If Loving You Is Wrong..Can First Amendment Protection Be Right - Alienation of Affection, Criminal Conversation, and the Right to Free Speech

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ARTICLES

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ALIENATION OF AFFECTION, CRIMINAL CONVERSATION, AND THE RIGHT TO FREE SPEECH

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In July 2015, millions of members of a popular Internet dating service had their information compromised by online hackers.1 Unfortunately, the act itself was fairly unremarkable; it was estimated in 2014 alone that approximately 110 million Americans — half of the nation’s adults — had their personal information revealed by hackers.2 What made the July 2015 incident more striking was that it involved individuals who subscribed to a website called AshleyMadison.com, a dating site that provided services to men and women attempting to cheat on their spouses.3 At the time of the hack, Ashley Madison claimed 37 million account holders.4 When the company did not shut its site down immediately as demanded, the hackers then released the names, user names, birthdays, and credit card transaction details of millions of Ashley Madison members.5 The impact was incredibly widespread. A pastor in Louisiana committed suicide, allegedly due to his distress over being outed in the release of information.6 The hacking and data release also produced several lawsuits, one of which was a class action

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3. See Grandoni, supra note 1.

4. Id.


seeking over one half-billion dollars in damages from the companies that operated the website.\footnote{7}

The hacking and release of information generated copious public discussion about Internet privacy and adultery, but also no doubt led to some very uncomfortable private conversations between Ashley Madison members and their spouses. Some of the excuses probably consisted of such time-honored pleas like, “It’s not you, it’s me,” or “I wanted to shake up our marriage and thought this would make it better for both of us.” Of all the potential justifications offered by Ashley Madison members, it is highly improbable that anyone said, “Well, the First Amendment of the United States Constitution secures my right to commit adultery.” Such a defense would be unlikely to yield much empathy in the marital household and would also seem to run well beyond the penumbras of privacy first constitutionalized by the United States Supreme Court in its 1968 landmark decision of \textit{Griswold v. Connecticut}.\footnote{8} Yet in June 2014, The Honorable John O. Craig, a Superior Court Judge in Winston-Salem, North Carolina, issued a ruling that validated the constitutional excuse legally, even if it would be unlikely to pacify the anger of one’s spouse domestically.

On February 12, 2014, Angela Rothrock, a resident of Kernersville, North Carolina, sued Ms. Sherry Cooke, a Winston-Salem resident, for civil damages.\footnote{9} Ms. Rothrock used the torts of alienation of affections and criminal conversation as the basis of her right to recover.\footnote{10} In theory, both torts protect and preserve the rights of plaintiffs to interests that are germane to the marital relationship.\footnote{11} Alienation of affection claims enforce the plaintiff’s exclusive right to receive the love, society, and companionship offered by his/her spouse.\footnote{12} Similarly, criminal conversation lawsuits preserve the plaintiff’s exclusive right to sexual intercourse with his/her spouse.\footnote{13} The defendants in such claims are generally not the unfaithful spouses, but the parties with whom they are accused of engaging in infidelity. While now

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\item \footnote{8} \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965).
\item \footnote{9} Rothrock v. Cooke, No. 14CVS870, 2014 WL 2973066, at *2 (N.C. Super. June 11, 2014) In this article, I will only make reference to the Superior Court’s opinion, its order, and some of the allegations in the complaint. The allegations have never been proven in court, so nothing I say here will serve as either confirmation or denial of the existence of an affair between the two principal parties involved in the case.
\item \footnote{10} Id. at *2.
\item \footnote{11} CHARLES E. DAYE AND MARK W. MORRIS, \textit{NORTH CAROLINA LAW OF TORTS} § 11.21 (2d ed. 1999).
\item \footnote{12} Id. § 11.22.2.
\item \footnote{13} Id. § 11.21.
\end{itemize}}
discredited in most of the country, North Carolina still recognizes these torts as viable.\(^\text{14}\)

Because Ms. Rothrock believed the separation from her husband was causally connected to his alleged affair with Ms. Cooke, Mrs. Rothrock sued Ms. Cooke in Forsyth County Superior Court.\(^\text{15}\) Nearly four months after Mrs. Rothrock filed her complaint, the court dismissed the lawsuit.\(^\text{16}\) The court’s order contended that North Carolina’s alienation of affections and criminal conversation laws improperly infringed upon the rights guaranteed to Ms. Cooke by the First and Fourteenth Amendments of the United States Constitution.\(^\text{17}\) The Court claimed the enforcement of North Carolina’s alienation and criminal conversation laws improperly curbed speech “by not setting clear limits on what speech is actionable and what is protected,” without ever producing the compelling state interest required by the U.S. Supreme Court.\(^\text{18}\) Moreover, the Court wrote that a person’s “right to engage in private consensual sexual intercourse involving another consenting adult or to engage in private consensual communication with another adult constitutes a fundamental liberty that is deeply-rooted in our Nation’s history.”\(^\text{19}\)

This article will use the *Rothrock* decision to discuss the ramifications of using the Constitution — specifically the First Amendment — to invalidate the torts of alienation of affections and criminal conversation. Part I will offer a brief history of each tort, while Part II provides an overview of the intersection between First Amendment law and tort law. Part III will analyze the *Rothrock* court’s order, and explain why its usage of the First Amendment as a tool of dismissal was imprecise at a minimum, and at maximum, it was activist.

**PART I: ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION: AN OVERVIEW**

A. The Historical Origins of Both Torts

Alienation of affections and criminal conversation claims are popularly known as “heartbalm” torts.\(^\text{20}\) These theories of recovery are both designed

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16. *Id.* at *2*, *16–17*.
17. *Id.* at *5–16*.
18. *Id.* at *8*.
19. *Id.* at *15* (citing Lawrence v. Texas, 539 U.S. 558, 574 (2003)).
20. The term “heart-balm” has been used to describe torts like alienation of affections and criminal conversation because they attempt to ease the pain that accompanies the discovery of an affair or loss of a relationship. See WILLIAM P. STATSKY, FAMILY LAW: THE ESSENTIALS 422 (3d ed. 2014).
to deter third parties from interfering with an existing marital relationship.\(^{21}\)

It was not always quite so simple though; the roots of alienation and criminal conversation are buried in a long, messy convergence of issues touching upon religion, property, and spousal roles in one’s marital relationship.

Both alienation and criminal conversation share the foundation of being rooted in the master-servant relationship, which allowed compensation for the master based on interference with the property interest he held in his servant.\(^{22}\) Similarly, at common law, the husband was deemed to own the wife’s body and mind.\(^{23}\) The husband was thought to be the “superior” of the spouses because the wife, as the lesser of the two parties and with no identified legal existence, could not suffer a legal loss or injury.\(^{24}\) This legal doctrine soon joined forces with religious dogma to create a firmer pathway for tort liability for adulterous behavior. This was not always the case.

The Seventh Commandment in the Bible’s teachings states that one shall not covet the wife of one’s neighbor.\(^{25}\) Since the Bible’s teachings still dominate the landscape of much of American life, it might be surprising to know that some of the cultures, which laid the groundwork for contemporary American attitudes, did not always value monogamous relationships.\(^{26}\) Before 600 A.D., the early Britons likely shared common wives within kinship groups.\(^{27}\) Then, Germanic tribes invaded the Britons, and because the conquering tribes did favor monogamy, this led to re-evaluation of the notion of adultery.\(^{28}\) Subsequently, the spread of Christianity helped cement the belief that one’s sexual conduct also had significant moral overtones.\(^{29}\) By the advent of the Ninth Century, adultery was seen not only as a crime against one’s husband, but a sin against God as well.\(^{30}\) While the King’s Court was typically where legal disagreements were addressed, the church

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27. Id. at 202–03.
28. Id. at 202–203. There were some pre-Biblical cultures that applied sanctions to extramarital relationships. Some cultures only precluded men from having sex with the wives of other men, while others banned all forms of extramarital relationships. See also Shauna M. Deans, Note, *The Forgotten Side of the Battlefield in America’s War on Infidelity: A Call for the Revamping, Revising, and Reworking of Criminal Conversation and Alienation of Affections*, 53 HOW. L.J. 377, 384 (2010).
30. Weinstein, supra note 26, at 207.
also initially held primary jurisdiction over marital disputes.\textsuperscript{31} The church maintained that legal standing until around the Eighteenth Century, but gradually yielded this terrain to the King’s Court, primarily because the church lacked the inherent authority to enforce the orders it issued when addressing marital problems.\textsuperscript{32}

The common-law path for what we now know as alienation of affections began to take shape in the 1300s when husbands received the right to bring an action for trespass on the case for actions emanating from adultery committed by their wives.\textsuperscript{33} The writ of abduction became one of the early forerunners to what would become alienation. Abduction allowed husbands to recover for the improper taking of their chattel (the wife), but this claim required an allegation of physical violence to remove the matter from the jurisdiction of the church.\textsuperscript{34} If there was no force involved and the facts of the ‘abduction’ were based centrally on the wife merely leaving her husband, the King’s Court yielded jurisdiction to the church.\textsuperscript{35} Another early claim was called ravishment, which allowed the husband to recover from the defendant if the wife was physically removed from the home of her spouse.\textsuperscript{36} Abduction and ravishment eventually became disfavored, and husbands began using the claim of enticement to recover from third parties who either influenced or assisted the wife from remaining separate from the husband.\textsuperscript{37} The basis of recovery for enticement paralleled that of the Statute of Labourers, which was designed to protect one’s labor force due to the employee shortage created by the Plague.\textsuperscript{38} Perhaps because of its origins in the master-servant context, enticement claims required no proof of either a loss of affection or sexual intercourse between the third party and the wife.\textsuperscript{39}

\textsuperscript{31} See Mischler, supra note 29, at 22. If the church’s resolution was deemed insufficient, Norman reforms of the Twelfth Century brought to Saxon/Briton criminal law allowed for the cuckolded spouse to engage in what one might call ‘self-help,’ i.e., the taking of blood vengeance upon the party who had seduced his wife. This practice dated back to the tribes who conquered the territory centuries before, who regularly allowed the wronged ‘husband’ to kill the offender. For a good discussion of more of the history of adultery, please see Mischler, supra note 29, at 19–23.


\textsuperscript{33} Weinstein, supra note 26, at 212–13; see also Deans, supra note 28, at 386.

\textsuperscript{34} Deans, supra note 28, at 386.

\textsuperscript{35} Weinstein, supra note 26, at 214–15.

\textsuperscript{36} PROSSER, supra note 22, at 917.

\textsuperscript{37} Id.

\textsuperscript{38} Weinstein, supra note 26, at 216–17.

The United States also had many of its early laws in this area shaped by historical views of religion and property. America, however, went one step beyond the claim of enticement when its courts began recognizing claims that were not focused on the damages that resembled those in respondeat superior contexts, but instead emanated from the rights of the husband that were tied to his domestic relationship with his wife. This set of rights comprised his exclusive rights to her services, companionship, affection, and sexual intimacy, more commonly known as "consortium" rights. In 1866, a New York Supreme Court recognized that men had the right to recover from third parties for damages inflicted to the marital relationship that alienated the love of the wife from her husband. Eventually, every state in the nation except Louisiana subsequently adopted alienation of affections as a cognizable claim.

Criminal conversation is often a companion tort to alienation of affections because it allows the plaintiff to sue the defendant for engaging in sexual intercourse with his/her spouse. Like alienation, criminal conversation's roots date back to very early tort law. Some Germanic tribes like the Teutons took a particularly harsh view of adultery, allowing husbands who caught their wives in the act with paramours to castrate them. Thankfully, this practice was not widespread, but criminal conversation did eventually become another path for a husband to state a monetary claim for damages against the interfering party. Unlike alienation, however, criminal conversation is much more like strict liability in that it does not assess the intent of the parties involved or whether the extramarital activity resulted in subsequent strife in the marriage. All that is needed is proof that sex occurred between a married spouse and the defendant during the time of the marriage.

Alienation of affections began to gradually fall from grace for several reasons. Initially, a wife had no rights to protect against the illegal interference with her marital relationship because she could not sue anyone in her

41. Deans, supra note 28, at 387.
42. PROSSER, supra note 22, at 916.
44. See Moulin v. Monteleone, 115 So. 447 (La. 1927) (holding that no cause of action existed for alienation of affection because women should not be considered the 'chattel' of their husbands).
47. See, e.g., Freund, supra note 46, at 1254 n.5.
own name. As society moved into the Twentieth Century, states began enacting Married Women’s Property Acts, giving women the right to own property and receive compensation for their own personal injuries. Extending equitable legal treatment to women weakened one of the principal rationales behind the doctrine of alienation of affection — that interference with the husband’s “property” needed to be compensated. As the status of women began to trend upward in the public domain, it was easier for critics to argue that alienation of affection suits were out of step with a society that had begun increasingly recognizing the contributions of women. This led to several states eliminating alienation of affections, as well as criminal conversation, as causes of action in the 1930s.

Societal attitudes about divorce also began to evolve. Prior to the Eighteenth Century, proving adultery was the only way to attain a divorce in England, meaning that unless the party could prove sexual intercourse with another, there was no way out of the marriage. Similarly in the United States, divorce was generally not available for parties if they could not prove misconduct on the part of their spouse, such as adultery, cruelty, desertion or bigamy. States gradually began allowing couples more latitude to justify the dissolution of the marriage. The concept of the now widely accepted “no-fault” divorce began to take hold across the country, allowing parties to leave marriage without the prerequisite of divulging the underlying cause of the split. This made divorce more accessible and less stigmatizing for people — specifically women — whose marriages were unsuccessful. The wider acceptance of divorce, less fear about the blackmail that sometimes played a role in alienation claims, relaxed attitudes about sexuality and the growth of the women’s movement collectively chipped away at the country’s alienation laws in more and more state legislatures.

49. PROSSER, supra note 22, at 916.
52. Id. at 418.
53. Id. at 418–19.
56. Id. at 206.
57. Everett, supra note 54, at 1764–65. For example, in North Carolina, one needs only to be separated from their spouse for one year before becoming eligible for a no-fault divorce. N.C. GEN. STAT. § 50-6 (2009).
58. Graham, supra note 51, at 421.
59. Id. at 408.
such to nearly eliminate it from the American landscape. Today, North Carolina is one of seven states — Hawaii, Illinois, Mississippi, New Mexico, South Dakota, and Utah — that still allows spouses to recover for alienation of affections damages. Criminal conversation is still actionable in North Carolina, but it too is now widely disfavored.

B. North Carolina’s Relationship with Both Torts

North Carolina’s relationship with alienation of affections can likely be traced to 1849. In *Barbee v. Armstead*, the North Carolina Supreme Court allowed a husband to recover from the defendant under an enticement theory. Such claims gradually evolved into something very similar to what alienation lawsuits look like today, the ability of the husband to recover for interference with the exclusive right to his wife’s society and affection. North Carolina was among the states which adopted some form of the aforementioned Married Women’s Property Acts in the Twentieth Century, giving women an independent legal existence. After the passage of these laws, North Carolina chose to extend alienation-based rights to women instead of dismantling alienation of affections as a mode of recovery. Today, any plaintiff can state a *prima facie* case for alienation of affections by showing that: 1) a marriage of genuine love and affection between husband and wife; 2) the love was alienated and destroyed by the defendant; and 3) the defendant’s wrongful, malicious acts alienated the plaintiff from his/her spouse. Conversely, criminal conversation plaintiffs must only prove the unfaithful spouse had a sexual relationship with the defendant during the time the couple was married. While sex is a necessary element to criminal

60. Id. at 425–26.
63. See, e.g., Knight v. Woodfield, 50 So.3d 995 (Miss. 2011).
64. The New Mexico Court of Appeals has expressed its “disfavor” with alienation of affections, a view that the New Mexico Supreme Court has suggested it supports. But the New Mexico Supreme Court has not yet abolished the tort. See Padwa v. Hadley, 981 P.2d 1234, 1240 (N.M. Ct. App. 1999); see also Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 610 (N.M. 1991).
68. Id. at 533–36.
conversation claims, sex between the defendant and the cheating spouse is not a prerequisite to alienation claims.\(^7\)

Both torts have drawn their share of criticism, in large part because their historical origins are grounded in notions of gender inequity that are now overwhelmingly disfavored.\(^7\) Both, however, have proven to be quite resilient in North Carolina, where they have survived several unsuccessful challenges. In 1984, the North Carolina Court of Appeals abolished both alienation of affections and criminal conversation in *Cannon v. Miller*.\(^7\) Citing the nationwide trend toward abolition and each tort's inability to never break "free from their property-based origins,"\(^7\) the Court of Appeals struck both torts from our jurisprudence. However, the North Carolina Supreme Court subsequently overruled the Court of Appeals in no uncertain terms:

It appearing that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court. It is therefore ordered that the petition for discretionary review is allowed for the sole purpose of vacating the decision of the Court of Appeals purporting to abolish the Causes of action for Alienation of Affections and Criminal Conversation.\(^7\)

The North Carolina General Assembly has also made several attempts to outlaw alienation of affections and criminal conversation during the 2000s, only to be defeated in the end.\(^7\) In 2009, the legislature did narrow the scope of recovery for alienation and criminal conversation somewhat by limiting the claim to extramarital conduct that took place before the husband and wife separated.\(^8\) Section 52-13 of the North Carolina General Statutes now mandates that "no act of the defendant shall give rise to a cause of action for alienation or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate, with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent."\(^8\) The statute also now requires that an action cannot "be com-

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7. DAYE & MORRIS, supra note 11, at 104.
75. See McDougal, supra note 39, at 181.
76. *Cannon*, 322 S.E.2d at 780.
77. Id. at 801.
80. N.C. GEN. STAT. § 52-13(a) (2009).
81. Id. This limitation was likely passed in response to the North Carolina Court of Appeals decision in *Jones v. Skelley*, where the court allowed a plaintiff's alienation of affections claim to go forward even if the parties were legally separated at the time of the claim. See *Jones v. Skelley*, 673 S.E.2d 385 (N.C. Ct. App. 2009); see also McCutchen v. McCutchen, 624 S.E.2d 620 (N.C. 2006).
menced more than three years from the last act of the defendant giving rise to the action." 82

While the passage of § 52-13 offered some hope among observers that perhaps the legislature was on its way to abolishing the two torts, this appears unlikely. The claims are justified in a number of ways. Contemporary alienation claims are deemed necessary to "maintain family solidarity and preserve marital harmony by deterring wrongful interference," 83 and therefore reinforce values that are germane to the foundation of marriage. 84 While it is difficult to prove how many people refrain from entering adulterous relationships because of the presence of the law, one can contend the laws provide a deterrent to such behavior by allowing compensation for damages resulting from the indisputably harmful impact infidelity can have on an entire family. 85

Another factor that makes North Carolina unique in its ongoing recognition of the torts lies with the sheer volume of alienation claims that are filed each year. In many states, alienation of affections laws were very rarely used by plaintiffs as a means of recovery. 86 When they were used, the publicity of alienation of affections recoveries was often outsized. 87 This helped create the public perception that too many undeserving plaintiffs were receiving lottery-like damages for private matters that should have been settled outside the court system. 88 In actuality, the converse was often true — there were not large numbers of lawsuits alleging alienation and/or criminal conversation in a number of states that had them on the books. 89 Their lack of social popularity made it politically expedient for some states to eliminate them without fear of recourse. But in North Carolina, some of the more recent data covering the years 2000-2007 estimated that an average of 230 alienation claims were filed in North Carolina each year — twice the amount of product liability lawsuits. 90 The judgments for some of these

82. See § 52-13(b). This language is also probably in response to a case, this time in the matter of Misenheimer v. Burris, where the North Carolina Supreme Court held that the claim accrues only when the affair should have been discovered as opposed to when it actually occurred. See Misenheimer v. Burris, 637 S.E.2d 173 (N.C. 2006). While the language clearly attempts to resolve such problems, it is thorny as to what comprises the last act in an alienation claim. Is it the last e-mail or text message? Is it the last act of sexual intercourse between the parties? Is it the last movie or dinner they attended together? It is difficult to know what should carry the day.
84. Id.
85. Id.
86. See Graham, supra note 51, at 409.
87. Id. at 414-15.
88. Id.
89. Id.
cases can be quite large, making the survival of the claims of economic interest to some factions of lawyers within the state. Moreover, legislators who vote to abolish it risk — albeit unfairly — being painted as anti-family or pro-adultery in future political campaigns. Against that economic and political backdrop, it is likely these claims will remain a viable part of North Carolina law for the foreseeable future.

PART II: THE INTERSECTION BETWEEN TORT LAW AND THE FIRST AMENDMENT

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is arguable that no other phrase in the Constitution has generated more debate, discussion, and passion than the forty-five words that comprise the First Amendment. The words summarize the individual pillars that have come to be viewed as the foundation of our nation’s theoretical commitment to honoring and respecting the differences that may exist among and within our citizenry. It is therefore at least a little ironic that the journey of the First Amendment to its contemporary significance, particularly as a protector of free speech, was actually quite circuitous.

The central premise behind the drafting of the original Constitution was to unify the thirteen original colonies, all independent entities, under one federal government. The priorities for the new document were two-fold: 1) to provide an infrastructure that could govern the country effectively and consistently, and 2) to insure that the states reserved enough power so as to lessen the possibility of tyranny with the new government. The drafters believed there did not need to be much language devoted to individual rights within the original version because they had taken great pains to insure that the federal government was one of limited power and authority. But when the drafters sent the proposed Constitution to each colony for ratification, the initial feedback suggested it did not go far enough to protect the rights of individuals. In Massachusetts, New York, and Virginia — all

91. For a brief summary of some of the state’s larger alienation and criminal conversation awards, see Cary & Scudder, supra note 79, at 3.
92. See McDougal, supra note 39, at 187.
93. U.S. CONST., amend. I.
95. Id. at 46-47.
of which had especially loud opponents of the new proposed government — each colony addressed the concern with a dual vote, tying the vote to ratify the Constitution with a call for the first federal Congress to approve more precise, less esoteric limits on the new government. Heeding the wishes of the colonies, the First Congress approved ten amendments for addition to the Constitution in 1791, now known as the Bill of Rights.

Because of the initial concerns about the reach of the federal government, one would assume that the rights espoused in the First Amendment would have been debated in such a way that their parameters would be clearly defined and understood upon passage. That, however, did not appear to be the case; there was little to glean from the discussion in the new House as to what freedom of speech actually meant. Similarly, the Senate kept no records of its debates at the time, either. One can properly surmise, however, that the free speech rights espoused in the First Amendment were no doubt linked to America’s historical ties to England, which heavily restrained one’s freedom of expression. For example, no one was allowed to publish or print material unless they received a license that could only be granted by the English government, a practice that lasted until the mid-to-late 1690s. While licensing was not prevalent in the United States at the time of the First Amendment’s adoption, the practice probably strongly influenced viewpoints at the time, especially given the concerns about potential tyranny from within the new government.

Additionally, any critique of the English government constituted a violation of what were called seditious libel laws, which criminalized such actions under the justification that the King should be immune to public critique. Clearly, the throttling of one’s right to speak generally, and more specifically, to be able to publicly and critically assess government policy, played a significant role in the shaping of how American governments created the infrastructure to both balance the rights of the individual with the state’s ability to regulate certain behaviors for the good of society. Again, it would seem more than a little ironic that the United States had its own excursions with seditious libel laws. Prior to the Constitution’s passage, several colonies adopted their own seditious libel prohibitions. Then in...
1798, with the country on the brink of a war with the French, the Federalist Party, in power at the time, found enough votes to pass The Sedition Act of 1798.\(^\text{106}\) The statute allowed the government to imprison individuals for up to two years if they wrote, printed, published or said anything that could be deemed to be false or malicious writing against the government, either house of Congress, or the President.\(^\text{107}\) Several individuals were prosecuted and convicted under the Act.\(^\text{108}\) While the United States Supreme Court never directly addressed whether the Act violated the First Amendment, its passage became a political issue.\(^\text{109}\) The prosecutions were unpopular with large swaths of the public, and contributed to Thomas Jefferson being elected as President and the Federalists' loss of control in the Congress.\(^\text{110}\) More importantly, it awakened Americans to the importance and need of having a society with both a free speech and a free press.\(^\text{111}\)

Meanwhile, tort law was long deemed to be the province of the states, placing civil liability for personal injury beyond the protections of the First Amendment.\(^\text{112}\) All this changed forever on March 29, 1960, when an advertisement ran in *The New York Times*.\(^\text{113}\) The full-page ad, entitled “Heed Their Rising Voices,” attempted to bring attention to the African-American struggle for civil rights in the Deep South.\(^\text{114}\) Specifically, the ad’s goals were three-fold: a) to raise money for the legal defense of Rev. Martin Luther King Jr., b) to support the student movement, and c) to keep the political pressure on the government to take measures to secure the African-American right to vote.\(^\text{115}\) The advertisement contained ten paragraphs in all, but some of its language was factually inaccurate. For example, the ad claimed that “truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus,”\(^\text{116}\) and that Dr. King had been arrested seven times.\(^\text{117}\) The police, while a presence on the campus at times, had never ringed the campus, and Dr. King had only been arrested four times,
not seven. There was no question of fact as to the inaccuracies in the advertisement.

L.B. Sullivan, a City Commissioner in Montgomery Ala., who supervised the local police and fire departments, sued four African-American clergy members and The New York Times for libel. Though he was not mentioned by name in the advertisement, Mr. Sullivan alleged that the ad defamed him because its reference to the term “police” could be reasonably understood to be “of and concerning” him personally. Mr. Sullivan further contended that several of the matters referenced by the ad concerning mistreatment of Dr. King, specifically a pair of bombings of his home, occurred before Mr. Sullivan became a city commissioner, as did three of King’s four arrests. A jury in Alabama awarded Mr. Sullivan damages in the amount of $500,000 against all of the defendants, a decision the Alabama Supreme Court subsequently affirmed in 1962. The fact that the U.S. Supreme Court might even hear the case was somewhat dubious at the time. The possibility of the Court accepting it for review meant addressing a state court decision reviewing a state law, which the Court typically did not do without the prospect of a constitutional issue. Since no prior award of damages for libel had ever been overturned on the grounds that it violated the First Amendment, it seemed questionable the Court might do so with the Sullivan case. But attorneys for The New York Times contended the Alabama ruling essentially immunized public officials, and therefore government, from critique and therefore stifled the free political discussion the First Amendment was designed to protect. Even though the “speech” in question came in the form of an editorial advertisement, it too, said the attorneys, was covered under the First Amendment.

The Supreme Court, of course, took the case and overturned the Alabama Supreme Court decision, changing the landscape of First Amendment law permanently. While the Court had not previously addressed the First Amendment in this specific context, Justice William Brennan pointed to several cases in his opinion — Stromberg v. California, Bridges v. Cali-
fornia,\textsuperscript{129} and Whitney v. California,\textsuperscript{130} — to support the premise that the right to free speech regarding public officials deserved considerable latitude.\textsuperscript{131} Brennan said:

Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials ... The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.\textsuperscript{132}

The Court held the First Amendment’s freedom of speech and press guarantees may limit the damages in libel claims brought by public officials who seek to recover against critics for what can be deemed official conduct.\textsuperscript{133} Critics of officials did not possess absolute immunity, as was suggested by Justice Hugo Black’s concurring opinion in New York Times,\textsuperscript{134} but did conclude that officials would have to prove “actual malice” when suing for defamation.\textsuperscript{135} In other words, public officials could not successfully recover for defamation unless he or she could show the statements were made with knowledge of their falsity or in reckless disregard of the truth.\textsuperscript{136}

The Court then spent the next two decades defining and redefining the boundaries with which the First Amendment should interact with defamation law. In Curtis Publishing v. Butts,\textsuperscript{137} the Court extended the actual malice standard to public figures. In that matter, the Court found that an athletic director and former football coach at the University of Georgia, while not a public official, still generated enough interest from the public to warrant the same heightened actual malice standard enunciated in New York Times in order to recover damages for libel.\textsuperscript{138} Seven years after Curtis Publishing, the Court was faced with the question of whether the standard of actual malice should apply to a private individual suing an entity with First Amendment protection. In Gertz v. Robert Welch, Inc.,\textsuperscript{139} the Court determined that the plaintiff, an Illinois attorney, was not a public figure, so he should not be held to the same actual malice standard to defeat the constitutional privilege. The Court did not like analogizing private individuals with

\textsuperscript{129} Bridges v. California, 314 U.S. 252 (1941).
\textsuperscript{130} Whitney v. California, 214 U.S. 357 (1927).
\textsuperscript{132} Id. at 270–71.
\textsuperscript{133} Id. at 283.
\textsuperscript{134} Id. at 293.
\textsuperscript{135} Id. at 279–80.
\textsuperscript{136} Id.
\textsuperscript{137} Curtis Publ’g Co. v. Butts, 388 U.S. 130, 165 (1967).
\textsuperscript{138} Id. at 154–55.
public figures for many reasons, chief among them that private parties lacked the same opportunity to "counteract false statements," were "more vulnerable to injury," and did not inject themselves into the public eye as did public officials and public figures." The Court then said states could not impose strict liability as a standard of recovery for private figures, but were free to instead define what the accompanying standard of liability was to be for publishers with constitutional privileges. The Court did, however, include an important caveat, adding that if states chose to make the standard less than actual malice, plaintiffs could only recover actual damages as opposed to punitive damages. But the Court subsequently held in *Dun & Bradstreet v. Greenmoss Builders* that if the defamatory matter at issue was about a private citizen/corporation, but did not relate to a matter of public concern, punitive damages could be collected by the plaintiff in that context.

After *New York Times*, the Court also had ample opportunity to assess the First Amendment in other tort contexts. In *Time, Inc. v. Hill*, the plaintiff argued that the defendant, which published *Life Magazine*, took too much creative license in a fictional reenactment of a story related to the kidnapping of the plaintiff and his family. The plaintiff sued under a New York state law that was tantamount to a theory of false light in an invasion of privacy claim. The plaintiff acknowledged a First Amendment privilege, but nonetheless argued that an actual malice standard should not apply because the plaintiff and his family had been involuntarily placed in the public eye. Attorneys for *Time* countered with the contention that the subject was protected by the First Amendment due to the legitimate news interest concerning the ordeal that led to the reenactment. The Court agreed, finding that any liability on the part of the defendant could not be assessed without the plaintiff showing that the publication was either knowingly false or published with reckless disregard, extending *New York Times* to the plaintiff's false light claim.

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140. *Id.* at 344.
141. *Id.* at 347-48.
142. *Id.* at 348-49.
144. *Id.* at 759-61.
146. *Id.* at 378-79.
147. *Id.*
148. *Id.* at 390-91.
149. *Id.* at 378-79.
150. *Id.* at 394-96; *see also* *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (overturning damages award against weekly newspaper on First Amendment grounds after newspaper accidentally disclosed name of rape victim, supplanting negligence *per se* claim that resembled public disclosure of private facts privacy theory).
Twenty-one years after *Time, Inc., v. Hill*, the Court heard a matter involving the Rev. Jerry Falwell, a prominent minister who sued *Hustler Magazine* over its distasteful representation of Falwell in one of the magazine’s advertisements.¹⁵¹ Falwell sued under a theory of intentional infliction of emotional distress, and argued the lower court’s jury award should stand despite the First Amendment argument because he was arguing emotional harm more so than reputational harm.¹⁵² The Court did not agree, unanimously finding that the outrageous nature of the ad merely displayed political speech of a different form and was therefore protected by the First Amendment.¹⁵³ In order for Falwell, a public figure, to recover for emotional distress, he too would have to prove actual malice, just as the plaintiff did in *Curtis Publishing* and *Hill*.¹⁵⁴

There is clearly history to suggest the First Amendment’s protections could potentially extend to other tort claims like alienation of affections and criminal conversation. At least one author has found a number of similarities between alienation of affections claims and defamation claims, arguing that they share:

> [T]he same societal purposes and have essentially protected the same individual rights. Each action developed, in the common law, as a hedge against violating the stability of society. Both actions represented the occurrence of a tort which would produce high emotions and which ran the risks of personal vengeance. In order to avoid acts of physical violence, these incidents became actionable in the courts.

Commonality on a few public policy grounds though does not justify commonality in protection as it pertains to the First Amendment. Perhaps if alienation claims were more likely to involve one friend facing civil liability for talking another friend into divorcing his or her spouse, there would then be a much straighter line to First Amendment protection, provided such speech could be deemed a matter of public concern. Most alienation claims, however, do not look like that. They instead involve exactly the kind of alleged behavior that led Ms. Rothrock to sue Ms. Cooke, conduct that has a much more spurious tie to any sort of First Amendment.

¹⁵². *Id.* at 52–53.
¹⁵³. *Id.* at 55–56.
¹⁵⁴. *Id.* at 56. The Court’s most recent discussion involving the overlap of tort law and the First Amendment in *Snyder v. Phelps*, discussed at length in the forthcoming section, is consistent with its line of cases spawned by *New York Times v. Sullivan*.
PART III: THE CONSTITUTIONALITY OF ALIENATION OF AFFECTIONS AND CRIMINAL CONVERSATION

Mrs. Rothrock sued Ms. Cooke for alienation of affection and criminal conversation in February 2014, asserting that Ms. Cooke intentionally interfered with the Rothrocks’ marital relationship. In March 2014, attorneys for Ms. Cooke filed a motion to dismiss the claim, which the Forsyth County Superior Court granted in June 2014. The crux of the Court’s rationale hinged on the fact that both torts violated the guarantees secured by the First Amendment of the U.S. Constitution, which are incorporated to the states through the Fourteenth Amendment. The order touched on many constitutional doctrines, ranging from one’s right to free association to one’s right to expressive conduct. The Court’s use of the First Amendment as its mechanism for mitigating the virility of alienation of affections and criminal conversation lacks exactness and should be reconsidered.

A. The “speech” at issue in Rothrock v. Cooke is on the fringes of what is typically protected by the First Amendment.

Much of the Rothrock opinion rests upon the premise that infidelity between two adults is protected speech, and because heart-balm torts like alienation and criminal conversation tend to punish this expression of intimacy, they must be unconstitutional. The U.S. Supreme Court has on many occasions held that expressive conduct is indeed worthy of First Amendment protection. The Court, however, has also just as clearly said that governments can regulate conduct-oriented speech. In United States v. O’Brien, the Court said:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

157. Id. at *2, *16.
158. Id.at *16.
159. Id. at *11.
160. Id. at *8–11.
161. See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that the wearing of black armbands by students to protest government policies in Vietnam was protected speech).
163. Id. at 377.
Therefore, if you have elements of speech and non-speech intertwined in one act, a government can regulate the conduct in question, provided its interest in doing so is important and only minimally burdens the speech at issue.\textsuperscript{164} Subsequently, the Court, in applying O'Brien to cases involving the burning of the American flag, clarified that if the regulation amounted to a content-based restriction, such a law would receive "the most exacting scrutiny,"\textsuperscript{165} i.e., the government must then prove the law is narrowly tailored to meet a compelling governmental interest.

The Rothrock order applied strict scrutiny and found North Carolina had no compelling state interest to justify its enforcement of alienation of affections and criminal conversation, so neither law could stand because they suppressed the fundamental right of free speech.\textsuperscript{166} On the whole though, the Court's assertions are too conclusory, and bypass some important guideposts that earmark typical First Amendment cases. This makes one's freedom of speech rights a flawed premise by which to reject both torts.

1. \textit{Adulterous conduct between two consenting individuals is unlikely to constitute speech of "public concern," potentially taking it outside of the realm of First Amendment protection.}

In Thornhill \textit{v. Alabama},\textsuperscript{167} Justice Frank Murphy said the freedom of speech guaranteed by the Constitution clearly "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."\textsuperscript{168} More recently, Chief Justice John Roberts echoed that sentiment in the case of Snyder \textit{v. Phelps},\textsuperscript{169} stating that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."\textsuperscript{170} Therefore, when assessing the breadth of one's First Amendment speech protections, it matters a great deal whether the speech or conduct at issue can be categorized as public speech or private speech.

In Snyder, the U.S. Supreme Court spent considerable time and energy in its opinion to the importance of this public/private speech delineation. The case involved the controversial Westboro Baptist Church of Topeka, Kansas. One of the church's fundamental tenets revolves around the premise that the United States' tolerance of homosexuality is deserving of God's

\begin{footnotes}
\footnotetext[164]{See also CHEMERINSKY, supra note 101, at 1099.}

\footnotetext[165]{Texas \textit{v. Johnson}, 491 U.S. 397, 412 (1989).}


\footnotetext[167]{Thornhill \textit{v. Alabama}, 310 U.S. 88, 101–02 (1940).}

\footnotetext[168]{Id. at 101–02.}

\footnotetext[169]{Snyder \textit{v. Phelps}, 131 S. Ct. 1207 (2011).}

\footnotetext[170]{Id. at 1215.}
\end{footnotes}
hatred and wrath. The church is particularly offended at the perceived lenience of the inclusion of gay and lesbian soldiers in the military. This has led congregation members to frequently voice Westboro’s displeasure of this policy by picketing and protesting at the military funerals of deceased soldiers. When Matthew Snyder, a solider in the Marine Corps, died in combat in Iraq, Westboro decided to protest during his memorial service by picketing at several locations, including public streets near the Maryland State House, the United States Naval Academy in Annapolis, Md., and roughly 1,000 feet from the church where the funeral was being held. At each location, members displayed signs that were both inflammatory and distasteful. None of the signs, however, mentioned Snyder by name. Members of the funeral procession passed the picket location, but never got closer than 200-300 feet from church members, and could apparently only see the tops of the picket signs. Snyder’s father saw coverage of the protests on television later that evening, and subsequently decided to sue Westboro in federal district court under a series of state tort theories, including intrusion upon seclusion and intentional infliction of emotional distress. A jury found Westboro liable for nearly $3 million in compensatory damages and another $8 million in punitive damages. Westboro appealed, claiming its speech was protected as a matter of law under the First Amendment.

In his majority opinion, Chief Justice Roberts offered two contexts he said were classic characteristics of speech that is of a public concern: 1) when the speech can be “fairly considered as relating to any matter of political, social, or other concern to the community,” or 2) when the speech is “a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public.” Moreover, when deciding whether speech is of a public or private concern, Roberts said the Court is required to assess the content, form, and context of the speech, measured by the entire record of the case.

171. Id. at 1213.
172. Id.
173. Id.
174. Id.
175. Id. One sign said “God Hates the USA/Thank God for 9/11.” Another said: “God Hates Fags.” Still another said, “Don’t Pray for the USA.”
176. Id.
177. Id.
178. Id. at 1213–14.
179. Id. at 1214. The trial court later reduced the punitive damages award.
180. Id.
181. Id. at 1216, (citing Connick v. Myers, 461 U.S. 138, 146 (1983)).
182. Id. (citing San Diego v. Roe, 543 U.S. 77, 83–84 (2004)).
183. Id. (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).
Against that backdrop, the Court concluded that Westboro’s First Amendment rights insulated it from civil liability in this context. Chief Justice Roberts found the signage to “fall short of refined social or political commentary,” but he said “the issues they highlight — the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy — are matters of public import.”184 The content of the signs spoke to broader interests of society at large, and through its choice of venues, the church clearly wanted to broadcast its message to vast amounts of people.185 Mr. Snyder had argued that because funerals were typically private affairs, the context for the speech had to make it speech of a private concern.186 Chief Justice Roberts disagreed, finding that “[t]he fact that Westboro spoke in connection with the funeral ... cannot by itself transform the nature of Westboro’s speech. Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society.”187 Therefore, the messages from Westboro’s church members and followers, delivered from locales where they had a legal right to be, cemented Westboro’s argument that its speech could be fairly categorized as relating to the political concerns necessary to make it public speech.

The standards enunciated by Chief Justice Roberts in answering the question of whether speech is of a public concern seem ill-suited to cover the alleged conduct of Mr. Rothrock and Ms. Cooke. Extramarital relationships take on many forms and characteristics. Some are intensely sexual in nature; others may involve no sexual intimacy at all.188 Parties who engage in extramarital relationships sometimes do so because they are not getting some set of emotional needs met in their marriage.189 The affair sometimes helps fulfill those needs, so discovery of such probably means the needs of the cheating spouse will no longer be met.190 Therefore, regardless of one’s rationale for being unfaithful, one of the common threads throughout such relationships is generally secrecy. According to Dr. Don-David Lusterman, the clandestine nature of infidelity is "part of the excitement of an affair. The danger of discovery can be as pulse-tingling as the new relationship

184. Id. at 1217.
185. Id.
186. Id.
187. Id.
189. An example of such would be the so-called “mid-life crisis,” which can often trigger infidelity. Id. at 23–24.
itself." So in most circumstances, there is usually little-to-no incentive to publicize one's infidelity. It is the epitome of private conduct, in content, form, and context.

Extramarital affairs as speech also do not stand up to examination under the other "public concern" criterion cited by Roberts' opinion: whether the speech can be deemed as relating to any matter of political, social or other concern to the community or if the speech can be deemed to be of legitimate news interest. Because infidelity is in some cases causally connected to separations and divorces, there is no doubt it has a societal impact. That, however, is wholly different from speech that presents a social or political concern to the community. Mr. Rothrock and Ms. Cooke's alleged behavior in a clandestine location is in no way analogous to the picket signs held by the Westboro Church members or the anti-war slogan etched into the jacket famously worn by Paul Cohen to protest the Vietnam War. There is no political or social concern expressed through the couple's behavior. While Chief Justice Roberts does mention "other concerns," when one measures the speech at issue within the content-form-context paradigm referenced in Snyder, it is dubious to think that infidelity between two private parties was one of the areas targeted for First Amendment protection.

The slightly stronger argument is that in some contexts, infidelity could bear some fruit as being of a legitimate news interest. For example in 2009 and 2010, there unquestionably was considerable news interest in the extramarital activity of Tiger Woods due to his prominence as one of the world's most famous athletes. His transgressions led to considerable media coverage, but that was due primarily to his status as one of history's best golfers. Similarly, in 2008, presidential candidate John Edwards created headlines for his affair with a campaign aide, which resulted in a pregnancy

\[191\] Lusterman, supra note 188, at 41.
\[194\] Mr. Cohen's jacket contained the words "F—k the Draft. Stop the War." Cohen was convicted under a California law that prohibited offensive conduct that disturbs the peace, and was sentenced to thirty days in jail. The U.S. Supreme Court overturned his conviction, holding that it violated Cohen's freedom of expression. See Cohen v. California, 405 U.S. 15 (1971).
\[195\] In explaining why the Court feels it permissible to bypass an analysis concerning the forum of the speech at issue, the Order itself concedes that it is safe to assume that the speech referenced by the alienation of affection "occurs in private areas, such as the home or bedroom." Rothrock v. Cooke, No. 14CVS870, 2014 WL 2973066, at *7 (N.C. Super. June 11, 2014).
and effectively ended what was a once promising political career. It is clear there will always be some community appetite for celebrity news of any sort, especially that involving adultery. Mr. Rothrock and Ms. Cooke, however, do not occupy the same public profile or standing as either Mr. Woods or Mr. Edwards. Absent some particularly tawdry detail or potential criminal activity, it is highly unlikely there would be anything about their circumstances that would merit any time on network television, nor would it yield a bevy of special reports or investigations. Whatever happened between Mr. Rothrock and Ms. Cooke was ostensibly a private matter between two private persons, making it much less likely to meet the “public concern” standards cited in Snyder.

2. Adultery should not qualify as a form of expressive speech that merits First Amendment protection.

Both alienation and criminal conversation often stem from one spouse being unfaithful to another. Criminal conversation liability punishes the physical act of sex with a married spouse. Sexual acts can also form the foundation of alienation liability, but at least in theory, an emotional affair that lacks physical intimacy can also possibly lead to liability in alienation claims. Either way, if one assumes the alleged intimate behavior in Rothrock does fall beneath the umbrella of “public concern,” there are still difficulties with the premise that this constitutes “expressive speech.”

The key inquiry in conduct-as-speech cases is two-fold: 1) Does the conduct at issue carry a present intent to convey a particular message, and 2) How great is the likelihood that the message would be understood by those who viewed it? The Rothrock Court concluded the alleged intimate behavior between Mr. Rothrock and Ms. Cooke expressed a “desire to be intimate with or display affection for one another. Moreover, when individuals engage in consensual sexual intercourse, a great likelihood exists that a reasonable person, when considering the conduct, would observe a ‘message’ of affection or intimacy.”

As a matter of course, it is very rational to accept that sexual expression can equate to expressive conduct. But that does not necessarily mean we

should leap to the presumption that all sexual expression is created equal, and therefore all sexual expression merits First Amendment protection. As a comparable, in *Barnes v. Glen Theatre*, the Supreme Court held that Indiana’s prohibition on nude dancing in bars did not violate the First Amendment. In a concurring opinion, Justice David Souter said there had to be a distinction made between dancing in a performance setting and what he described as “general” dancing. While performance dancing could clearly be deemed expressive, Justice Souter was uncertain as to whether dancing in general was expressive in the same manner. Therefore, according to Souter, two acts of dancing could perhaps even literally and figuratively involve the same steps, but their First Amendment protection — as well as the state’s ability to regulate such — was largely dependent upon context.

Sexual expression warrants the same type of distinction referenced by Justice Souter in *Barnes*. As a society, we do not view an act of sexual intimacy between a married couple in the same way we see a sexual act between a prostitute and a client, or intercourse between two 14-year-olds. Sexual intimacy between married spouses and intimacy between parties who are engaging in infidelity is likely to be viewed through very different social prisms. In each case, the act(s) itself is largely the same, but the context of the behavior is the very personification of the phrase “polar opposite.” If we accept this basic premise as accurate, can it really then be determined at the pleading stage exactly what message either Mr. Rothrock or Ms. Cooke had the present intent to communicate with any real level of certainty? Is the alleged intimacy a statement about Mr. Rothrock’s feelings about his marriage? Was it meant to illustrate his love for Ms. Cooke? Or was it merely just a periodic sexual relationship that had nothing at all to do with affection or how he felt about his wife? When a member of the Ku Klux Klan burns a cross in his/her yard or on the property of another, there can be little doubt about the message he/she intends to convey, and who they intend to receive it. The same clarity of message cannot be assumed with conduct such as that alleged in *Rothrock*. In fact, given the clandestine nature of most adulterous relationships, it can reasonably be contended that the usual inherent desire for secrecy is illustrative of the wish that the cou-

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202. *Id.* at 581.
203. *Id.* at 584–86.
204. *Id.*
ple has neither the intent nor the desire to communicate a public message at all.

Some behaviors — the burning of a draft card, burning a flag, or the antidraft message emblazoned on the jacket of Mr. Cohen — are classic examples of conduct-oriented speech. But in *O'Brien*, the Supreme Court cautioned that it "cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea."\(^\text{206}\) All we really know in *Rothrock* is what is alleged from the plaintiff — that her husband purportedly had an affair with the defendant that included a sexual relationship. The intent behind what the message of such a relationship meant to communicate is, at best, unclear. Against such a backdrop, it is difficult to imagine universal acceptance of the supposition that adultery should be deemed expressive conduct worthy of First Amendment protection.

**B. North Carolina has a definitive, compelling interest in regulating marriage among its citizens which extends to prohibition of third-party interference with marital relationships.**

If one were to accept the concept of adultery as constitutionally protected expressive speech, fundamental concerns about the soundness of the *Rothrock* opinion would still exist when exploring the next step of the analysis. In such cases, North Carolina must show the suppression of speech furthers an important governmental interest, and the law creates only incidental restrictions on conduct that do not go beyond what is needed to further that government interest.\(^\text{207}\) The enforcement of alienation and criminal conversation laws sufficiently meets this standard.

In its discussion of whether a viable state interest exists in such matters, the *Rothrock* court leaned heavily on language used by the North Carolina Court of Appeals in the 2005 case of *State v. Whiteley*.\(^\text{208}\) In *Whiteley*, an alleged sexual assault victim accused the defendant of committing several sexual acts without her consent, acts classified under state law as crimes against nature.\(^\text{209}\) The defendant argued the sexual activity had been consensual, but a jury rejected his assertions and found him guilty.\(^\text{210}\) Earlier in 2005, however, the U.S. Supreme Court in *Lawrence v. Texas* ruled that a state statute prohibiting "deviate" sexual intercourse with a member of the

\(^{208}\) State v. Whiteley, 616 S.E.2d 576 (2005).
\(^{209}\) Id. at 577-78.
\(^{210}\) Id. at 578.
same sex violated the Due Process Clause. The Supreme Court said the Constitution protected liberty interests, which were tied to individual choices related to intimate, physical relationships involving consenting adults. The state law at issue in Whiteley, N.C. Gen. Stat. § 14-177, said that if "any person shall commit a crime against nature, with mankind or beast, he shall be punished as a Class I felon." On appeal, the defendant in Whiteley argued the Lawrence holding invalidated the application of state law to his case on constitutional grounds, because the sex acts in question were consensual. The Court of Appeals agreed and vacated his conviction. The Court found no evidence existed to counter the defendant’s contention that this was consensual sex between two adults, making the criminalization of acts listed under § 14-277 unconstitutional under the facts in Whiteley.

The Rothrock court cemented much of the foundation of its decision on the holdings of Lawrence and Whiteley. First, its order accurately stated that regulation of “particular sexual acts is permissible when legitimate state interests justify intrusion into the personal and private life of an individual, but is not permissible when such regulation intrudes upon personal relations with no legitimate state interest." The Rothrock court then went on to say though that Whiteley recognized such a state interest in criminal matters involving minors, coercive conduct, non-consensual conduct, public conduct, and prostitution. Because alienation of affections and criminal conversation claims did not involve such conduct, the Rothrock court concluded there could be no "substantial, important, or even legitimate state interest” related to the enforcement of either tort. The difficulty with this language is that nowhere in Whiteley does the Court of Appeals affirmatively state the above-referenced list is all-inclusive, or exhaustive of any and every state interest North Carolina may possess in the prosecution of such claims. This conclusion conveniently overlooks another vital state interest possessed by North Carolina — its interest in regulating marriage.

There cannot be doubt that North Carolina has an interest in the existing marital relationships within its borders, and would therefore have considerable autonomy to regulate in that arena. Once people marry, they may

212. Id. at 578.
213. Whiteley, 616 S.E.2d. at 579 (citing N.C. GEN. STAT. § 14-177).
214. Whiteley, 616 S.E.2d. at 578.
215. Id. at 583.
216. Id. at 582–83.
219. Id. at *9–10.
220. See generally Baity v. Cranfill, 91 N.C. 293 (1884).
subsequently incur obligations that go well beyond the promises they make to one another on the day of the wedding. Among the largest of those obligations may include the joint acquisition of property and/or the decision to have children. These are interests that co-exist with state interests. Should the marriage then fail for any reason, the state of North Carolina would have a concerted interest in making certain neither party simply walks away from those commitments, so the state will not inherit the duties and obligations of the couple. It therefore makes perfect sense that North Carolina would have equitable distribution laws, child support laws, and alimony provisions.

To its credit, the Rothrock court never goes so far as to say North Carolina has no interest in regulating marriage per se. It instead says that its interest in such cannot justify either “alienation of affections” suppression of a right as fundamental as free speech or “punishing affection or intimacy expressed through consensual sexual conduct that takes place in private.” But it is simply too short-sighted to say that alienation and criminal conversation cannot adequately serve as tools to protect the state’s interest in the marital relationship of its citizens. To the contrary, while the torts originate from a different era, alienation and criminal conversation in this context aligns fairly comfortably with other torts in other contexts that serve as a viable deterrent to third parties to justify the state’s interest.

For example, assume for a moment that Taylor Swift, currently one of popular music’s most prominent artists, signed a contract with Time Warner Cable Arena in Charlotte to perform two shows on back-to-back nights in July. Officials at PNC Bank Arena in Raleigh find out about the deal, and approach Ms. Swift’s handlers. They tell them PNC Bank will double Ms. Swift’s contract compensation and give her a higher percentage of the gate receipts if she agrees to perform on the same two nights in Raleigh. Ms. Swift readily agrees and decides to perform in Raleigh instead of Charlotte. The officials at Time Warner Arena would rightly be furious, especially if they had already sold tickets and started promoting the shows.

While Time Warner officials could state a garden-variety breach of contract claim against Ms. Swift, North Carolina law also allows Time Warner officials to sue PNC Bank for tortiously interfering with their contract with Ms. Swift. In order to recover, the law requires plaintiffs to show: 1) that a valid contract existed between the plaintiff and the third party; 2) the de-

fendant had knowledge of the contract; 3) the defendant intentionally induced the third person not to perform the contract; 4) the defendant’s actions were not justified; and 5) the defendant’s acts resulted in actual damage to the plaintiff. If Time Warner officials were to file such a lawsuit, it would be generally accepted without much in the way of pushback or fervor. Time Warner had an existing relationship with Ms. Swift. PNC Bank, despite knowledge of the contract, still enticed Ms. Swift to break it. When she did so, Time Warner officials were left with a potential loss of thousands of dollars and a loss of its reputation and standing among factions of the ticket-buying public. This would not have happened without the interference by PNC Bank. The functionality of the tort in this context is fundamental to society’s vested interest in protecting the integrity of our contractual relationships, which in turn steadies our commercial activity by giving it predictability and order. Accordingly, this tort is available to plaintiffs in North Carolina, as well as most of the country.

It may be easy for some to reject any comparison between a marital relationship and business relationship, but conceptually, they are not all that dissimilar in very substantive ways. Marriage is essentially a social contract between parties. Spouses exchange vows and promises and are typically dependent upon one another to execute those promises. Such contracts are in no way uniform; what works for one couple may be disastrous for another. But ultimately, if the couple reaches an accord that creates a functioning, healthy relationship, one can easily contend there is a contract that is reliant upon the mutual promises and benefits derived by each party. Just as Time Warner’s viable, healthy relationship with Ms. Swift at the time of the initial contract was upended by the actions of PNC Bank officials, the non-cheating spouse can similarly have his or her relationship turned inside out by the actions of a third party. If the defendant is civilly responsible for the harm in the business context, it does not seem fanciful to contend that the defendant should also be responsible for the harm in a marital context. North Carolina has an interest in protecting both sets of relationships.

The historical background and the modern-day application of both torts share a common bond: each is designed to protect one’s marital relationship. The General Assembly, in its refusal to enact legislation abolishing

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227. See also McMillian, supra note 21, at 1993...
230. See also McMillian, supra note 21, at 2017.
the torts, believes the laws have enough of a connection to the state’s interest in regulating marriage to keep them around. When the North Carolina Court of Appeals decided the state needed to join the parade of other states that walked away from alienation and criminal conversation, the North Carolina Supreme Court abruptly reversed the decision. Those two acts underscore the fact that more than one thing can be true at the same time. It is true that someone who lives in North Carolina who goes to the trouble of clandestinely establishing an account with a dating website like Ashley Madison is unlikely to be deterred by the existence of either tort. It is also true though that an unsuccessful deterrent effect does not invalidate its validity as a tool of regulation. Every state has laws related to drinking and driving. Yet North Carolina would never repeal any of its drunk driving laws merely because they fail as a complete deterrent for some citizens who routinely violate those laws every day. Even if the deterrent effect on infidelity is unexceptional, that does not mean the torts are unsustainable to support a state’s interest in regulating marriage. Neither law has ever cited the suppression of the speech of state residents as its primary goal. To the degree that alienation and criminal conversation’s continued existence impacts one’s free speech rights (presuming such rights exist in the first place), such an impact is negligible, allowing their enforcement to withstand constitutional scrutiny.

C. North Carolina’s enforcement of alienation of affections and criminal conversation is not tantamount to a content-based restriction.

One of the fundamental tenets of the First Amendment’s free speech protections is that governments should not have the ability to prohibit or preclude messages or content with which it disagrees. The U.S. Supreme Court has consistently said the First Amendment is “hostile” to most content-oriented regulation, even if government attempts to show neutrality by precluding discussion of an entire subject. Content-based restrictions on speech receive strict judicial scrutiny when assessing the law’s constitutionality, requiring the government to prove that the law in question is narrowly tailored to serve a compelling governmental interest.

The Rothrock court also touched on this framework in its order. It concluded that alienation claims “obviously constitute(s) a content-based pro-

233. Content-based restrictions may, however, be constitutional if for example the law attempts to regulate areas like child pornography or other speech unprotected by the First Amendment. See, e.g., Burson v. Freeman, 504 U.S. 191 (1992).
hition on speech, because determining whether the defendant’s speech resulted in the loss of spousal love and affection necessarily requires investigating the meaning of the defendant’s speech.\textsuperscript{234} Once it asserted that the speech was content-based, it reiterated one of the major themes throughout its order — that no compelling state interest existed that justified suppressing the fundamental rights tied speech generated by the expressive conduct depicted in extramarital affairs.\textsuperscript{235}

Even if one assumes that speech protections could somehow extend to infidelity, both assertions still lack precision, primarily because of the manner in which both claims arise. The court’s statement that alienation claims comprise content-based prohibitions would make sense in the exceedingly rare alienation case where Best Friend tells Husband that staying in his marriage is a bad idea, because his Wife continually disrespects him. If the Husband was to follow Best Friend’s urgings and leave the home, then Wife could, in theory, sue Best Friend for alienation. If a jury or court was then to impose civil liability upon Best Friend, it could be argued Best Friend would be liable merely for expressing his opinion that Husband should leave the household. If one accepts the premise that this is speech that falls beneath the umbrella of First Amendment protection, imposing liability would indeed look like a content-based restriction.

This, however, was not the case in \textit{Rothrock}, nor is it the case in the overwhelming number of alienation claims. The \textit{Rothrock} lawsuit originated from the same circumstances that nearly all alienation claims do — from alleged extramarital conduct between a spouse and a third party. Without a firmer tie to content, one is left to use the faulty premise that infidelity merits protection as expressive conduct, and therefore triggers a strict scrutiny analysis. It is a connection that is tenuous at best. And again, even if you could somehow get there from here, a state’s interest in regulating marital relationships is still compelling enough to infringe upon the individual rights recognized by the \textit{Rothrock} court.

\textbf{CONCLUSION}

Our society has seen the institution of marriage evolve considerably over time. It was once inconceivable that individuals of different races could get married in the United States, a social taboo that perished legally with the Supreme Court’s holding in \textit{Loving v. Virginia}.\textsuperscript{236} It was perhaps even less probable that couples of the same sex would ever secure the right to legally

\begin{itemize}
\item \textsuperscript{235} \textit{Id. at *8}.
\item \textsuperscript{236} \textit{Loving v. Virginia}, 388 U.S. 1, 2 (1967).
\end{itemize}
marry, but with the Court’s recent 5-4 decision in *Obergefell v. Hodges*, that, too, is now a reality. Regardless of one’s feelings about the extension of these rights, or perhaps even the institution itself, finding common ground on some basic issues about marriage is still easily attainable.

First, wives are no longer seen under the law as the chattel of their husbands. Such a viewpoint is now rightfully dismissed as antiquated, sexist, and unrefined. Second, adultery is still, by and large, viewed as a bad thing. We certainly live in a much more sexually progressive society than we did at the time the torts of alienation of affection and criminal conversation originated. The fact remains, however, that the aftershocks, which accompany the discovery of an affair, can devastate the marital relationship and forever alter the foundation of a family. This is the principal reason adulterous behavior is still judged negatively in many corners of society. So what happens when an arm of government is faced with the dilemma of enforcing a law like alienation of affection when sizable factions of its society see its origins as archaic? Should the law be invalidated due to the obsolete rationale that serves as its foundation, or should the pendulum instead swing toward allowing government the latitude to protect the state’s identifiable interest by any means necessary?

One can safely conclude that the *Rothrock* court was influenced by the former, moreso than the latter in reaching its final decision, but the order contained notable gaps. The court never fully explained why adultery in the form of a sex act is analogous to content-based speech or expressive speech, nor did it distinguish between adultery and sex between consenting adults who are not married. Had the court focused its reasons for invalidating the laws in a way that aligns more closely with the theory forwarded by the petitioners in *Lawrence v. Texas* — that all individuals are guaranteed the right of individual autonomy when engaging in certain intimacies — the opinion stands on slightly firmer ground. But without a more substantive tie to content or expression, the underpinnings of the court’s findings are too specious to support its larger conclusions.

Even if one was to concede to the premise that adultery can indeed serve as a form of speech, the Supreme Court has consistently held that government can regulate that expression if it furthers an important government

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240. See also Volokh, *supra* note 239.
interest that is unrelated to suppressing speech and only incidentally restricts freedom. There can be no doubt that North Carolina, like any state, has a substantial interest in the institution of marriage, but the order finding Mrs. Rothrock's lawsuit to be unconstitutional was largely dismissive of the utility of alienation and criminal conversation as tools used in support of the state's interest in regulating marriage. To date, the North Carolina General Assembly and our appellate courts have decided that laws related to the deterrence of extramarital behavior are connected enough to the state's interest in regulating marriage that they do not yet need to be jettisoned. It is debatable as to whether alienation of affections and criminal conversation may serve as the proper vehicles for such regulation, but it simply cannot be said the state's interest in regulating marriage should yield to one's "right" to engage in an extramarital relationship. Even if such a right exists, our tort laws covering this area would serve as little more than an incidental restriction in the larger picture of the state's interest in regulating marriage. The laws can, and should, survive First Amendment scrutiny.

While alienation of affection and criminal conversation should be deemed constitutional, this conclusion should not necessarily serve as a ringing endorsement of either tort. The outdated origins of each tort are difficult to stomach as viable in contemporary society. North Carolina already has a civil tool that addresses adultery in that if one spouse has been unfaithful to another, it can be a factor courts may use in assessing the amount and duration of alimony awards. In theory, the stated rationale for keeping the torts as viable is the protection of the marital relationship. The facts in these cases, however, will always produce the strong likelihood that anger, hurt, and betrayal will be the driving force behind such lawsuits, lending itself to the possibility of abuse in the actual practice of litigating these claims. Still, it seems short-sighted to improperly inject the First Amendment into this already convoluted equation. Hopefully, if and when North Carolina's appellate courts have opportunity to address the matter, they can at least restore some constitutional stability to an area already rife with complication.