra* note 34, at 656.

44. Karchner v. Mumie, 398 Pa. 13, 15, 156 A.2d 537, 538 (1959); *see* Note, *Abolition of Actions for Breach of Promise, Enticement, Criminal Conversation & Seduction*, 22 VA. L. REV. 205, 206-07 (1935).

45. *See* Parker v. Newman, 200 Ala. 103, 107-08, 75 So. 479, 483 (1917); Lockwood v. Lockwood, 67 Minn. 476, 481-83, 70 N.W. 784, 784-86 (1897); Newsom v. Fleming, 165 Va. 89, 93, 181 S.E. 393, 395-96 (1935).

names.[46] Other opinions could be interpreted to say that the Married Women's Acts granted women rights unavailable to them at common law.[47] Yet others saw the Married Women's Acts as only one part of a changed legal and social milieu that warranted extending the actions to wives.[48] Indeed, as one commentator pointed out, following the Acts the courts might have reasonably either "deprived the husband of his existing action or allowed the wife a similar action."[49]

A very small number of courts in fact declined to extend one or the other of the actions to wives, on varying grounds, even though the actions remained for husbands.[50] Most recently, in *Kline v. Ansell*,[51] the Maryland court held that the Maryland Married Women's Property Act could not be construed to have extended the action of criminal conversation to wives. The Maryland court reasoned that at common law a wife had no action for criminal conversation; the Married Women's Act had only removed a woman's legal disability but had not created new rights unknown at common law.[52] Thus, in Maryland, wives could not sue for criminal conversation. The court went on to hold that since this resulted in the law's providing "different benefits for and . . . different burdens upon its citizens based solely upon their sex,"[53] the state's equal rights amendment to the state constitution was violated. Thus, the court held the action for criminal conversation was unconstitutional and no longer viable.[54]

This latter view interprets the Married Women's Property Act as removing a procedural disability and not as affecting substantive rights. It is important to note, however, that a small minority of courts inter-

46. Seaver v. Adams, 66 N.H. 142, 144, 19 A. 776, 776 (1889); Bennett v. Bennett, 116 N.Y. 584, 591, 23 N.E. 17, 18-20 (1889). *But see* Oppenheim v. Kridel, 236 N.Y. 156, 163, 140 N.E. 227, 229 (1923) (court, with reference to *Bennett*, states that it "is difficult to understand how any substantial right could exist at common law for which there was no remedy afforded"). *See also* Holbrook, *supra* note 32, at 2-5.

47. Turner v. Heavrin, 182 Ky. 65, 76, 206 S.W. 23, 25-27 (1918); Wolf v. Frank, 92 Md. 138, 144, 48 A. 132, 134-35 (1900) ("If . . . her cause of action existed at common law, but was held in abeyance by reason of her disability of coverture, this statute relieved her of that disability. But, independent of that, such rights were conferred on married women by the Act of 1898, . . . as to remove all possible doubt as to the right of the wife to sue, in cases of this character [alienation of affections], as the husband can").

48. *See* Karchner v. Mumie, 398 Pa. 13, 16, 156 A.2d 537, 538 (1959) (court noted that "the general emancipation of women in America did not begin or end with the Act of 1893 [the Pennsylvania Married Women's Property Act]"); Holmes v. Holmes, 133 Ind. 386, 388, 32 N.E. 932, 933 (1893) ("independent of statute expressly giving the wife the right . . . we think the ancient doctrine that the husband and wife are one person in law has been so completely discarded . . . that it may be held that the wife may maintain such an action").

49. Feinsinger, *supra* note 22, at 990.

50. Doe v. Roe, 82 Me. 503, 503, 20 A. 83, 84 (1890) (a wife's remedy is divorce); Kroessin v. Keller, 60 Minn. 372, 376, 62 N.W. 438, 439 (1895) (criminal conversation); Duffies v. Duffies, 76 Wis. 374, 384-85, 45 N.W. 522, 525-26 (1890) (alienation of affections).

51. 287 Md. 585, 414 A.2d 929 (1980).

52. *Id.* at 593 n.4, 414 A.2d at 933 n.4.

53. *Id.* at 593, 414 A.2d at 933.

54. *Id.*

preting the Acts in cases involving physical injury to the wife held that husbands could no longer recover for loss of consortium in such cases because the wife no longer owed her husband services.[55] This minority interpretation of the Married Women's Property Acts in loss of consortium cases views the Acts as effecting a legal change in the rights and duties of married partners vis-a-vis each other and not merely as extending to wives the rights that husbands always held.[56]

Modern Treatment of the Actions

Over the last five decades, the two tort actions have come under considerable attack, and a substantial number of state legislatures have abolished them.[57] The first wave of opposition to the actions occurred in the 1930's.[58] State legislatures, led by Indiana,[59] responded by passing legislation abolishing some or all of the tort actions of alienation of affections, criminal conversation, breach of promise to marry, and seduction.[60] The primary impetus for this legislative action seems to have been public objection to threats of blackmail employed to force excessive out-of-court settlements, excessive verdicts, and unfounded actions.[61] Since the 1930's, there has been a steady move in state legislatures to abolish the actions. At this writing, 30 states and the District of Columbia have either abolished or severely limited the action for alienation of affections,[62] while 22 states and the District of Columbia

55. Marri v. Stamford St. RR. Co., 84 Conn. 9, 21-24, 78 A. 582, 586 (1911) (but distinguishing actions for loss of consortium resulting from physical injury from those claims based on alienation of affections—one being "material," the other "sentimental"), *overruled*, Hopson v. St. Mary's Hosp., 176 Conn. 485, 487, 408 A.2d 260, 261 (1979); Rodgers v. Boynton, 315 Mass. 279, 283, 52 N.E.2d 576, 578 (1943); Helmstetler v. Duke Power Co., 224 N.C. 821, 825, 32 S.E.2d 611, 612-14 (1945), *overruled in* Nicholson v. Hugh Chatham Mem. Hosp., 266 S.E.2d 818, 823 (N.C. 1980); W. PROSSER, *supra* note 3, § 125, at 890-91.

56. *See* Holbrook, *supra* note 32, at 6-8. For further reference to the Married Women's Property Acts, see text & notes 100-01 *infra*.

57. *See* text and notes 58-64 *infra*.

58. Note, *supra* note 44, at 205; Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63, 63-65 (1936).

59. Note, *supra* note 44, at 205; Kane, *supra* note 58, at 64-65.

60. For background to the enactment of such legislation in the 1930's, *see generally* Feinsinger, *supra* note 22; Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417 (1935).

61. Kane, *supra* note 58, at 66-67.

62. ALA. CODE tit. 6, § 5-331 (1975); ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1978-79); CAL. CIV. CODE § 43.5 (West 1954); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. § 52-572(b) (Supp. 1979); DEL. CODE ANN. tit. 10, § 3924 (1975); D.C. CODE ENCYCL. § 16-923 (West Supp. 1978-79); FLA. STAT. ANN. § 771.01 (West 1964); GA. CODE ANN. § 105-1203 (1980); ILL. ANN. STAT. ch. 68, § 34-40 (Smith-Hurd 1959) (action allowed, but recovery limited to actual damages); IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1980); ME. REV. STAT. tit. 19, § 164 (Supp. 1977-78); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1980); MICH. STAT. ANN. § 27 A-2901 (1980); MINN. STAT. ANN. § 553.01 (West Supp. 1980); MONT. REV. CODES ANN. § 17-1201 (1947); NEV. REV. STAT. § 41.380 (1975); N.J. STAT. ANN. § 2A:23-1 (West 1952); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page Supp. 1980); OKL. STAT. ANN. tit. 76, § 8.1 (West Supp. 1980) ("alienation of the affections of a spouse of sound mind and legal age . . . is hereby abolished"); OR. REV. STAT. § 30.840 (1977-78); PA. STAT. ANN. tit. 48, § 170 (Purdon 1965) (actions abolished as to parties unrelated to alienated spouse); VT.

have taken similar action with respect to criminal conversation.[63] Consistent with a major criticism of the actions—that they encourage blackmail—in at least eight states it is a crime to file a complaint based on either action.[64]

In the last decade, in states where the actions were not legislatively abolished, defendants began to argue that the actions were no longer justified and should be judicially abolished.[65] State supreme courts faced with the arguments, however, questioned whether the judiciary was the appropriate body to consider the abolition of the actions. Of the six state supreme courts facing the question, three concluded that judicial abolition of one or the other of the actions was appropriate.[66]

In the latest of these decisions, the Iowa Supreme Court abolished the action for alienation of affections in *Fundermann v. Mickelson*.[67] This five to four decision came only three years after the Iowa court had considered the merits of abolishing the action, and refused to do

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STAT. ANN., tit. 15, § 1001 (Supp. 1980); VA. CODE § 8.01-220 (1977); W. VA. CODE § 56-3-2a (Supp. 1980); WIS. STAT. ANN. § 768.01 (West Supp. 1980); WYO. STAT. § 1-23-101 (1977).

The number given in the text includes the states of Louisiana, Washington, and Iowa. Louisiana has never recognized the action. Moulin v. Monteleone, 165 La. 169, 172-73, 115 So. 447, 448-49 (1927) (because the action is basically punitive, and because Louisiana law does not recognize punitive damages, action will not be recognized in Louisiana). The state of Washington abolished the action judicially, Wyman v. Wallace, 615 P.2d 452 (Wash. 1980). For further discussion of the Washington court's decision, see text & notes 67-71 *infra*. Most recently, the Iowa Supreme Court, in Fundermann v. Mickelson, 7 FAM. L. REP., 2418 (1981), abolished the action for alienation of affections. *See* text & notes 67-71 *infra*.

63. ALA. CODE tit. 6, § 6-5-331 (1975); CAL. CIV. CODE § 43.5 (West 1954); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. § 52-572f (West Supp. 1979); DEL. CODE ANN. tit. 10 § 3924 (1975); D.C. CODE ENCYCL. § 16-923 (West Supp. 1978-79); FLA. STAT. ANN. § 771.01 (West 1964); GA. CODE ANN. § 105-1203 (1980); ILL. REV. STAT. Ch. 68 § 41-47 (Smith-Hurd 1959) (action allowed, but actual damages must be proved); IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1980); MICH. STAT. ANN. § 27A-2901 (1980); MINN. STAT. ANN. § 553.01 (Supp. 1980); NEV. REV. STAT. § 41.380 (1975); N.Y. CIV. RTS. LAWS § 80-a (McKinney 1976); OHIO REV. CODE ANN. 2305.29 (Page Supp. 1980); OR. REV. STAT. § 30.850 (1977-78); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1980); VA. CODE § 8.01-220 (1975); WIS. STAT. ANN. § 768.01 (West Supp. 1977-80); WYO. STAT. § 1-23-101 (1977).

This number includes Iowa, Pennsylvania, and Maryland, which have abolished the action. *See* Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980); Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976). For a discussion of these three cases, see text & notes 50-54 *supra*, and 72-84 *infra*.

64. Florida, Indiana, Maryland, Montana, New Jersey, New York, Wisconsin, and Wyoming have provisions in their statutes that provide substantial penalties for filing a statutorily prohibited action. See notes 62 & 63 *supra* for statute citations. The penalties are consistent with the argument that the actions provide an opportunity for blackmail and that the mere filing of the action can harm a defendant's reputation.

65. *See* Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); Gorder v. Sims, 306 Minn. 275, 237 N.W.2d 67 (1975); Kremer v. Black, 201 Neb. 467, 268 N.W.2d 582 (1978); Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973); Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980). For a discussion of these cases, see text & notes 66-99 *infra*.

66. Iowa: Fundermann v. Mickelson, 7 FAM. L. REP. 2418, 2419 (1980); Bearbower v. Merry, 266 N.W.2d 128, 135 (Iowa 1978); Pennsylvania: Fadgen v. Lenkner, 469 Pa. 272, 276, 365 A.2d 147, 149 (1976); and Washington: Wyman v. Wallace, 94 Wash. 2d 99, —, 615 P.2d 452, 455 (1980).

67. 7 FAM. L. REP. 2418 (1981).

so, in *Bearbower v. Merry*.[68] The *Fundermann* court noted the difficulty juries face in resolving the factual disputes involved in such cases, but based its abolition primarily on the fact that "[i]t is the theory of recovery that is flawed."[69] Noting the "unmistakable trend away from allowing alienation suits,"[70] (the trend due primarily to statutory abolition), the court went on to state its final analysis of the issue: "[T]he action should be abolished because spousal love is not property which is subject to theft. . . . [P]laintiffs in such suits do not deserve to recover for the loss of or injury to 'property' which they do not, and cannot, own."[71]

Until *Fundermann*, the only court to abolish the action for alienation of affections had been the Washington Supreme Court in *Wyman v. Wallace*.[72] In doing so, the Washington court acknowledged that in every other state where it had been abolished the legislature had abolished the action for alienation of affections.[73] Nevertheless, it concluded that since the action had been judicially created, the court need not wait until the legislature had focused its attention on the subject.[74] The court, following the reasoning of the Washington Court of Appeals, abolished the action.[75] The five major reasons given to support abolition were:

> (1) The underlying assumption of preserving marital harmony is erroneous; (2) The judicial process is not sufficiently capable of policing the often vicious out-of-court settlements; (3) The opportunity for blackmail is great since the mere bringing of an action could ruin a defendant's reputation; (4) There are no helpful standards for assessing damages; and (5) The successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse's affections.[76]

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68. 266 N.W.2d 128 (Iowa 1978), *overruled*, Fundermann v. Mickelson, 7 FAM. L. REP. 2418 (1981). The *Bearbower* court had held that the action for alienation of affections would be retained, 266 N.W.2d at 134, but that the action for criminal conversation should be abolished. *Id.* at 135.

69. 7 FAM. L. REP. 2419 (1981).

70. *Id.*

71. *Id.* The Court was careful to note that it was not abolishing the action "because defendants in such suits need or deserve our protection. We certainly do not do so because of any changing views on promiscuous sexual conduct." *Id.* Despite this disclaimer, the dissenting opinion complained that the *Fundermann* "result doubtlessly will be hailed by those who believe extramarital conduct should be accorded a constitutional right to privacy, and those who support the increasing amoralization of public policy." *Id.* at 2420.

72. 94 Wash. 2d 99, 615 P.2d 452 (1980). The Louisiana Supreme Court refused to recognize the tort action in Moulin v. Monteleone, 165 La. 169, 172-73, 115 So. 447, 448-49 (1927).

73. 94 Wash. 2d at —, 615 P.2d at 455.

74. *Id.* at —, 615 P.2d at 453-54.

75. *Id.* at —, 615 P.2d at 455.

76. *Id.* The Supreme Court of Washington reinstated the decision of the Washington Court of Appeals, reported at 15 Wash. App. 395, 549 P.2d 71 (1976). For a discussion of the court of appeals' opinion, see Note, *Alienation of Affections*, 12 GONZAGA L. REV. 545 (1977).

The Washington Supreme Court noted that the *Wyman* case did not present the "analogous question of the continuing viability of actions for criminal conversation." 94 Wash. 2d at — n.2, 615 P.2d at 455 n.2.

Prior to *Wyman*, the Iowa Supreme Court, in *Bearbower v. Merry*,[77] also had determined that it was proper for a court to consider whether the actions for alienation of affections and criminal conversation should be retained or judicially abolished.[78] The *Bearbower* court, while retaining the action for alienation of affections,[79] abolished the action for criminal conversation as to conduct occurring after January 1, 1978.[80] To the *Bearbower* court, the important distinction between the actions was that criminal conversation, with its lack of relevant defenses,[81] allowed recovery even when the marital relationship was not injured.[82] Where there was injury to the marriage resulting from a course of adulterous conduct, the court stated that a plaintiff could pursue an action for alienation of affections.[83] The *Bearbower* court's distinction between alienation of affections and criminal conversation was implicitly rejected by the Iowa court's later decision in *Fundermann v. Mickelson*,[84] where the action for alienation of affections as well was abolished in Iowa.

The Pennsylvania Supreme Court in *Fadgen v. Lenkner*[85] used reasoning similar to the *Bearbower* court in abolishing the action for criminal conversation. The Pennsylvania court emphasized that the only defense to the action was the plaintiff's consent[86] and that dam-

77. 266 N.W.2d 128 (Iowa 1978), *overruled*, Fundermann v. Mickelson, 7 FAM. L. REP. 2418 (1981).

78. *Id.* at 129.

79. *Id.* at 134. The Iowa court considered the most frequently raised arguments against the action and rejected them in turn. The first argument considered was that the action should be abolished because there are no definite standards for determining damages. *Id.* at 133. The court's response was that juries routinely measure damages for loss of consortium in negligence cases, and such measurement is no different in alienation of affection cases. *Id.* Next, the court rejected the argument that marriages disrupted in alienation of affection cases were not stable and thus that no recovery should be allowed. *Id.* Such previous marital instability could be shown in mitigation of damages. *Id.* The third familiar argument to the action is that it offers opportunity for blackmail. *Id.* To this, the court responded that in Iowa, many alienation of affections cases were brought against close relatives and did not present cases where blackmail or risk to reputation was really a factor. *Id.* at 133-34. Fourth, the defendant had argued that Iowa's no-fault divorce statute implied a legislative intent inconsistent with the maintenance of the actions. *Id.* at 134. Noting the flood of divorce litigation in the courts, the court concluded that any deterrent to "third-party meddling" during waiting periods was desirable. *Id.* Finally, the court rejected the argument that courts were incapable of dealing with the abuses of the action, including excessive verdicts and fraud. *Id.* To this the court responded that courts are capable of separating the "just from the unjust causes." *Id.*

80. *Id.* at 135.

81. *Id.* at 134-35.

82. *Id.* at 135.

83. *Id.* The result was made possible in Iowa because Iowa's recently enacted criminal code no longer made adultery a crime. *Id.* Iowa law provides civil remedies "for injuries sustained by reason of crimes." *Id., citing* Hall v. Montgomery Ward and Co., 252 N.W.2d 421 (Iowa 1977). *See* IOWA CODE § 611.21 (1973), interpreted as itself providing a civil remedy for violation of a criminal statute. 252 N.W.2d at 423. Thus, without the repeal of the adultery statute in Iowa it would not have been possible to abolish the civil action for criminal conversation. 266 N.W.2d at 135.

84. 7 FAM. L. REP. 2418, 2419 (1981). *See* text & notes 67-71 *supra*.

85. 469 Pa. 272, 365 A.2d 147 (1976).

86. *Id.* at 277, 365 A.2d at 149.

ages were inexact and often punitive.[87] It stated that the civil action is an anachronism,[88] noting that in Pennsylvania the crime of adultery had been abolished.[89]

In contrast to the opinions just discussed, the supreme courts of Nebraska, Minnesota, and Texas held that consideration of abolition of the actions is best left to the legislature.[90] In *Kremer v. Black*,[91] the Nebraska Supreme Court refused to consider abolishing criminal conversation, even when, as in *Kremer*, the plaintiff and spouse were already separated before the adulterous conduct and the participating spouse initiated the offending conduct.[92] The majority also hinted that if left to the court, the action might be upheld anyway, stating that "this court has consistently upheld a spouse's right of recovery for criminal conversation."[93]

In *Gorder v. Sims*,[94] the Minnesota Supreme Court responded similarly to a defendant's argument that the action for alienation of affections should be abolished. The court relied on legislative inaction to support its refusal to hold that alienation of affections actions are contrary to public policy.[95] It found no "compelling sense of urgency,"[96] absent legislative declaration, to abolish the action.[97] If the decision was an invitation to the state legislature to act, it was quickly accepted. The Minnesota legislature's response to *Gorder* was to abolish the actions for alienation of affections and criminal conversation.[98]

While showing no great respect for the action of criminal conversation, the Texas Supreme Court in *Felsenthal v. McMillan*[99] nevertheless deferred to the legislature for its abolition.[100] Although *Felsenthal* was the first action for criminal conversation to reach the Texas Supreme Court,[101] the court recognized that criminal conversation was part of the common law adopted by the Texas legislature.[102] Thus, the court invited the legislature to act, stating that it was the legislature's

87. *Id.* at 279, 365 A.2d at 150-51.
88. *Id.* at 280, 365 A.2d at 151.
89. *Id.* at 280 n.7, 365 A.2d at 151 n.7.
90. *See* text & notes 86-99 *infra*.
91. 201 Neb. 467, 268 N.W.2d 582 (1978).
92. *Id.* at 470, 268 N.W.2d at 583 (defendant argued that it should be a defense that plaintiff and her spouse were separated at the time of the complained of acts).
93. *Id.* at 470, 268 N.W.2d at 584.
94. 306 Minn. 275, 237 N.W.2d 67 (1975).
95. *Id.* at 282, 237 N.W.2d at 71.
96. *Id.*
97. *Id.*
98. MINN. STAT. ANN. § 553.01 (West Supp. 1980).
99. 493 S.W.2d 729 (Tex. 1973).
100. *Id.* at 730.
101. *Id.* at 732 (Steakley, J., dissenting).
102. *Id.* at 729.

prerogative if a change was deemed necessary.[103] The Texas legislature responded by abolishing the action for criminal conversation in 1975, but it apparently left intact the action for alienation of affections.[104]

Other Legal Developments Since the Torts' Origins

It will be recalled that most courts treated the Married Women's Property Acts as extending the tort actions to wives and not as abolishing the actions for husbands.[105] In this regard, the Acts are best viewed as but a part of the developing legal and social changes demonstrating an increasing concern with the rights of both individuals in the marital relationship. On the other hand, the Married Women's Property Acts may have actually slowed the recognition of individual autonomy within the marital relationship. By providing support for extending the alienation of affections and criminal conversation actions to wives as well as husbands, the Acts may have made the actions easier to justify and, thus, harder to abolish. Indeed, the Pennsylvania court in *Fadgen v. Lenkner*[106] noted that the extension of the tort action in 1959 on the basis of the Married Women's Property Act in Pennsylvania only delayed abolition of the action of criminal conversation which legal and social changes demanded.[107]

A review of those legal changes demonstrates that any attempt to articulate a modern legal basis for the actions under discussion conflicts with the conclusion that marital partners are individuals, "each with a separate intellectual and emotional makeup."[108] This conclusion is supported by legal developments in a variety of contexts, no one of which alone can be said to mandate abolition of the actions. Taken together, however, these changes show that the notion of married persons as autonomous individuals is incompatible with the continued recognition of the tort actions.

As a backdrop to considering these changes, the modern justification for retaining the tort actions, particularly alienation of affections, should be kept in mind. Those who would retain the actions argue that the "relevant question" is "whether a family member's interest in the continued *harmony* of his home is of sufficient magnitude to warrant

103. *Id.* at 730.

104. See TEX. FAM. CODE ANN. § 4.05 (Vernon Supp. 1980). Entitled "Criminal Conversation Not Authorized," the statute provides, "A right of action by one spouse against a third party for criminal conversation is not authorized in this state." *Id. See also* Williford v. Sharpe, 578 S.W.2d 498 (Tex. Civ. App. 1979) (an action allowing recovery for alienation of affections, where the 1975 statute abolishing criminal conversation is not mentioned in the court's opinion).

105. See text & notes 45-56 *supra*.

106. 469 Pa. 272, 365 A.2d 147 (1976).

107. *Id.* at 276, 365 A.2d at 149.

108. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

judicial protection from those who intentionally would interfere with it."[109] The weakness of this argument can be seen by examining other legal contexts where courts have been increasingly faced with a reexamination of issues that involve some variation of the "marital harmony" argument. Often the court in these cases must choose between recognizing the individual autonomy of one spouse or accepting the argument that the need for the protection of marital harmony requires the court to ignore the interests of the individual spouse. Increasingly, courts are concluding on closer examination that the marital harmony justification for many traditional legal postures, and some modern ones, can no longer withstand scrutiny.

A case in which the marital harmony argument proved unconvincing was *Planned Parenthood of Central Missouri v. Danforth*.[110] There the Supreme Court held that a state could not require that a married woman obtain written consent of her husband before she could obtain an abortion.[111] In *Danforth*, the Court underscored the individual right of the woman to make this determination as opposed to the right of married partners to make such a decision together. Significantly, such a right was recognized as the woman's alone despite forceful arguments on the part of the state of Missouri that the husband's consent would protect marital harmony.[112]

Further recognition by the United States Supreme Court of the independence of spouses was evident in its opinion in *Trammel v. United States*.[113] The issue in *Trammel* was whether the marital privilege against "adverse spousal testimony" could be defeated if the witness spouse chose voluntarily to testify against the other spouse.[114] The Court decided that such adverse spousal testimony would be allowed when the witness spouse chose to testify despite the claim that to allow one spouse to testify against the other would be inimical to marital harmony. Rejecting this latter claim, the Court reasoned that where such willingness to testify on the part of one spouse was present, marital harmony probably did not exist and, thus, was not likely to be pre-

109. Note, *supra* note 3, at 431 (emphasis added); Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978), *overruled*, Fundermann v. Mickelson, 7 FAM. L. REP. 2418 (1981).

110. 428 U.S. 52 (1976).

111. *Id.* at 71. The decision in *Danforth* followed Roe v. Wade, 410 U.S. 113 (1973), where the Court held that a woman has a constitutional right to choose whether or not to have an abortion, at least during the first trimester of pregnancy. *Id.* at 163.

112. *See* 428 U.S. at 67-72. The state of Missouri argued, "It is difficult to see how marital harmony could possibly be preserved if husbands were precluded from participating in decisions which affect the very essence of the marriage relationship." Appellant's Statement on Appeal at 25. The Court's response to this was that even if the state had the power to delegate to the husband a veto power over the wife's decision, it is not at all likely that such action would further the state's interest in protecting the marriage. 428 U.S. at 71.

113. 445 U.S. 40 (1980).

114. *Id.* at 41-42.

served by application of the privilege.[115]

Such reasoning parallels the reasoning of the *Wyman* court abolishing the action for alienation of affections in Washington.[116] There the court noted that when one spouse is susceptible to the interference of an outsider, a viable marriage is not likely to be present.[117] Indeed, the latter point is an implicit rejection of the idea that it is the defendant who has caused the injury complained of in alienation of affections actions. Rather, it is a tacit recognition that the affections of the participating spouse are often already alienated, independent of the actions of the defendant; there is, indeed, no family harmony to protect.

Another area of the law where courts have begun to scrutinize more carefully the marital harmony argument is in the area of interspousal tort immunity. Many state supreme courts have rejected the argument that interspousal tort immunity furthers the goal of preserving marital harmony.[118] As one opinion suggests, if tranquility exists, the parties are likely to maintain the action only so long as it does not harm that tranquility.[119] On the other hand, where disharmony already exists, barring suit for recovery is more likely to be a "bone of contention than a harmonizing factor."[120]

The abolition of spousal tort immunity is significant not only because of its rejection of the marital harmony justification. It raises directly questions about the maintenance of the two tort actions, or something similar, between spouses. This in turn offers an opportunity to scrutinize the foundations of the tort actions.

The two tort actions, a species of interference with contract,[121] have always been brought against a third party. But in most cases involving interference with contract, the plaintiff can sue not only a third party for interference with contract but also the other party to the contract. In a case involving alienation of affections or criminal conversation, that other party to the "contract" would be the plaintiff's spouse who participated in the tort. Until recently, the idea of suit for money

115. *Id.* at 52.

116. The *Wyman* court cited *Trammel* on the marital harmony argument. 94 Wash. 2d at —, 615 P.2d at 454.

117. *Id.* at —, 615 P.2d at 455 (citing 15 Wash. App. at 399-400, 549 P.2d at 74).

118. *See* Brooks v. Robinson, 259 Ind. 16, 21, 284 N.E.2d 794, 796 (1972) (doctrine cannot be upheld "under the guise of maintaining the peace and harmony of the marriage"); Lewis v. Lewis, 370 Mass. 619, 629, 351 N.E.2d 526, 529 (1976); Digby v. Digby, 388 A.2d 1, 3 (R.I. 1978). *Contra*, Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979); Varholla v. Varholla, 10 Ohio Op. 3d 403, 404, 383 N.E.2d 888, 889-90 (1978). *See generally* Karell, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251 (1975); Comment, *Lewis v. Lewis: Dissolving the "Metaphysical" Merger in Interspousal Torts*, 12 NEW ENG L. REV. 333 (1976).

119. Freehe v. Freehe, 81 Wash. 2d 183, 187, 500 P.2d 771, 774 (1972).

120. *Id.*

121. *See* Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 340-43 (1980).

damages between husband and wife on grounds similar to those found in alienation of affections and criminal conversation was not taken seriously. In the early stages of the tort, the idea would have been difficult to imagine because of the common law unity of husband and wife, which recognized the marital unit as one person—the husband. But even after married women were recognized as separate legal persons, the doctrine of interspousal tort immunity served as a conceptual, if not a real, barrier[122] to serious consideration of a suit of this kind.

Today, with the rejection of common law unity and with growing rejection of interspousal tort immunity, it is reasonable to ask whether one spouse could maintain an action against the other spouse.[123] Should one spouse be allowed to sue the other for money damages for "spontaneous" loss of affection or for refusal to engage in sexual intercourse? Should one spouse be allowed to recover money damages for loss of affections resulting from transfer of affection to another party or because the participating spouse has voluntarily engaged in sexual intercourse with another? It is difficult to imagine a court awarding damages in these cases. Perhaps this is so because the assertion that one person possesses rights to the feelings of another is inherently offensive. It may also be because of the recognition that one person cannot "owe" affection (of the genuine sort) to another.[124] Yet the tort actions rest on precisely such a foundation, veiled somewhat by the presence of a third party on whom the change in the marriage is blamed. But if it is hard to imagine a court awarding damages between the parties to a marriage, why award the same damages against a third party?

The conclusion that recovery against a third party should be precluded is sound in both the "best" case for recovery in an alienation of affections or criminal conversation case and in the "worst" case for recovery. The "best" factual case for recovery involves an initiating third party defendant who is aware of the marital relationship and whose actions clearly result in the participating spouse's change in conduct or attitude toward the plaintiff spouse. The "worst" case for recovery is when plaintiff has alienated the participating spouse's affections al-

122. It may be only a conceptual barrier since the hypothetical action between spouses would be one for breach of contract and not a tort action. *But see* Browning v. Browning, 584 S.W.2d 406, 408 (Ky. App. 1979) (tort action brought by one spouse against the other, rejected by court).

123. A Kentucky Court of Appeals recently answered the question in the negative. Browning v. Browning, 584 S.W.2d 406, 407 (Ky. App. 1979) (tort action brought by one spouse against the other for "openly consorting" with a third party dismissed; "public policy would not be served by authorizing recovery of damages under the circumstances alleged. The morals of mankind are more perfectly judged by a court having final and eternal jurisdiction." *Id.* at 408).

124. "It seems strange that the law, in saying what the husband and wife owe to each other, does not mention love and affection; perhaps it is because the law undertakes only to control and regulate human conduct—not human nature." Moulin v. Monteleone, 165 La. 169, 172, 115 So. 447, 448 (1927).

ready, when the participating spouse has actively pursued the third party defendant, and when the defendant is unaware of the marital relationship.[125]

Undoubtedly in the first case the plaintiff spouse has been injured. But the injury to the spouse is an injury not to "rights" but to feelings and expectations. Moreover, even in the best case for recovery the plaintiff's injury results more from the voluntary acts of the participating spouse than from the third party's conduct. Without the voluntary participation on the part of the participating spouse, there would be no injury. Because the injury to the plaintiff has resulted most directly from the conduct of the plaintiff's spouse, it is only reasonable that the plaintiff look to the spouse, and not the third party, for a remedy. It has already been suggested that money damages from a spouse would be inappropriate. When the injured spouse wishes to work toward resolution of the differences, litigation in any form is not likely to foster the marital harmony the tort actions are said to protect. Rather, some form of nonlegal remedy such as counseling would be far more likely to result in a resolution of the differences. Where, however, either spouse finds the behavior or attitude of the other spouse to be intolerable, the appropriate legal remedy is divorce. No-fault divorce is now available in 47 of the 50 states, and adultery can serve as grounds for divorce in all 50 states.[126] Thus, the two appropriate remedies are attempted reconciliation or divorce, and not tort action against a third party.

Conclusion

Consent is central to the contemporary marital relationship—not only to its creation, but to its maintenance as well. It will be recalled that the incapacity of the wife to consent was seen by many commentators as central to the husband's tort action for criminal conversation. Today's legal context is entirely different from that at common law; increasingly, there is both implicit and explicit recognition that marital partners are individuals, "each with a separate intellectual and emotional makeup."[127] In view of this recognition, it is submitted that one spouse's voluntary acts that conflict with a spousal assertion of a

125. This "worst" case for recovery closely matches the facts in Kremer v. Black, 201 Neb. 467, 477, 268 N.W.2d 582, 587 (1978).

126. Freed & Foster, *Divorce in the 50 States—An Overview As of 1978*, 13 FAM. L. Q. 105, 109 (1979). Only three states retain the "fault only" grounds for divorce: Illinois, Pennsylvania, and South Dakota. *Id.* Of those three, only South Dakota retains the common law form of the actions for criminal conversation and alienation of affections. Illinois has a much restricted form of both actions, *see* citations at notes 62 & 63 *supra*. Pennsylvania abolished criminal conversation in Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976), and has severely restricted the action for alienation of affections by statute. PA. STAT. ANN. tit. 48, § 170 (Purdon 1965).

127. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

"right" to exclusive sexual intercourse should defeat any legal interest the plaintiff spouse may assert in the other's body. As to alienation of affections, parallel reasoning is appropriate. Where the participating spouse has voluntarily associated with the defendant and the defendant's ideas, it cannot be said that the plaintiff spouse has a right to the "unpolluted mind" of the participating spouse. Although the interests of the plaintiff spouse are indeed great, a recognition of the autonomy of the other spouse must defeat legal recovery for resulting losses. To allow recovery against a third party endorses the idea that one partner has certain rights over the very person of the other partner, an idea that runs counter to those principles in our legal system that recognize individual autonomy. The voluntariness of the conduct of the participating spouse, then, should act as a complete bar to the plaintiff's action in tort against a third party.

Numerous states have legislatively abolished one or both of the tort actions for alienation of affections and criminal conversation. In yet others the same result has been achieved judicially. Where the actions are still permitted, serious consideration should be given to the purposes served by the actions and to the countervailing principles which favor individual autonomy. It is difficult to defend the actions on the grounds that they protect marital harmony when there is strong evidence that the argument is losing credence in other contexts. Finally, where reconciliation is desired, a more appropriate remedy would be nonlegal counseling; where reconciliation is impossible, the appropriate legal action is divorce.