Notes

THE QUESTIONABLE CONSTITUTIONALITY OF CURTAILING CUCKOLDING: ALIENATION-OF-AFFECTION AND CRIMINAL-CONVERSATION TORTS

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ABSTRACT

What can you do if your husband or wife cheats on you? Go to a marriage counselor? Seek a divorce? Sue the marital interloper for millions of dollars in damages? The third option is still available in some states through actions euphemistically titled "alienation of affection" and "criminal conversation." This Note tackles their constitutionality in light of the Supreme Court's growing body of jurisprudence dealing with intimate relations and marital status. Put simply, it attempts to answer the question: Is there a constitutional right to commit adultery? After exploring both the First and Fourteenth Amendments as avenues for establishing this right, this Note explains how states could tailor these torts to pass constitutional scrutiny. It also discusses specific concerns regarding matters of marital choices raised by the Supreme Court's recent decision in Obergefell v. Hodges*. Though there is no definite answer, this Note covers as much ground as possible to see if states have any room to constitutionally curtail cuckolding.*

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INTRODUCTION

An overwhelming majority of Americans find adultery morally unacceptable.[1] Adultery can impose emotional tolls on families, cause financial problems, and lead to costly divorces. However, even these costs can pale in comparison to the tort liability facing the adulterous spouse's paramour in states where the torts of alienation of affection and criminal conversation still exist.[2] These actions allow a wronged spouse to recover damages from the marital interloper,[3] even capturing the dalliances of celebrities including the Vanderbilts[4] and professional golfer John Daly.[5] Scholars have noted that these torts raise serious policy questions.[6] The more fundamental legal question is whether they can withstand a constitutional challenge.

Although these torts may at first seem to be a laughable vestige of a bygone era, both have very real consequences for defendants obligated to pay millions of dollars in damages.[7] These seven-figure judgments do not stem from just a few rogue juries; judges also hand down million-dollar damages awards.[8] These awards often withstand appellate review and as recently as 2014 a state appellate court

1. Frank Newport & Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx [http://perma.cc/KZ5A-YH5P].

2. These judgments are often in the millions of dollars and can force the defendants into bankruptcy. Cullen Browder, *NC One of Seven States that Makes Cheaters Pay*, WRAL.COM (Apr. 29, 2014), http://www.wral.com/nc-one-of-seven-states-that-makes-cheaters-pay/13599861 [http://perma.cc/4E2H-RGZ7]. For the states that retain these actions, see *infra* notes 32–37, 42–45, and accompanying text.

3. *See infra* Part I.

4. *See infra* note 62.

5. Randy Wallace, *Alienation of Affection Case with John Daly Headed Back to Court*, RANDYWALLACE (Feb. 11, 2015), https://randywallace.wordpress.com/2015/02/11/alienation-of-affection-case-with-john-daly-headed-back-to-court [http://perma.cc/ER6Z-7TCW].

6. *See, e.g.*, Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163, 180–88 (1998) (analyzing policy justifications behind the two torts).

7. *See, e.g.*, Lance McMillian, *Adultery As Tort*, 90 N.C. L. REV. 1987, 1990–91 (2012) (noting the recent seven-figure damage awards in North Carolina).

8. One North Carolina judge recently awarded approximately $5.8 million in damages in an alienation-of-affection and criminal-conversation case. Paul Thompson, *Spurned Wife Sues Her Husband's Mistress – and WINS $5.8 million*, DAILYMAIL.COM, (Sep. 9, 2010 7:47 AM), http://www.dailymail.co.uk/news/article-1310322/Spurned-wife-Lynn-Arcara-sues-husbands-mistress-WINS-3-75m.html [http://perma.cc/JXZ8-FKL5].

affirmed a verdict for $9 million in compensatory and punitive damages for alienation of affection and criminal conversation.[9]

Hutelmyer v. Cox[10] provides a glimpse into court review of these high damages,[11] with facts fit for a Lifetime special. In *Hutelmyer*, a wife brought alienation-of-affection and criminal-conversation claims against her ex-husband's paramour/secretary.[12] She received compensatory damages for alienation of affection based on emotional harm and consortium rights.[13] Articulating the basis for criminal-conversation compensatory damages, however, always presents an awkward challenge because someone can only commit the tort by engaging in sexual conduct.[14] Thus, affirming compensatory damages for criminal conversation implicitly validates the notion that one has a compensable property interest in one's spouse that is violated even if the adulterous spouse consents. Nonetheless, the court summarily affirmed the compensatory damages and danced around the uncomfortable implications by stating that "the measure of damages is incapable of precise computation."[15] The court also affirmed the punitive damages for alienation of affection because of the public nature of the adulterous relationship and the paramour's knowledge of the husband's marriage.[16] The court sustained the punitive damages for criminal conversation based on nothing more than the conduct required to establish the tort.[17]

Given the obvious lack of guiding principles when dealing with love affairs, it may not be shocking that punitive damages bear little to no relation to the compensatory damages.[18] In one case, the North Carolina Court of Appeals affirmed damages for alienation of affection and criminal conversation "award[ing] $1.00 in

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9. Shackelford v. Lundquist, No. COA13-960, 2014 WL 1791267, at *2, *7 (N.C. Ct. App. May 6, 2014), *appeal denied*, 762 S.E.2d 460 (N.C. 2014) (mem.).

10. Hutelmyer v. Cox, 514 S.E.2d 554 (N.C. Ct. App. 1999).

11. *Id.* at 560–63.

12. *Id.* at 557–58.

13. *Id.* at 561.

14. *See infra* Part I.B.

15. *Hutelmyer*, 514 S.E.2d at 561 (citation omitted).

16. *Id.* at 560.

17. *Id.* ("[T]he same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages." (quoting Horner v. Byrnett, 511 S.E.2d 342, 345 (N.C. Ct. App. 1999))).

18. These damage awards themselves may raise constitutional concerns, a possibility I do not explore in this Note. For a discussion of these concerns, see *infra* notes 104–12 and accompanying text.

compensatory damages for alienation of affection and criminal conversation and $85,000.00 in punitive damages for criminal conversation."[19] The problems of excessive or disproportionate damages in these cases have plagued common-law courts for centuries.[20]

One pivotal question remains: Does the adulterer have a constitutional right to adultery?[21] This Note argues that Fourteenth Amendment substantive-due-process and First Amendment intimate-association precedent calls into question the constitutionality of these torts. It then suggests an alternate legal approach that would largely achieve these torts' goals within constitutional bounds. Although these torts present constitutional problems, civil recourse may not be constitutionally impermissible in all respects. A tort of marital interference could replace alienation of affection and criminal conversation, serving the same interests without running afoul of the Constitution. This may not require creating a new tort, but could be yet another court-engineered retooling[22] of the current tort frameworks. If this proposal is not—or cannot—be adopted in states retaining the actions, alienation of affection still has a high probability of passing constitutional scrutiny. But even if alienation of affection could stand as a claim, criminal conversation is likely unconstitutional.

This Note proceeds in five Parts. Part I outlines the two actions, including their historical roots. Part II locates the state action in these tort judgments, which makes them susceptible to constitutional analysis. Part III attempts to locate a possible constitutional right to adulterous sexual conduct or intimate relationships, pausing briefly to mention an argument for marriage as a contract waiving these rights. Part IV weighs the possible government interest in maintaining these actions against the mediums that these actions represent—assuming a

19. *Horner*, 511 S.E.2d at 344.

20. *See, e.g.*, Hewlett v. Cruchley, (1813) 128 Eng. Rep. 696, 698; 5 Taunt. 277, 281. ("Nevertheless it is now well acknowledged in all the courts of Westminster-hall, that whether in actions for *criminal conversation*, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury." (emphasis added)).

21. At least one North Carolina Superior Court judge does not think so. In *Rothrock v. Cooke*, No. 14CVS870, 2014 WL 2973066 (N.C. Super. Ct. June 11, 2014), the judge decided that alienation of affection and criminal conversation violated the First and Fourteenth Amendments of the U.S. Constitution. *Id.* at *10.

22. For a discussion of how courts revised the torts following the Married Women's Property Acts, see *infra* notes 70–81.

level of scrutiny somewhere above traditional rational-basis review, but below strict scrutiny. Part V discusses the complications raised by the Supreme Court's recent holding establishing same-sex marriage as a constitutional right.[23] Part V.A offers a way to conform the torts to the new ruling. And despite this Note's attempts to avoid policy discussions, Part V.B suggests that the Supreme Court's disentangling of state involvement from matters of marital choice might result in the total abolition of these torts.

I. ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION

A. Alienation of Affection

Although the formulation of the action can vary from state to state, in general "the essential elements of an action for alienation of affection are the marriage, the loss of affection or consortium, the wrongful and malicious conduct of the defendant, and a causal connection between such loss and such conduct."[24] The plaintiff need not prove an untroubled marriage, only that her spouse had *some* love or affection, and that it was lost "as a result of defendant's wrongdoing."[25] Nor must the plaintiff show intent to destroy the marriage on the part of the defendant—intent to engage in the extramarital affair is all that is required.[26] It is also of no legal consequence that other causes—spousal neglect, annoying in-laws, differing opinions on *Seinfeld*, and other serious issues—may have contributed to marital problems.[27] Moreover, courts exclude many defenses from alienation-of-affection actions.[28] Perhaps most bizarrely, the adulterous spouse's consent does not serve as a

23. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015). Now that marriage is a constitutionally defined right for all regardless of the gender of the spouse one chooses, differentiations between same-sex and opposite-sex marriage will no longer be necessary. Nevertheless, this Note retains the dichotomy to discuss implications for two torts based solely on the concept of marriage as between a man and a woman.

24. Bishop v. Glazener, 96 S.E.2d 870, 873 (N.C. 1957) (citations omitted).

25. Brown v. Hurley, 477 S.E.2d 234, 237 (N.C. Ct. App. 1996) (citation omitted).

26. *Bishop*, 96 S.E.2d at 873; *see also* Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 732 (2004) ("[Alienation of affections] did require intent but not a specific intent or conscious design to interfere with the existing marital relationship.").

27. *See Bishop*, 96 S.E.2d at 873 ("The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections.").

28. *See, e.g.*, McDougal, *supra* note 6, at 167 (discussing the defenses North Carolina courts exclude).

defense.[29] Furthermore, in some jurisdictions, the defendant's ignorance of her counterpart's marital status is not a defense.[30] In alienation-of-affection actions, the interference need not be sexual in nature, and—with some limited exceptions—a plaintiff can bring an action for alienation of affection against other third parties who merely proffer advice that contributes to the harm or dissolution of the marriage (so watch out, meddling in-laws).[31] Alienation of affection is still a viable[32] tort claim in five states: Mississippi,[33] Hawaii,[34] North Carolina,[35] South Dakota,[36] and Utah.[37]

B. Criminal Conversation

Unlike alienation of affection, criminal conversation requires only "actual marriage between the spouses and sexual intercourse between the defendant and the plaintiff's spouse during the coverture."[38] Adulterous sexual intercourse is the crux of the claim.[39]

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29. *Id.* at 166–67 ("[T]he fact that the spouse willingly entered into or even initiated the relationship does not negate the malice element."); Fitch v. Valentine, 959 So. 2d 1012, 1032 (Miss. 2007) (Dickinson, J., concurring) (noting that "consent was historically prohibited as a defense to alienation actions").

30. McDougal, *supra* note 6, at 166. *But see* Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978) (noting—in a case before the tort was abolished—that "[t]he only general defenses to an action for alienation of affections are plaintiff's consent, defendant's lack of knowledge of the existence of the marriage, and the statute of limitations").

31. Greenstein, *supra* note 26, at 732; McDougal, *supra* note 6, at 167–68.

32. The claim's status in New Mexico is uncertain. The New Mexico Supreme Court has not expressly abolished it, despite lower courts frequently expressing how the tort is inconsistent with New Mexico's public policy. *See, e.g.*, Padwa v. Hadley, 981 P.2d 1234, 1240 (N.M. Ct. App. 1999) ("[O]ur Supreme Court has not yet formally abandoned the doctrine . . . ."); Thompson v. Chapman, 600 P.2d 302, 304 (N.M. Ct. App. 1979) (noting the tort should be abolished as against public policy, but the appellate court does not have the power to do so).

33. *Fitch*, 959 So. 2d at 1020 ("[T]his Court declines the invitation to abolish the common law tort of alienation of affections in Mississippi.").

34. Although not exercised frequently, the action still appears to be viable in Hawaii. *See* Hunt v. Chang, 594 P.2d 118, 123 (Haw. 1979) ("The action for alienation of affections has not been abolished by statute in this jurisdiction.").

35. Brown v. Ellis, 678 S.E.2d 222, 224 (N.C. 2009) (exerting personal jurisdiction over a California defendant in a suit for alienation of affection and criminal conversation).

36. State Farm Fire & Cas. Co. v. Harbert, 741 N.W.2d 228, 234 (S.D. 2007) (holding that alienation of affection is a cause of action under South Dakota law).

37. Heiner v. Simpson, 23 P.3d 1041, 1043 (Utah 2001) (holding that the plaintiff could bring a claim for alienation of affection as a matter of law).

38. Sebastian v. Kluttz, 170 S.E.2d 104, 109 (N.C. Ct. App. 1969).

39. Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. L. 365, 367 (2012). An interesting question is what counts as "sexual intercourse" for the tort of criminal conversation. The question is salient for plaintiffs who wish to bring a criminal-conversation claim where the

Criminal conversation does not include an intent element and operates as a strict-liability tort.[40] With the exception of the statute of limitations, the only defense to criminal conversation is approval from the nonadulterous spouse before the intercourse.[41] Criminal conversation is still a viable tort claim in four states: Hawaii,[42] Kansas,[43] Maine,[44] and North Carolina.[45]

C. History of the Torts

Alienation of affection and criminal conversation grew out of the belief that a husband owned his wife and was entitled to compensation for a lost property interest in her sexual fidelity.[46] The earliest English common-law system assumed this justification through the writs of ravishment and abduction, which "allowed the wife to be listed as one of the husband's chattels. He could use this writ to get his wife back if she was taken by force or left under her

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sexual conduct does not include penile-vaginal intercourse, *see, e.g.*, Blaylock v. Strecker, 724 S.W.2d 470, 471–72, 476 (Ark. 1987) (upholding application of alienation-of-affections tort where the wife had a relationship with another woman), or if a plaintiff brings a claim for criminal conversation in same-sex marriages, heretofore unchartered territory. Given that a tort restricting penile-vaginal intercourse would infringe the right outlined later in this paper, this question does not need to be reached. *See infra* Part III. For an interesting discussion on how courts handle this conundrum in the context of criminal-adultery statutes, see Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 117–19 (2011).

40. Caroline L. Batchelor, Comment, *Falling Out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. REV. 1910, 1937 (2009). This construction of criminal conversation as a strict-liability tort continues, despite Supreme Court dicta suggesting it should be otherwise. *See* Kawaauhau v. Geiger, 523 U.S. 57, 63 (1998) (dictum) (noting that a previous bankruptcy case "placed criminal conversation solidly within the traditional intentional tort category").

41. McDougal, *supra* note 6, at 169–70. Some states have statutorily constrained criminal-conversation actions if the conduct occurred when the spouses were separated. *See* N.C. GEN. STAT. § 52-13 (2013) (disallowing actions arising from conduct that occurred after separation).

42. Batchelor, *supra* note 40, at 1915 n.35 (identifying Hawaii as a jurisdiction where the tort is still viable). However, I could not find a more recent reported Hawaii case discussing criminal conversation than one dating back to 1896. Republic of Hawaii v. Kuhia, 10 Haw. 440, 441 (Haw. 1896).

43. KAN. STAT. ANN. § 60-428 (West 2005) (holding that there is no marital privilege for confidential communications in a cause of action for criminal conversation); *see also* Drennan v. Chalfant, 282 P.2d 442, 445 (Kan. 1955) (bringing a cause of action for criminal conversation).

44. Collett v. Bither, 262 A.2d 353, 357 (Me. 1970) (recognizing criminal conversation as a distinct tort apart from alienation of affection).

45. Brown v. Ellis, 678 S.E.2d 222, 224 (N.C. 2009) (exerting personal jurisdiction over a California defendant in a claim for alienation of affection and criminal conversation).

46. *See* Hoye v. Hoye, 824 S.W.2d 422, 424 (Ky. 1992) ("The Anglo-Saxons based actions against third parties involving tortious interference with the marriage relation in trespass.").

own freewill."[47] These early cases described the adulterous activity as the cuckolding paramour kidnapping the wife and robbing the husband, even when the underlying actions were consensual sex between the wife and paramour.[48]

Thirteenth-century English pleading and jurisdictional requirements necessitated these legal fictions. Ecclesiastical Courts had "exclusive jurisdiction over all matters relating to the marital relationships" and these courts could only administer social punishment.[49] For the husband to obtain monetary damages, he had to bring his case in the Royal Courts under the established writs of abduction or ravishment.[50] Under these writs, the wife was property; "[w]hen a man trespassed on another man's wife, the adulterer was obliged to pay damages for the injury as if he had taken the plaintiff's livestock or gone uninvited onto the plaintiff's land."[51]

It was not until the seventeenth century that true civil adultery actions took form.[52] The civil actions came from laws and actions regulating "master/servant relations, where a party would be held civilly liable for 'enticing' away a servant from the master or physically injuring the servant, leading to a loss of services."[53] This promoted the wife from chattel to indentured servant (Progress!).[54]

This new framework necessitated a new justification for compensation. Courts no longer imagined the compensable loss in an ownership interest in the wife, but instead in owning an exclusive right to her services.[55] Civil recovery for adultery found a new home

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47. Veeder v. Kennedy, 589 N.W.2d 610, 614 n.2 (S.D. 1999) (citation omitted).

48. LAURA HANFT KOROBKIN, CRIMINAL CONVERSATION: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 27–28 (1998).

49. *Id.* at 44.

50. *Id.* at 44–45.

51. Batchelor, *supra* note 40, at 1914.

52. KOROBKIN, *supra* note 48, at 49.

53. Greenstein, *supra* note 26, at 731.

54. Macfadzen v. Olivant, (1805) 102 Eng. Rep. 1335, 1336; 6 East 387, 389–90 ("No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant *per quod servitium amisit*; and so by a husband for a trespass and assault of this kind upon his wife *per quod consortium amisit*."). The husband's loss of a wife was also compared to a master's loss of a servant:

> [T]he action is not brought in respect of the harm done to the wife, but it is brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have this action, as the master shall have for the loss of his servant's service.

Guy v. Livesey, (1619) 79 Eng. Rep. 428, 428; Cro. Jac. 501, 502.

55. KOROBKIN, *supra* note 48, at 137.

in claims of criminal conversation and loss of consortium.[56] This legal shift also led to the development of a distinct action for enticement, which included action when no adultery took place.[57] Enticement "evolved into the modern day alienation of affections tort."[58] The mother-in-law became as accessible a target as the paramour.[59]

The United States inherited the English common-law system and adopted the English rationales for torts.[60] American courts also emphasized another reason for compensating the husband, namely the "genealogical uncertainty that might surround the offspring of his adulterous wife."[61] Cases of criminal conversation and alienation of affection abounded in nineteenth- and twentieth-century America, involving well-known public figures such as the Vanderbilts.[62] As in England, these actions were originally limited to husbands, and a wife had no right to civil redress against her husband's inamorata.[63]

Courts justified this limitation on many grounds, but most justifications fit under the broad moniker of the "natural and unchangeable conditions of husband and wife."[64] *Duffies v. Duffies*[65] echoes views prevalent at the end of nineteenth-century America. In denying women the right to bring an alienation-of-affection claim, the court highlighted the wife's domestic role and elevated women to a

56. *Id.* at 49.

57. *See, e.g.*, Winsmore v. Greenbank, (1745) 125 Eng. Rep. 1330, 1330–31; Willes 578, 578–79 (listing the elements of enticement and their application to the counts in this case).

58. Michele Crissman, Note, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 519 (2003).

59. LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 117 (2007).

60. *See, e.g.*, Tinker v. Colwell, 193 U.S. 473, 481 (1904) (discussing criminal conversation).

61. Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 407 (2008).

62. FRIEDMAN, *supra* note 59, at 117. Alfred Vanderbilt, millionaire playboy of the late nineteenth and early twentieth century, is best known for famously giving his life to save others during the infamous sinking of the *Lusitania*. What many do not know is that his chivalry did not extend to his marital choices. His first wife divorced him after he committed adultery aboard a private railway car with the also-married Mary Agnes O'Brien Ruiz, the wife of a Cuban diplomat in Washington. The divorce cost him $10 million dollars and considerable reputational costs when Ms. Ruiz committed suicide by poison after her husband left her. In 1911, Alfred married a divorcee, whose husband "threatened to sue Vanderbilt for alienation of affection, but the two later settled out of court." *Mr. Alfred Gwynne Vanderbilt*, THE LUSITANIA RESOURCE, http://www.rmslusitania.info/people/saloon/alfred-vanderbilt [http://perma.cc/0FXQ-5YV6].

63. *E.g.*, Doe v. Roe, 20 A. 83, 84 (Me. 1890) (refusing to extend the civil actions to wives).

64. Duffies v. Duffies, 45 N.W. 522, 525 (Wis. 1890).

65. Duffies v. Duffies, 45 N.W. 522 (Wis. 1890).

higher moral plane.[66] The husband meanwhile had understandable moral weaknesses because of his duty to provide for the family, and "[t]he wife had reason to expect all these things when she entered the marriage relation, and her right to his society has all these conditions, and is not the same in 'degree and value' as his right to hers."[67] This narrative of man's supposedly reasonable weakness explained the reasons women had no right to bring these actions. Moreover, judicial concerns for the floodgates of litigation demanded that this action be limited to male plaintiffs: "[A]ctions by the wife for the loss of his society would be numberless. This right of action in the wife would be the most fruitful source of litigation of any that can be thought of."[68]

Yet, not even these impenetrable arguments for judicial economy could slow the tide of mounting pressures for social equality in the late nineteenth and early twentieth century.[69] The same legal advocates who established the Married Women's Property Acts[70] pushed most states to allow women to bring both tort actions.[71] This extension led to uncertainty over the rationales underlying the torts, and "necessitated adjusting their rationale."[72] As one commentator suggested, "[i]f women were to be permitted to bring civil adultery cases against other women, a new set of story-making assumptions would have to be found that would recognize wives as speaking subjects with enforceable marital rights."[73]

Courts accomplished this shift by extending the right of marital services to women and by reframing the actions as protections for marital intimacy.[74] Courts claimed that the torts compensated emotional harm and loss of "spousal consortium."[75] The early English

66. *Id.* at 525.

67. *Id.*

68. *Id.*

69. *See* FRIEDMAN, *supra* note 59, at 119 ("The rule that a woman was not entitled to sue for alienation of affections or criminal conversation weakened considerably in the early twentieth century and even earlier in some states.").

70. The name given to a collection of state laws enacted at various times during the nineteenth and twentieth centuries that gave married women many rights including, "the power to sue and be sued, to conduct business in their own names, and to keep their own property." KOROBKIN, *supra* note 48, at 127; *see also* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2132–41 (1994) (discussing the history of the Acts and scholarship surrounding them).

71. McDougal, *supra* note 6, at 165.

72. Hoye v. Hoye, 824 S.W.2d 422, 424 (Ky. 1992).

73. KOROBKIN, *supra* note 48, at 138.

74. *Id.* at 139, 144; *see also supra* note 69 (describing this shift).

75. Graham, *supra* note 61, at 407.

shift from grounding these torts not in trespass, but instead in a loss of services, proved vital to their survival as a tool for both spouses.[76] A husband or wife surely could not sue in court to compel his or her spouse to offer affection and attention, but the spouse could sue if someone else violated that right to marital services.[77] After this shift, concerns over legitimacy of children,[78] inheritance, and other husband-centric concerns gave way to the idea that the two torts were a "means to preserve marital harmony by deterring wrongful interference."[79] These torts took on the new role as guardians of marriage as an institution. In the states where the actions remain, these justifications reign.[80] Not all courts and states found this adjustment persuasive though; the shaky precedential grounds combined with the torts' potential as a means of blackmail and extortion led many state legislatures and judiciaries to abolish the torts during the twentieth century.[81]

II. STATE ACTION: ANCHORING A CONSTITUTIONAL CHALLENGE

Torts must involve some kind of state action to be subject to constitutional analysis.[82] Three potential bases could explain how alienation of affection and criminal conversation constitute state action: 1) statutory enabling of the torts as state action, 2) Supreme Court precedent on private civil actions as state action, or 3) punitive damages as state action. Judicial enforcement of these torts represents state action on at least one of these theories.

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76. KOROBKIN, *supra* note 48, at 139.

77. *Id.* at 137.

78. Graham, *supra* note 61, at 407 ("This explanation obviously did not apply to criminal conversation suits brought by a wife, who could be pretty well assured that her children were her own."). Modern advances in paternity testing also belie any concern over legitimacy or inheritance questions. *See* RICHARD A. POSNER, SEX AND REASON 185 (1992) (discussing the effects "a cheap and infallible paternity test" would have on the harm caused by adultery).

79. Hoye v. Hoye, 824 S.W.2d 422, 424 (Ky. 1992) (citation omitted); *see also* Helsel v. Noellsch, 107 S.W.3d 231, 232 (Mo. 2003) (en banc) ("Modern courts came to justify suits for alienation of affection as a means of preserving marriage and the family." (citations omitted)).

80. *See* Graham, *supra* note 61, at 420 (discussing modern cases).

81. FRIEDMAN, *supra* note 59, at 210–11. Other factors likely contributed to the torts' demise as well. For an in-depth discussion of the abolition of criminal conversation, alienation of affection, and other related torts, see Graham, *supra* note 61, at 406–30.

82. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

A. Statutory State Action

In some states, statutes validate or define the common-law actions of alienation of affection and criminal conversation.[83] For instance, North Carolina General Statutes section 4-1 declares that the common law is in force within the state of North Carolina,[84] and North Carolina General Statutes section 52-13 defines the procedures in causes of action for alienation of affection and criminal conversation.[85] Statutes clearly constitute state action, and if they do not merit heightened constitutional scrutiny, it is for another reason.[86]

B. Tort Actions as State Action

As early as 1948, the Supreme Court held that judicial enforcement in civil lawsuits could constitute state action.[87] In *Shelley v. Kraemer*,[88] the Court found state action in court enforcement of private contract and proclaimed that "it has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch of the state government."[89]

The Court has similarly applied the state-action doctrine to judicial enforcement of tort awards.[90] In *New York Times Co v. Sullivan*,[91] the Supreme Court found state action in enforcement of a civil libel suit.[92] The Court explained that the civil context of the case and application of common law were not dispositive for the state-action inquiry: "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[93]

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83. *E.g.*, N.C. GEN. STAT. § 52-13 (2014).

84. *Id.* § 4-1.

85. *Id.* § 52-13.

86. One possible argument for this is that the statutes constitute only incidental burdens on the rights. *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1232–33 (1996) ("Although riddled with inconsistencies and exceptions, existing law in the areas of free speech, (statutory) free exercise of religion, and privacy appears to recognize that an incidental burden on a primary conduct right triggers some form of heightened scrutiny if, but only if, the burden is substantial.").

87. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

88. Shelley v. Kraemer, 334 U.S. 1 (1948).

89. *Id.* at 18.

90. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

91. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

92. *Id.* at 265.

93. *Id.* (citations omitted).

Defendants in tort actions can also allege violations of constitutional rights to escape tort liability.[94] Recently, in *Snyder v. Phelps*,[95] the Court held that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits."[96] The decision affirmed the Fourth Circuit's conclusion that "[i]t is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment."[97]

Although the tort jurisprudence concerning state action deals primarily with First Amendment free-speech claims, there is no reason it should not also apply when the tort action infringes Fourteenth Amendment substantive-due-process rights or First Amendment intimate-association rights.[98] In the speech-claims context, the Court has found state action because the common-law action executed by a judge has coercively transferred money from one party to another due to the content of their speech.[99] The state-action inquiry is separate from the constitutional-scrutiny analysis.[100]

At the very least, torts are more likely to be subject to constitutional analysis when they mirror criminal regulation: "What a State may not constitutionally bring about by means of a criminal

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94. *E.g.* Snyder v. Phelps, 562 U.S. 443, 461 (2011) (holding that the First Amendment shielded a religious group that picketed a funeral from tort liability); *see also* Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1086 (1990) ("[A] private party is not entitled to have its wishes enforced by the government when such enforcement would be unconstitutional. The private motivation in such a case ceases to be private when it becomes the basis for governmental action.").

95. Snyder v. Phelps, 562 U.S. 443 (2011).

96. *Id.* at 451.

97. Snyder v. Phelps, 580 F.3d 206, 217 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011) (citation omitted).

98. Civil liability extends otherwise private actions into the public sphere of state action. *See, e.g.*, Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 134 (2005) ("There is no room here for the idea that civil liability is something quite different from a fine; there is no purely private aspect.").

99. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (stating that civil liability counted as state action partially because potential civil liability was one thousand times greater than the amount of the fine under the criminal statute).

100. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 527 (1985) ("[F]inding state action does not necessarily mean that the private conduct is an impermissible violation of rights. Rather, it simply implies that the courts cannot dismiss cases for want of state action, but instead must reach the merits.").

statute is likewise beyond the reach of its civil law."[101] Thus, just as states cannot criminalize sexual conduct between consenting adults, the fear of tort damages cannot be used to dissuade people from engaging in that same conduct.[102]

C. Punitive Damages

State action is often present when courts grant punitive damages in tort.[103] In *BMW of North America, Inc. v. Gore*[104] and *State Farm Mutual Automobile Insurance Company v. Campbell*,[105] for example, the Supreme Court extended its due-process jurisprudence to encompass constraints on civil damages.[106] This precedent indicates that private suits for punitive damages could constitute state action. By giving private actors power to punish and deter—power usually reserved for the state—punitive damages exhibit state action.[107]

Some may argue that the constitutional analysis of punitive-damage awards in alienation of affection and criminal conversation should be limited to their possible excessiveness in light of the

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101. *Sullivan*, 376 U.S. at 277. The Court recognized that "[t]he fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* (citation omitted).

102. *See* John C. P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3, 6 n.9 (2004) ("[T]o the extent the result in a particular tort case suggests that the state judiciary is presiding over a system of tort law that is functioning for all intents and purposes as a regulatory scheme and no longer functioning as a system of private law, the state action requirement may also be met.").

103. Eric E. Walker, Note, *State Action and Punitive Damages: A New Twist on an Old Doctrine*, 38 CONN. L. REV. 833, 835 (2006) ("By approaching the recent punitive damage award cases from a state action perspective, we see a striking similarity between these recent decisions and the theory of state action expounded by the *Shelley* Court: that judicial decisions inject the unmistakable imprimatur of the state, thereby turning an otherwise private or civil action into a state action for purposes of constitutional review.").

104. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

105. State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408 (2003).

106. *See Gore*, 517 U.S. at 562 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." (citation omitted)); *see also State Farm*, 538 U.S. at 426 ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

107. *See, e.g.*, Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 4 (2004) ("The framework of punitive damages gives us the worst of both worlds: Pure public power is vested in the hands of purely private actors, but those private actors do not simultaneously assume the constitutional and political restrictions traditionally imposed on those who exercise pure public power.").

Gore/*State Farm* standard.[108] This again confuses the constitutional-infringement analysis with the state-action analysis.[109] If punitive damages constitute state action, they cannot infringe *any* constitutional rights without meeting a tailoring analysis.[110]

Under the above reasoning, the use of punitive damages in alienation-of-affection or criminal-conversation judgments constitutes state action and warrants constitutional review for its possible infringement of any constitutional rights and protections.[111] The state is directly regulating sexual conduct and intimate association by using them as either the starting point to begin enforcing punitive damages or as criteria in calculating punitive damages.[112]

While the state-action inquiry presents intriguing legal questions, a more in-depth analysis is outside the scope of this Note. For present purposes, it suffices to presume the presence of state action. That presumption in turn raises two main questions: First, do these torts infringe any constitutional rights?[113] Second, under a heightened level of scrutiny, is the state interest behind these tort actions sufficiently tailored or related to the means the states have selected through these tort actions?[114]

III. CONSTITUTIONAL RIGHT TO ADULTERY

The kind of conduct that can give rise to liability for alienation of affection or criminal conversation—usually sexual intercourse

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108. For that standard, see *State Farm*, 538 U.S. at 418 (citing *Gore*'s guideposts as the standard applied in the case).

109. *See supra* note 100.

110. By utilizing the power of the State to collect damages and punish conduct, ordinary people can infringe upon the constitutional rights of others, which should qualify as state action. *See* Shelley v. Kraemer, 334 U.S. 1, 18 (1948) ("[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials."); Redish & Mathews, *supra* note 107, at 53 ("[P]rivate plaintiffs seeking punitive damages are exercising what amounts to pure public power in a legally coercive manner.").

111. Again, this is because punitive damages give powers traditionally held by the State to private litigants. *See* Zipursky, *supra* note 98, at 170 ("[P]unitive damages give legal recognition to a *right to be punitive*.").

112. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) (describing libel law's punitive damages as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law" (quoting Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 70 (1963))).

113. *See infra* Part III.

114. *See infra* Part IV.

between consenting adults, and often in a long-term but unmarried relationship[115]—is also conduct that seems to fall within the ambit of at least two fundamental constitutional rights: First, especially post-*Lawrence v. Texas*,[116] the conduct may be protected by Fourteenth Amendment substantive due process.[117] Second, First Amendment intimate-associations rights might protect these relationships.[118] This Part delves into these two doctrines and attempts to articulate not a right to adultery per se, but instead a right to defined sexual conduct or intimate relationships.

The marital context of these torts does present situation-specific problems for constitutional-rights analysis. Marriage can theoretically be seen as a contract that waives constitutional rights.[119] But realizing that marriage cannot waive a constitutional right under established unconstitutional-conditions doctrine readily dispatches this complication.[120]

A. The Fourteenth Amendment

Fourteenth Amendment substantive due process protects additional rights beyond those guaranteed explicitly by the Bill of Rights.[121] Although the Court looks to historical practices to determine substantive-due-process rights in some contexts, it appears that this approach no longer applies in the context of sexual intimacy

115. Sexual intercourse has to occur for a viable claim of criminal conversation. It is hard to accurately generalize about what situations alienation-of-affection suits most often arise out of, given that most of the litigation occurs only in the lowest state courts. In my research, I found no recent cases in which alienation-of-affections suits were brought against someone who was not sexually active with the plaintiff's spouse. Legal practitioners seem to agree that these claims most often involve sex. *See, e.g.*, Julie Scelfo, *Heartbreak's Revenge*, NEWSWEEK (Dec. 3, 2006, 7:00 PM), http://www.newsweek.com/heartbreaks-revenge-105245 [http://perma.cc/5W8H-P3EF] (referencing comments from a former chair of the North Carolina Bar's family-law section about how people "file these claims as leverage in divorce and custody disputes"). For a discussion of the emerging trends in the application of doctrines governing facial and as-applied challenges, see Symposium, *The Roberts Court: Distinguishing As-Applied Versus Facial Challenges*, 36 HASTING CONST. L.Q. 563 (2009).

116. Lawrence v. Texas, 539 U.S. 558 (2003).

117. *See infra* Part III.A.

118. *See infra* Part III.B.

119. *See infra* Part III.C.

120. *See infra* Part III.C.

121. *See Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) (discussing Court precedent in this area).

and marriage.[122] These rights may be infringed if the state action affecting them does not exhibit a sufficiently close connection to a sufficiently important government purpose.[123]

Alienation-of-affection and criminal-conversation suits possibly infringe some right to sexual conduct announced by *Lawrence*. The case for the unconstitutionality of alienation-of-affection actions based solely on a Fourteenth Amendment right is not straightforward. Any facial Fourteenth Amendment challenge to the tort based on some kind of *Lawrence* right to sexual conduct must recognize that the claim is based on the "wrongful and malicious conduct of the defendant."[124] Any ruling on Fourteenth Amendment grounds would have to account for other actions—actions that may not be fundamental rights—which could establish the wrongful and malicious conduct necessary for an alienation-of-affection claim. In most instances, however, alienation-of-affections suits include sexually active adulterous relationships.[125] Considering criminal-conversation torts, the case for unconstitutionality is straightforward.[126]

1. *Piecing Together* Lawrence. In *Lawrence*, the Supreme Court invalidated a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.[127] The Court held that the Texas statute criminalizing sexual conduct "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[128] This decision overturned *Bowers v. Hardwick*,[129] wherein the Court had held that the Constitution did not protect sodomy.[130] The Court based its

122. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.").

123. *See Lawrence*, 539 U.S. at 593 (discussing Court precedent in this area).

124. *See* Bishop v. Glazener, 96 S.E.2d 870, 873 (N.C. 1957) (stating that although "[t]he wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections," most cases have this conduct as "the controlling or effective cause of alienation").

125. *See supra* note 115.

126. Criminal conversation requires sexual conduct. *See supra* Part I.B.

127. *Lawrence*, 539 U.S. at 564, 578.

128. *Id.* at 578.

129. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

130. *Id.* at 194.

holding in *Lawrence* on Fourteenth Amendment substantive due process,[131] even though it could have decided the case under the Fourteenth Amendment's Equal Protection Clause.[132] The Court did not announce any clear standard of review,[133] instead reaching its holding after discussing multiple substantive-due-process and equal-protection cases,[134] and concluding that the dissenting view in *Bowers* "should have been controlling."[135]

So, what exactly did *Lawrence* hold? *Lawrence* produced confusion, including among some of the most preeminent constitutional scholars.[136] Lower courts are split on whether *Lawrence* created a fundamental right to private sexual conduct between consenting adults.[137] Nonetheless, some principles seem reasonably clear. *Lawrence* does not include a right to pederasty, rape, sexual assault, bestiality, public sex, or prostitution.[138] A minimalist

131. *Lawrence*, 539 U.S. at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

132. *See id.* at 579 (O'Connor, J., concurring) (urging this approach).

133. *See id.* at 586 (Scalia, J., dissenting) (noting the lack of a standard of review); *see also* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004) (noting the lack of an explicit standard in *Lawrence*).

134. *Lawrence*, 539 U.S. at 564–77.

135. *Id.* at 578.

136. *See, e.g.*, Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 29 (describing the *Lawrence* opinion as "remarkably opaque").

137. *See* Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After* Lawrence, 79 FORDHAM L. REV. 605, 622 n.129 (2010) (discussing circuit split on the issue).

138. *See Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices . . . ."). To parse the language, "two adults" and "not involve minors" excludes pederasty; "full and mutual consent" and "situated in relationships where consent might not easily be refused" excludes rape and sexual assault; "two adults" excludes bestiality; and the last two are left to the discerning reader. Regulations on polygamy and bigamy need not be addressed at all here because they are not regulations on sexual activity, but instead are regulations on marital-relational status and would be analyzed under a similar structure to that of same-sex marriage. For a similar analysis, see Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 759–61 (2006). Luckily for Scalia, the majority frames its argument in terms of sexual activity between two adults and hence his hypothetical laws on masturbation appear safe. *See* Williams v. Pryor, 220 F. Supp. 2d 1257, 1296 (N.D. Ala. 2002) ("[M]asturbation is not now, nor has it ever been, a crime in any state of the Union.").

interpretation could find some circumscribed right to sexual conduct in *Lawrence* from the Court's enumeration of sexual practices *not* at issue in the case, combined with its analysis and statement that "the Due Process Clause gives them the full right to engage in their *conduct* without intervention of the government."[139]

2. Lawrence *Covers Extramarital Sex.* But neither party in *Lawrence* was married, leaving open the possibility that *Lawrence* did not extend to extramarital sexual conduct.[140] Some have argued that there is a meaningful distinction between rights practiced inside marriage and those rights practiced outside of marriage.[141] Others argue that *Lawrence* did not include the right to engage in sexual conduct that could "injure a person or harm an institution (like marriage) that the state may constitutionally protect."[142]

But this view overlooks the possible interpretation that the Court is protecting individual conduct;[143] specifically, an individual's right to autonomy in certain decisions.[144] Other Supreme Court precedent may illustrate that individuals indeed possess not only a right to engage in private, consensual sexual conduct, but also a right to do so regardless of marital status.[145] In *Griswold v. Connecticut*,[146] Justice

139. *Lawrence*, 539 U.S. at 578 (emphasis added); *see also* Tribe, *supra* note 133, at 1917 ("To search for the magic words proclaiming the right protected in *Lawrence* to be 'fundamental,' and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice.").

140. However, Justice Scalia lamented that laws regulating adultery would no longer survive rational-basis review. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

141. Justice Scalia himself suggested this view in a footnote of the plurality opinion of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a view that Justices O'Connor and Kennedy did not join despite joining the plurality opinion. *See id.* at 127 n.6 (using traditional marriage to define parental rights).

142. *E.g.*, Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1164 (2004).

143. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (citation omitted)); *see also* Bowers v. Hardwick, 478 U.S. 186, 205–06 (1986), *overruled by Lawrence*, 539 U.S. 558 (Blackmun, J., dissenting) ("In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.").

144. *See* Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 800–01 (2012) ("[S]ome choice rights essentially become rights to autonomy, whatever the labels—such as 'privacy'—under which they do business.").

145. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 778 (2011)

Goldberg posited in his concurrence that "if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid."[147] Noting this absurdity he further stated, "In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected."[148] Adopting this logic, forbidding sexual conduct outside the marriage because of perceived harm to the marriage is similar to a law "that mandates sex between spouses exactly five times weekly on grounds that anything less hurts the marriage. Either the sexual affairs of marriage are a matter of personal decision or they are not."[149] The Constitution does not protect some idealized concept of marriage, it protects fundamental rights.

Marriage cannot render fundamental rights more or less fundamental. In *Eisenstadt v. Baird*,[150] the Court protected "the right of the *individual*, married or single" to make decisions about contraception.[151] In *Roe v. Wade*,[152] the Court upheld the right of women to individually decide whether they wanted to have a child.[153] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[154] the Court held that the State could not abridge this right of individual choice by requiring a woman to inform her husband of the abortion beforehand.[155] This was so even though "[i]n many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair."[156] In *Obergefell v. Hodges*,[157] the

("*Lawrence* was ultimately not a group-based equality case about gays, but rather a universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their homes.").

146. Griswold v. Connecticut, 381 U.S. 479 (1965).

147. *Id.* at 497 (Goldberg, J., concurring).

148. *Id.*

149. Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 73 (1992) (discussing Goldberg's concurrence in *Griswold*). For an argument that there is also a correlative right not to engage in sexual intimacy, see Blocher, *supra* note 144, at 777 ("Presumably there is also a right not to be sexually intimate . . . .").

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

151. *Id.* at 453.

152. Roe v. Wade, 410 U.S. 113 (1973).

153. *Id.* at 166.

154. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

155. *Id.* at 893–95.

156. *Id.* at 892.

157. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Supreme Court held that the state could not abridge a person's right to choose a spouse of the same sex despite arguments that "allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages."[158] It is the ability to choose that grounds these rights in the Constitution.[159]

These precedents illustrate that the marital context alone cannot limit fundamental rights. Individuals can make decisions about contraception regardless of marital status.[160] Individuals can decide whether or not to bring a child—whom may be a product of an extramarital affair—into this world without the consent of their spouse.[161] Individuals can decide whom they want to marry even if others claim it will harm the institution of marriage.[162] Ultimately, marital status cannot suddenly negate the constitutionally granted power to make *individual* decisions in sexual matters.[163]

3. Lawrence *Covers Fleeting Relationships.* Furthermore, the *Lawrence* right is not simply about advancing meaningful relationships, but also "the substantive due process right to engage in consensual intimate conduct in the home free from government intrusion."[164] In *Reliable Consultants, Inc. v. Earle*,[165] the Fifth Circuit cited *Lawrence* to strike down a Texas statute that criminalized the

158. *Id.* at 2606.

159. *See, e.g.*, *id*. at 2599 ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy . . . . Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.").

160. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.").

161. *See Casey*, 505 U.S. at 895 (invalidating Pennsylvania's spousal notification provision).

162. *See Obergefell*, 135 S. Ct. at 2606–07 (rejecting the argument that "allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages").

163. *See* C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 472 (2004) ("[T]he Court's regulation of adult non-marital intimate relationships in *Eisenstadt* and *Lawrence* reveals a court willing to expand its notion of Constitutional protection of conduct within intimate adult relationships that do not fit within the blood, marriage and adoption triangle."); *see also* Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837, 853 (2006) ("Arguably, the decision of an individual to commit adultery is . . . sufficiently similar to other personal choices regarding marriage, family, procreation, contraception, and sexuality . . . .").

164. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).

165. Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

selling, advertising, giving, or lending of sex toys.[166] Although some have argued eloquently for the benefits of sex toys in furthering relationships,[167] it is undeniable that sex toys are commonly "used for masturbatory purposes"[168] that do not further meaningful relationships.[169] *Lawrence* cannot be about a right to sexual conduct only in committed relationships because the couple in *Lawrence* "w[as] not in a long-term committed relationship—if they were involved at all."[170] *Lawrence* spurns the idea that moral opprobrium alone justifies curtailing sexual conduct.

> The deeper answer is that *Lawrence*, in all its emotional, social, and legal complexity, is a reflection of life itself. People do indeed lead complex lives. They fall in love, cheat, lie, drink. None of this makes them any less entitled, as Justice Kennedy put it, to "respect for their private lives." If it were otherwise, there would be very few people—gay or straight—entitled to liberty.[171]

Morality ceases to be a legitimate state purpose when it infringes on the constitutional rights of others.[172] *Lawrence* "delink[ed] sex and marriage in a continuation of the project [the Court] began with *Eisenstadt*."[173] In short, "sex between two unmarried individuals is as private and important an endeavor as sex between an unmarried and

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166. *Id.* at 740–41, 746. *But see* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004) (reversing the district court and holding that *Lawrence* did not create a right and upholding a similar Alabama statute).

167. One such argument comes from the district court's factual record in *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002), which devoted an entire paragraph to how "'sexual aids help in the revitalization of potentially failing marital relations,' and that the use of sexual devices is recommended in 'therapy for couples who are having sexual problems in their marriage.'" *Id.* at 1296, 1305.

168. *Id.* at 1296.

169. The conduct may further other autonomy goals: "[I]ndividuals often derive satisfaction, self-esteem, and self-possession, among other values, through masturbation, either as a complement to engaging in sex acts with other people or in lieu of such interactions." Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 837 (2010) (footnote omitted).

170. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 280 (2012).

171. *Id.* at 281 (footnote omitted).

172. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

173. Dubler, *supra* note 138, at 810.

a married person, between persons married to each other, or between persons married to others."[174]

Even if the *Lawrence* opinion lends itself more to some kind of relational underpinning for a right to sexual conduct,[175] no workable regime exists by which the government could legitimately distinguish between meaningful relationships and one-night stands.[176] What begins in what many deem moral depravity or pure lust may lead to lasting long-term relationships, or it may not.[177] If *Lawrence* was about sexual conduct furthering meaningful relationships, then how could the Court conclude that the case "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"?[178] Most likely, *Lawrence* struck down the sodomy statute at issue in recognition of this regulatory impossibility.[179]

Nonetheless, if *Lawrence* is about some right of "meaningful" sexual conduct, then it in some measure "challenges the idea that marriage can be a proxy for legal sex, and strengthens the notion that constitutional privacy rights concern not the relationship of marriage but instead the sexual autonomy to enter into many kinds of relationships."[180] "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[181] In that

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174. Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1674 (1991).

175. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.").

176. *See* Siegel, *supra* note 149, at 78 ("It is difficult, both theoretically and practically, to single out the sexual contacts two people may have from the rest of their relationship—to criminalize the one and constitutionally protect as fundamental the other.")

177. For example, the adulterous parties in the *Hutelmyer* case, *see supra* notes 10–17, eventually married once the husband finalized his divorce. Angela Jones, *Buck County Native's Unique Suit Became a Movie*, THE MORNING CALL (Aug. 25, 1999), http://articles.mcall.com/1999-08-25/features/3262512_1_joe-hutelmyer-affection-alienation [http://perma.cc/EM9Y-7AYB].

178. *Lawrence*, 539 U.S. at 578.

179. *See id.* at 567 ("The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.").

180. Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 19 (2009) (citing *Lawrence*, 539 U.S. at 567).

181. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

way, First Amendment intimate-association cases inform the inquiry.[182]

B. First Amendment Intimate Association

Alienation-of-affection and criminal-conversation actions may also infringe the First Amendment, which protects an individual's right to freely associate with others.[183] The Supreme Court has recognized two ways that the Constitution protects freedom of association.[184] First, "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[185] Second, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment."[186] Adulterous relationships possibly implicate both protections,[187] but the case is much more compelling for the first.[188] If adulterous relationships are protected intimate associations, then regulation of those relationships must pass a heightened standard of constitutional scrutiny.[189]

1. *Adultery and Intimate Association.* The Court has historically protected relationships "that attend [to] the creation and sustenance of a family."[190] Although adulterous relationships may seem to fall outside this protection, nothing expressly forbids constitutional protection of them.[191] *Roberts v. U.S. Jaycees*[192] established the factors

182. Paul M. Secunda, Lawrence*'s Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. 117, 132 (2005).

183. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918–19 (1982) ("The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another.").

184. Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984).

185. *Id.* at 617–18.

186. *Id.* at 618.

187. *See* Siegel, *supra* note 149, at 77 ("The act of having an extramarital affair involves, to some degree at least, both types of association.").

188. *See infra* Part III.B.1.

189. *Roberts*, 468 U.S. at 623 ("Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." (citations omitted)).

190. *Id.* at 619.

191. *Id.* at 620 ("[There is] a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State."); *see also* Bd.

relevant to determining whether the Constitution protects the relationship, which include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[193]

In *Marcum v. McWhorter*,[194] the Sixth Circuit held that adulterous relationships were not constitutionally protected.[195] The adulterer argued that his adulterous relationship met the *Roberts* factors because the relationship "was relatively small—just the two of them; highly selective in the decision to begin and maintain the affiliation; and others were secluded from the relationship."[196] The court held that "[a]lthough these factors may weigh in favor of a finding of a protected relationship, we find that the adulterous nature of the relationship does not portray a relationship of the most intimate variety afforded protection under the Constitution."[197] But the court in *Marcum* incorrectly blended the rights analysis with the scrutiny analysis.[198]

Adulterous relationships represent intimate associations that arguably satisfy the factors enumerated in *Roberts*.[199] Affairs are usually between two people, making them small and selective.[200] The purpose of affairs is to exercise intimate emotional and sexual autonomy, and "[t]his is no more or less true if the partners happen to be single, married to each other or married to third parties."[201] An adulterous relationship serves similar goals to that of any other

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of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) ("Of course, we have not held that constitutional protection is restricted to relationships among family members.").

192. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

193. *Id.* at 620; *see also id.* ("As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.").

194. Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002).

195. *Id.* at 643.

196. *Id.* at 640.

197. *Id.*

198. Siegel, *supra* note 149, at 77; *see also id.* ("[D]etermining whether an adulterous affair is or is not an intimate association hinges on the characteristics of that relationship, not on the correctness, moral or otherwise, of the relationship.").

199. *See* Cohen, *supra* note 137, at 637–38 ("[A]n adulterous affair can satisfy most of the *Roberts* factors, particularly if the relationship is more than a casual fling.").

200. *See* Siegel, *supra* note 149, at 78 ("[I]t is usually very small, selective and secluded . . . .").

201. *Id.* at 77–78.

associational relationship.[202] Likewise, "experiencing sexual pleasure, without regard to relationship or other end goals, can be an important aspect of individual identity and self-expression."[203] Restrictions on sexual conduct diminish a person's expression of identity.[204] Adulterous relationships can meet the test for intimate associations, but they are intimate associations that compete with marriage[205] as an intimate association. To what degree, then, should the state be able to decide which relationship should take preference? And if the state should decide, what factors should it consider?[206]

2. *Marriage and Adultery as Competing Intimate Associations.* There is no categorical answer, but "intimate relations may not be micromanaged or overtaken by the state."[207] Marriages, like adulterous relationships, often meet the test of intimate association. Yet marriages do not have to meet that test. Marriage is about a right of choice: "[T]he freedom to leave gives added meaning to the decision to stay."[208] Any interest the state has in protecting one intimate association from another must be weighed against the alternatives the state has to protect the the marriage.[209]

Furthermore, to say that marriage is an intimate association presumes that parties have a right to choose to engage in that intimate association.[210] The torts of criminal conversation and

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202. *Id.* at 78 ("[T]he adulterous relationship does foster diversity just as any unique association[] do[es]. And it can play a crucial role in providing emotional sustenance and opportunities for self-definition.").

203. Rosenbury & Rothman, *supra* note 169, at 836.

204. Blocher, *supra* note 144, at 806 (noting that constraining "the ability to engage in sexual intimacy therefore effectively restraints [sic] a person's ability to *be* who they are").

205. This assumes that the marriage is not polyamorous or open.

206. Relationships outside of marriage have worth. Otherwise, "regardless of any other factors that might be considered in assessing whether a relationship should be afforded constitutional protection, the only relevant factor in determining whether a relationship should be afforded constitutional protection . . . is whether the relationship can be deemed adulterous." Marcum v. McWhorter, 308 F.3d 635, 643 (6th Cir. 2002) (Clay, J., concurring). I agree with Judge Clay's ultimate conclusion that "the adulterous nature of the relationship alone should not be dispositive." *Id.* at 644.

207. Tribe, *supra* note 133, at 1922.

208. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 638 (1980).

209. Any alternate view of associations removes the choice aspect of a marriage. "Wives are not property. Neither are husbands. The love and affection of a human being who is devoted to another human being is not susceptible to theft. There are simply too many intangibles which defy the concept that love is property." Hunt v. Hunt, 309 N.W.2d 818, 821 (S.D. 1981).

210. Karst, *supra* note 208, at 633 (noting that "the value of commitment is fully realizable only in an atmosphere of freedom to choose whether a particular association will be fleeting or

alienation of affection focus on interlopers.[211] These torts pretend that the availability of partners for adultery is the only thing affecting the choice to stay in a marriage when, in reality, "[d]ecisions about whether to marry and raise children are based on many personal, romantic, and practical considerations."[212] If the only thing keeping a spouse sexually or emotionally monogamous is lack of a willing third-party participant for adultery, then the association has little meaning.[213] Still, states can seek to protect licensed relationships through tort law. What role tort law can constitutionally occupy to balance these competing relationships requires a tailoring analysis.[214]

C. Marital Waiver of Constitutional Rights

Some scholars argue that marriage is a contract and, as part of that contract, spouses may waive their right to extramarital sex or extramarital intimate associations.[215] This is incorrect in two regards. First, conditioning the grant and recognition of marital rights on the surrender of other fundamental rights implicates heightened scrutiny under an unconstitutional-conditions analysis.[216] Second, even if it is a permissible argument, alienation of affection and criminal conversation also punish the interloper, who is not party to the contract. Any analogy to tortious interference with contract[217] must also fail because after a normal contractual breach "the plaintiff can

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enduring"); *see also* Siegel, *supra* note 149, at 76 ("Our constitutional jurisprudence, however, should be confident, if the states cannot be, that a marriage's privacy and autonomy are the best routes to safeguarding liberty and pluralism. This is no less true when the power to choose, as it inevitably will, results in bad choices.").

211. *See supra* Part I.

212. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

213. *Cf.* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1993 (2010) ("Family law is a licensing scheme, necessary for formation (marriage) and dissolution (divorce), but with little to say, or do, in between.").

214. *See infra* Part IV.

215. *See, e.g.*, William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for A New Career*, 33 ARIZ. ST. L.J. 985, 1033–34 (2001) (outlining the argument).

216. *See, e.g.*, Note, *supra* note 174, at 1675 ("Marriage provides many state-sponsored benefits: adultery statutes condition these gains upon renunciation of the constitutionally protected freedom to have sex with unmarried individuals. Such conditions are unconstitutional unless justified by a compelling state interest. By conditioning benefits upon the surrender of fundamental freedoms, adultery laws implicate these rights." (footnotes omitted)); *see also* Siegel, *supra* note 149, at 75 (discussing similar arguments).

217. *See, e.g.*, Thomas v. Siddiqui, 869 S.W.2d 740, 742 (Mo. 1994) (en banc) (Robertson, J., dissenting) (claiming the two torts "are species of the tort genus interference with contract").

sue not only the third party but also the other party to the contract. In alienation of affection and criminal conversation the other party to the 'contract' is the plaintiff's spouse who . . . may not be subject to a suit by the marital partner."[218] Furthermore, tortious interference with contract requires that the third party *know* he is violating the contract of others,[219] whereas alienation of affection and criminal conversation do not require this knowledge.[220]

IV. SURVIVING SCRUTINY

The level of scrutiny applied depends on the possible rights these torts infringe, and the jurisprudence discussed in Part III is not known for its clear standards.[221] Whatever the precise standard, it is most likely "a standard of review that lies between strict scrutiny and rational basis."[222] Therefore, state regulation of adulterous actions and relationships should receive some form of heightened scrutiny.[223] This Part does not suggest a concrete scrutiny test for the rights discussed herein, but instead discusses the general balance between the possible state interests and means used to achieve those interests. This Part considers each of the historical justifications[224] for these torts in turn: protecting marital morality,[225] deterring harmful conduct,[226] and

218. Hoye v. Hoye, 824 S.W.2d 422, 426 (Ky. 1992) (citation omitted).

219. *See, e.g.*, Ullmannglass v. Oneida, Ltd., 927 N.Y.S.2d 702, 705 (N.Y. App. Div. 2011) ("[T]o sustain a claim for tortious interference with a contract, it must be established that a valid contract existed which a third party knew about . . . ." (quoting Clearmont Prop., LLC v. Eisner, 58 A.D.3d 1052, 1055 (N.Y. App. Div. 2009))).

220. *See supra* Part I.

221. *See, e.g.*, Secunda, *supra* note 182, at 128 ("[D]ivining the proper judicial standard of review from the *Lawrence* majority is rendered difficult by the exceedingly enigmatic nature of the opinion.").

222. Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008); *see also* Witt v. Dep't of the Air Force, 527 F.3d 806, 816 (9th Cir. 2008) ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review.").

223. For instance, in discussing the constitutionality of criminal adultery provisions, one scholar argued that the State should only be able to criminalize adultery "after demonstrating a compelling purpose for doing so in the least restrictive terms." Siegel, *supra* note 149, at 69. Considering *Lawrence* and the intimate-association analysis together is warranted because "[a]lthough the 2003 Supreme Court *Lawrence v. Texas* decision did not use the phrase 'intimate association' or address intimate [association, it may] provide critical guidance for future intimate association cases and may be read as a type of intimate association case itself." Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 299 (2006).

224. *See supra* Part I.C.

225. *See infra* Part IV.A.

226. *See infra* Part IV.B.

compensating[227] for harm caused by adulterous actions. Existing tort frameworks suggest an alternative to alienation of affection and criminal conversation that may hew more closely to the interests that these torts claim to serve.[228]

A. Tort Law and Morality

1. *The Transformation of Morality's Role in Law.* It seems morality plays a constitutionally questionable role in regulating sexuality and marital choices.[229] This logic should extend to tort law as well.[230] Morality doubtlessly seeps into jury deliberations of what embodies community standards, outrageous conduct, and other tort concepts.[231] Tort law attempts to compensate victims, deter harmful behavior, and normatively "encourage the development of a society in which people behave responsibly toward one another."[232] Any higher level of scrutiny above rational-basis review entails looking at those interests instead of maintaining the actions on the tenuous basis that they serve some community interest in morality.[233] The

227. *See infra* Part IV.C.

228. *See infra* Part IV.D.

229. *See, e.g.*, Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 745 (5th Cir. 2008) ("These interests in 'public morality' cannot constitutionally sustain the statute after *Lawrence.*"); *see also supra* note 176.

230. *See* Marcus, *supra* note 223, at 305 ("In *Lawrence*, a solid majority of the Court consequently recognized that the broader constitutional traditions of protecting the autonomy, equal rights and liberty of its diverse citizenry supersede more narrow traditions reflected in the moral prejudices of even a majority of the populace.").

231. Indeed, the tort of intentional infliction of emotional distress is predicated on the community sense of morality. *See, e.g.*, Banks v. Fritsch, 39 S.W.3d 474, 480 (Ky. Ct. App. 2001) (noting that for conduct to be sufficient for an intentional infliction of emotional distress claim it must be "so outrageous and intolerable as to offend generally accepted standards of morality and decency").

232. ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS 230 (2004). The normative function works by "vindicat[ing] not only the victim but others in society who behave in an appropriate manner and reinforc[ing] standards of acceptable behavior." *Id.* Putting aside the authors' legitimate doubts that the tort system serves any of these social functions efficiently, any normative function based on the positive reinforcement others get from tort enforcement can be viewed as a positive correlative of deterrence. Thus, by confirming societal values, tort law affirms socially beneficial behavior.

233. *See* Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1112 (2004) ("By finding that morality alone cannot justify a prohibition, . . . a state must now demonstrate some other rationale for such laws, presumably some form of objectively harmful effects."); *see also* Viator, *supra* note 163, at 855 ("Thus, after *Lawrence* it would seem the promotion of public morality could no longer justify the criminal prohibition of adultery.").

community-morality rationale must be yanked down from the ethereal realm and tethered to tort law's concrete functions.

Lawrence may symbolize at least one time when the Court took this view on morality. Professor Cass Sunstein connects the Court's decision in *Lawrence* with "the old common law idea of desuetude. According to that concept, laws that are hardly ever enforced are said, by courts, to have lapsed, simply because they lack public support."[234] The lack of public support or use does not evidence a lack of moral acceptability for the action, but instead reflects the belief that state action is not a legitimate medium to regulate the conduct.[235] Sunstein explains that this desuetude argument cannot be freestanding, but must instead hinge on "whether an interest has some kind of constitutional status."[236] Sunstein argues that the "Court must have concluded that as a matter of principle, the right to engage in same-sex relations had a special status in light of the Court's precedents taken along with emerging public convictions—and that the moral arguments that supported the ban were no longer sufficient to justify it."[237]

Expanding this argument to interpret alienation of affection and criminal conversation as examples of a *Lawrence*-type desuetude necessitating abolition or constraint requires an evaluation of when this desuetude analysis would "be triggered."[238] One possibility is that the desuetude analysis is triggered when few states allow these actions and such litigation is rare.[239] At the time of *Lawrence*, thirteen states still criminalized sodomy.[240] By this count, alienation of affection and

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234. Sunstein, *supra* note 136, at 49–50 (footnote omitted).

235. Sunstein's argument discusses criminal adultery provisions:

> The difficulty here is that in the context of adultery, criminal prosecutions are extremely unusual, at least as rare as criminal prosecutions for sodomy. There is a good argument that criminal prosecutions, in this context, are inconsistent with emerging social values. This is not because adultery is thought to be morally acceptable; it is not. It is because adultery is not thought to be a proper basis for the use of the criminal law.

Id. at 65–66. In the same way that the declining presence of both adultery laws and prosecutions evidence this in the criminal-law context, the declining validity and use of alienation-of-affection and criminal-conversation actions among the states would evidence this value in the civil context. Admittedly, Sunstein does not reach this argument, and in a footnote posits that civil disabilities such as employment discrimination may be constitutionally valid, even if criminal restrictions would not be. *Id.* at 66 n.178.

236. *Id.* at 51.

237. *Id.* at 51–52.

238. *See id.* at 54 (explaining when this desuetude analysis would "be triggered").

239. *Id.*

240. Lawrence v. Texas, 539 U.S. 558, 573 (2003).

criminal conversation are an even more compelling case for a desuetude abolition with only five and four states, respectively, allowing the actions.[241] The *Lawrence* sodomy statutes were rarely enforced before they were abolished.[242] Most of the states that still allow alienation of affection or criminal conversation have few, if any, recent suits;[243] expressly declare the suits to be against public policy;[244] or severely restrain recovery in the suits.[245]

But the desuetude argument is not a clear winner in every state.[246] In North Carolina, these suits are still valid and prevalent. For example, some estimates put the number of alienation-of-affection and criminal-conversation suits filed in North Carolina each year around two hundred.[247] Their prevalence in North Carolina suggests that the torts may serve as legitimate mediums to deter certain behavior and compensate the harm adultery causes.

Nonetheless, the conduct that gives rise to the alienation-of-affection and criminal-conversation actions is subject to constitutional analysis.[248] *Lawrence* and First Amendment law suggest that moral disapproval of adultery *alone* cannot serve as a legitimate interest in constitutional analysis.[249] To understand what interests suffice for constitutionally permissible regulation depends upon understanding the context of marriage in today's society and the harm that adultery creates.

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241. *See supra* notes 32–37, 42–45, and accompanying text.

242. *See, e.g.*, *Lawrence*, 539 U.S. at 573 ("The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances." (citation omitted)).

243. *See supra* notes 32–37, 42–45, and accompanying text.

244. *See, e.g.*, *supra* note 32 (explaining how a New Mexico court has said that the tort alienation of affection violates the state's public policy).

245. Until July 21, 2015, Illinois had statutory constraints on damages for alienation-of-affection and criminal-conversation torts. *See* 740 ILL. COMP. STAT. 5/1 to 5/7 (2010) (repealed by Act of July 21, 2015, Pub. Act 099-0090, art. I (effective Jan. 1, 2016)); *id.* 50/1 to 50/7 (same).

246. *See* Sunstein, *supra* note 136, at 54–55 ("Certainly the standard desuetude idea cannot be invoked in a state in which the law in question is actively enforced.")

247. *See* Browder, *supra* note 2 ("Ditched spouses file about 200 lawsuits each year in North Carolina—187 in 2012, 199 in 2011 and 205 in 2010.").

248. *See supra* Part III.

249. That the choice to engage in adultery may not be one that society condones should not affect the existence of the liberty interest as "[a]n individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

2. *The Transformation of Marriage's Role in Law.* The State continues to regulate marriage and, to the extent that adultery harms marriage and the parties to it, the State has an interest in regulating adultery.[250] Assuming that marriage is a beneficial institution, adultery works a personal harm against the nonadulterous spouse and possibly against any children of the marriage.[251] Nevertheless, marriage does not serve the same purpose it has always served: "Historians have observed a marked difference in the cultural purpose of marriage in the past two centuries: the rise of companionate marriage, in which spouses are expected to satisfy each others' emotional needs."[252] The constitutional justifications for protecting marriage must evolve with the changing definition of marriage.[253] Marriage is now more about personal emotional fulfillment and companionship.[254] Viewing marriage as personal emotional fulfillment flies in the face of many traditional justifications for marriage.[255] This does not mean the concept of family has "dissolved. . . . It is simply a demand for a more elastic definition of legitimate marriage."[256] This elasticity means that marriage "has become less tethered to procreation and more bound

250. *See* Cohen, *supra* note 137, at 633 ("Accordingly, to the extent that adultery is an act that causes harm to the institution of marriage, or to individuals involved in that institution (e.g., spouses and children), the state's interest in banning adultery is at least facially legitimate and possibly compelling.").

251. Sunstein, *supra* note 136, at 65. *But see* Phyllis Coleman, *Who's Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399, 411–12 (1991) (noting that a marriage may already be irreparably harmed by the time a spouse decides to commit adultery and "many spouses report that having an affair actually strengthened their marriages"). Harm to children is an entirely different question. Divorce and extramarital affairs may harm children less than conventional wisdom suggests. *See* E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 228–30 (2002) (discussing studies on the matter); *see also* Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 15 (same).

252. Abrams & Brooks, *supra* note 180, at 10.

253. *See Obergefell*, 135 S. Ct. at 2595 ("The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.").

254. *See id.* at 2600 (noting that marriage "offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other").

255. *See* Abrams & Brooks, *supra* note 180, at 10 ("This [view of marriage] is a highly personal, individualistic view of marriage where the couple's personal desires take precedence over the needs of the individuals' fathers to control their property, their extended families to create alliances, or the community's need to discipline sexuality.").

256. LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 11 (2004).

up in fulfillment."[257] This definition of marriage would not conform to the traditional justifications for alienation-of-affection and criminal-conversation torts[258]: "This most recent version of family life puts particular pressure on marriage to be fulfilling."[259] Marriage "has shifted in the last two centuries from being fundamentally concerned with community and the individual's role within the community to being concerned with the individual's self-actualization through the creation of family ties."[260] Nonetheless, it remains true that "[c]hoices about marriage shape an individual's destiny."[261]

Sexual relationships that precede marriage reflect this changing view of how an individual constructs romantic relationships.[262] The law undeniably impacts identity through regulating sexual conduct and relationships.[263] The State must locate the harm it is trying to prevent or deter more precisely to avoid unconstitutionally infringing this right.[264]

B. Tort Law and Deterrence

Deterrence may serve counterproductive goals. Deterrence cannot be seen as a means to fix a broken marriage. What's more, these actions may cause further harm to any existing marriage.[265] These suits "are almost exclusively brought after the marriage is

257. Abrams & Brooks, *supra* note 180, at 11. Procreation has never been the sole basis for legally recognized marriage in the United States. *See Obergefell*, 135 S. Ct. at 2601 ("An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. . . . [I]t cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate.").

258. For a discussion of these traditional justifications, see *supra* Part I.C.

259. Abrams & Brooks, *supra* note 180, at 10.

260. *Id.* at 13.

261. *Obergefell*, 135 S. Ct. at 2599.

262. *Lawrence* provides an example where "the relationship was about gratifying personal commitments and desires, not about claiming public rights or entitlements." Dubler, *supra* note 138, at 760.

263. *See id.* at 765 ("[I]n the past and the present—legal notions of sexual illicitness shape people's intimate identities and their chosen forms of erotic expression . . . .").

264. For an example of this type of exercise, see Deana Pollard Sacks, Snyder v. Phelps, *The Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 194–95 (2010) ("In *Sullivan*, the Court reconciled defamation liability with the First Amendment by tailoring the elements of the plaintiff's prima facie case in an attempt to find the optimal balance of rights to protect both personal interests and freedom of speech.").

265. In discussing criminal conversation, one court noted that it "may even be counterproductive if it is used for vindictive purposes by a spouse whose marriage has failed for reasons attributable to the fault of that spouse." Norton v. Macfarlane, 818 P.2d 8, 17 (Utah 1991).

either legally dissolved or irretrievably broken. Revenge, not reconciliation, is the [sic] often the primary motive."[266] Moreover, the suits require the plaintiff to "publicly acknowledg[e] the intimate details that led to the breakdown of the marriage. The necessarily adversarial positions taken in litigation over intensely personal and private matters does not serve as a useful means of preserving the marriage."[267]

These tort actions do not deter harm to the affected marriage, but instead serve to deter harm to other marriages.[268] The argument for deterrence boils down to a simple formulation: "Given that the outsider is likely to have other options that do not carry all the risks associated with the married person, the additional risk of financial liability may deter the outsider."[269] How can tort actions deter harmful conduct when the actions do not require the defendant to intend or even be reasonably aware that she is causing harm to the marriage?[270]

Moreover, it is possible that these torts will not deter a majority of spontaneous adulterous behavior because "the nature of the activities underlying criminal conversation [and most alienation of affection cases], that is sexual activity, are not such that the risk of damages would likely be a deterrent."[271] Adultery is often unplanned, and a third party does not contemplate civil damages[272] as a possible consequence of her conduct.[273] If adulterers make decisions based on passion and do not weigh possible tort damages as a consequence of

266. Helsel v. Noellsch, 107 S.W.3d 231, 233 (Mo. 2003) (en banc) (citations omitted).

267. *Id.* (citations omitted).

268. The best these torts can do is compensate affected parties. *See, e.g.*, Nelson v. Jacobsen, 669 P.2d 1207, 1216 (Utah 1983) ("Similarly, a suit for alienation of affections does not attempt to 'preserve' or 'protect' a marriage from interference, but only to compensate a spouse who has suffered loss and injury to his or her marital relationship through the intentional interference of a third party.").

269. Corbett, *supra* note 215, at 1017.

270. States that judicially abolished the actions note this paradox. *See, e.g.*, Fundermann v. Mickelson, 304 N.W.2d 790, 791–92 (Iowa 1981) ("[I]t is folly to hope any longer that a married person who has become inclined to philander can be preserved within an affectionate marriage by the threat of an alienation suit. If we did pretend that a would-be paramour would be thereby dissuaded, a substitute is likely to be readily found.").

271. Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

272. *See* Batchelor, *supra* note 40, at 1937 ("Many plaintiffs only become aware of the cause of action when they consult a family law practitioner.").

273. *See, e.g.*, O'Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986) ("The unplanned nature of the tort, at least where sexual activities are involved, makes the threat of any damage suit unlikely to deter the culpable conduct that has allegedly interfered with the marriage."); *see also* Batchelor, *supra* note 40, at 1934 ("Courts and legal commentators generally agree that criminal conversation does not deter adultery.").

their behavior,[274] then the State does not have a legitimate deterrence interest in preserving these torts.

Even if the rationale is that the torts deter the conduct itself—regardless of intent or ex ante knowledge of these torts—this argument overlooks that these torts' "deterrent effect, which was never great, is today swamped by the costs and uncertainties that they impose on the judicial system."[275] With the possibility for millions in damages, parties often bring or threaten to bring criminal-conversation or alienation-of-affection claims to extort concessions out of an opposing party in divorce proceedings.[276] Some have even argued that the possibility of legal liability will have the (literally) perverse impact of *encouraging* affairs.[277] Either way, the action does not deter the party who has the most control over initiating the relationship—the adulterous spouse.[278]

Another way to conceptualize the deterrence function is through its positive correlative—the normative function.[279] By recognizing societal values, the continuing existence of these torts confirms people's views that adultery is wrong and that their decision not to partake in it is correct. Thus, even when the quantifiable deterrence value may seem nominal, the existence of the tort can shape behavior normatively.[280] Deterrence and normative functions alone seem an uneasy justification, but the arguments for compensation provide more support for the torts' viability.

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274. *See* Cohen, *supra* note 137, at 636 ("Indeed, the failure of deterrence is evidenced by the sheer ubiquity of marital infidelity.").

275. POSNER, *supra* note 78, at 82.

276. *See, e.g.*, Batchelor, *supra* note 40, at 1940–42 (discussing this phenomenon in the criminal-conversation context).

277. *See* Coleman, *supra* note 251, at 409 ("When an estimated sixty percent of American adults have extramarital affairs, it is hardly credible to suggest criminal laws have had any deterrent effect. In fact, the danger associated with forbidden conduct may enhance the sexual experience, paradoxically increasing the likelihood it will occur.").

278. *See, e.g.*, *O'Neil*, 733 P.2d at 698 ("The action for alienation of affections purportedly exists to discourage third persons from weakening marriages. However, a marriage is not likely to falter without the active participation of one of its members."); *see also* Bearbower v. Merry, 266 N.W.2d 128, 138 (Iowa 1978) (McCormick, J., dissenting) ("It is simplistic and unrealistic to suppose the edifice [of marriage] will be held together either so long as or because spouses have the right to obtain vengeance in the form of damage suits against the third person.").

279. *See* COCHRAN JR. & ACKERMAN, *supra* note 232, at 230 (noting the two functions are "closely related").

280. Corbett, *supra* note 215, at 1055 n.365.

C. Tort Law and Compensation

Any justification for these torts rests more comfortably on a compensatory theory: the defendant has caused harm to a person, which requires compensation.[281] Proponents of the two torts point out that damages in alienation of affection and criminal conversation turn on many of the same issues as loss-of-consortium claims.[282] Accordingly, our tort system at least assumes that these injuries are compensable.[283] The torts seek to compensate emotional harm, which may be hard to appraise. Nonetheless, some courts posit that emotional harm in these torts is "no more difficult to value than pain and suffering in a personal injury action or the loss of comfort, society, and companionship in an action for wrongful death."[284]

Nevertheless, the compensation has to relate to the harm caused and the interest articulated by courts rationalizing the torts: loss of consortium or emotional harm to the spouse and, in some cases, to the children of the marriage. Claiming the actions of an adulterer harmed some abstract concept of marriage ignores the fact that marriages are merely associations of individuals. Besides, trying to compensate harm to "marriage" creates complicated causation issues given that "infidelity may be the result, not the cause, of marital difficulties."[285] There may be good *policy* arguments for eliminating damages arising from adultery,[286] but these arguments do not

281. *See id.* at 1021 (discussing the compensation theory).

282. *See* McMillian, *supra* note 7, at 1994 ("[S]uch as the state of the parties' marriage prior to the tortious conduct, the sexual intimacies of the marriage, and the causal link between the tortious conduct and the state of the parties' marriage post-injury.").

283. *See id.* at 1995 ("The closeness between these other areas of law and alienation of affections demonstrates that tort remedies are properly employed as adultery-remedying tools.").

284. Nelson v. Jacobsen, 669 P.2d 1207, 1217 (Utah 1983). Indeed, uncertainty in damages is not a constitutional argument outside of the punitive context:

> Pain and suffering is notoriously difficult to calculate, but we still allow juries to take their best shot. Tort damages for the death of a child cannot bring that child back to life, but they are nevertheless appropriate, and no one says otherwise. The whole point of loss of consortium is to compensate for things lost in a marriage through the actions of a third party. These examples show that the inherent problem of anticommodification affects the tort system as a whole. Although imperfect, money remains the best means we have for compensating injured parties, including plaintiffs who assert claims for damages arising from the injuries left in adultery's wake.

McMillian, *supra* note 7, at 2003–04 (footnote omitted).

285. Cohen, *supra* note 137, at 636.

286. *See, e.g.*, McDougal, *supra* note 6, at 184–86 (discussing policy arguments).

implicate the Constitution.[287] If a state's judiciary or legislature determines that damages are needed to compensate victims of marital interlopers,[288] and adequately polices the damages, the law could indeed pass a higher level of scrutiny. However, if the actions are used instead to regulate sexual conduct by punishing those who engage in disfavored conduct, the actions may be overbroad unconstitutional infringements. This tough tailoring question should consider other tort remedies available to the plaintiff that do not base damages directly—and in some cases only—on the sexual conduct,[289] or that carry the baggage of precedent that assumes compensation lies in a forced sale of affections as property.[290]

D. Tort Law and Tailoring

Interests in deterrence and compensation can be executed through more consistent regulatory frameworks. The following analysis of intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) offers insight into how these marital torts could be reworked to avoid constitutional issues.

1. *IIED in the Marital Context.* Alienation of affection and criminal conversation may be unnecessary because of the availability of IIED.[291] The elements of intentional infliction of emotional distress vary by jurisdiction, but the tort generally requires "(1) extreme and outrageous conduct; (2) which is intended to cause and does in fact cause; (3) severe emotional distress."[292] Courts have recognized that

287. *See Nelson*, 669 P.2d at 1217 ("The rule that affirms the availability of a cause of action despite uncertainties in the assessment of damages is of course implemented in the context of appropriate jury instructions and the court's power to require remittitur to restrain or reduce arbitrary or excessive jury verdicts.").

288. Tort law may fill gaps in family-law compensation structures. *See* Benjamin Shmueli, *What Have Calabresi & Melamed Got to Do with Family Affairs? Women Using Tort Law in Order to Defeat Jewish and Shari'a Law*, 25 BERKELEY J. GENDER L. & JUST. 125, 129 (2010) ("Tort law can award the victim 'consolatory' damages in cases where the remedies in family law are insufficient for legal or technical reasons.").

289. Criminal conversation uses this calculus for damages.

290. Both criminal conversation and alienation of affection have this background. *See supra* Part I.C.

291. *See* Meredith L. Taylor, Comment, *North Carolina's Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage*, 32 WAKE FOREST L. REV. 1261, 1267–76 (1997) (noting the availability of IIED claims in the marital context).

292. Poston v. Poston, 436 S.E.2d 854, 856 (N.C. Ct. App. 1993) (citation omitted).

IIED is different from alienation of affection, and that a claim for IIED could result from a failed marital relationship.[293]

One problem that could emerge in trying to use IIED in place of alienation of affection or criminal conversation is that a judge or jury may find "adultery does not evidence the extreme and outrageous conduct" required by IIED claims.[294] Given the prevalence of adultery, it is hard for adulterous conduct to meet the extreme and outrageous threshold.[295] However, given the large damages juries award in alienation-of-affection and criminal-conversation cases,[296] courts should not conclude this as a matter of law.

Courts also cite constitutional privacy rights when denying claims for IIED in the marital context.[297] Again, if this legal denial is correct, alienation-of-affection and criminal-conversation claims cannot stand as torts because they implicate the same constitutional concerns.[298] But if they can pass constitutional scrutiny, then courts cannot categorically deny relief in the IIED context.[299]

Yet IIED claims cannot serve as a substitute for alienation-of-affection and criminal-conversation torts for a third reason: IIED requires that the defendant *intend* to cause emotional harm to the

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293. *See, e.g.*, Van Meter v. Van Meter, 328 N.W.2d 497, 498 (Iowa 1983) (recognizing the difference between alienation-of-affections claims and IIED claims and concluding the issue of whether a failed marital relationship states a claim for IIED is fact-specific and therefore should be resolved at summary judgment or trial). Recognizing a claim for IIED in the marital context would not cause any problem for states that have abolished criminal conversation and alienation of affection because those states could continue to rule it out for the same public policy reasons that motivated their abolition of alienation of affection and criminal conversation in the first place. *See, e.g.*, Doe v. Doe, 747 A.2d 617, 625 (Md. 2000) ("The public policy of this State, reflected in the abolition of the actions for alienation of affections and criminal conversation, required the dismissal of the tort actions asserted in this case.").

294. *Poston*, 436 S.E.2d at 856.

295. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse As A Tort?*, 55 MD. L. REV. 1268, 1317 (1996) ("Certainly if one believes that a finding of 'outrage' in IIED cases must involve behavior that goes well beyond the common complaints divorcing spouses have about one another, then neither adultery alone nor deceitful adultery can qualify.").

296. For a discussion of these large damages awards, see *supra* notes 7–20 and accompanying text.

297. *See, e.g.*, Padwa v. Hadley, 981 P.2d 1234, 1241 (N.M. Ct. App. 1999) ("It is difficult to envision how the cuckolded spouse or lover could successfully state a claim in tort against the third party, whatever the label, without simultaneously trammelling the privacy rights and liberty interests of the other spouse, or the former spouse or partner.").

298. *See supra* Part III.

299. Unless there exists some constitutionally principled distinction between IIED on the one hand, and alienation-of-affection and criminal-conversation torts on the other, then there is no basis for such categorical denials.

plaintiff.[300] That element has never been a part of alienation-of-affection or criminal-conversation torts.[301] The emotional harm results from the surrounding situation, not just the intent of the interloping party. But divorce, even without adultery, causes severe emotional harm, and tort law should not overcompensate, or force parties to compensate harm they are not alone responsible for creating.[302]

2. *NIED in the Marital Context.* Could NIED contain an adequate level of culpability and causation? Some courts have allowed NIED claims in adulterous contexts.[303] However, NIED claims will not likely prove a helpful substitute to alienation-of-affection and criminal-conversation claims. NIED claims commonly arise in three scenarios, but only one scenario comes close to the typical adulterous relationship.[304] Some jurisdictions allow NIED recovery when a person negligently causes serious emotional harm to another and it "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm."[305] This can occur, for example, in the doctor–patient context if the doctor misdiagnoses his patient with a serious disease.[306] This can extend in some cases to recovery against medical providers by a spouse for a resulting divorce.[307] Courts that have allowed IIED or NIED claims to proceed against adulterous paramours represent cases that often concern adultery that occurred within a special-relationship capacity, such as

300. Poston v. Poston, 436 S.E.2d 854, 856 (N.C. Ct. App. 1993).

301. *See supra* Part I.

302. *See, e.g.*, Martin v. Elliotte, No. 160440, 1998 WL 972222, at *8 (Va. Cir. Ct. June 5, 1998) ("Many individuals who experience the trauma of divorce suffer from situational depression and the hardship that Plaintiff is enduring. This lawsuit cannot mend a broken heart or vindicate morality.").

303. Heiner v. Simpson, 23 P.3d 1041, 1043 (Utah 2001) (holding that the plaintiff could bring claims for alienation of affection, intentional infliction of emotional distress, and negligent infliction of emotional distress as a matter of law).

304. *See* Ellman & Sugarman, *supra* note 295, at 1299–1300 (explaining that the first two NIED scenarios allow claims when one is put in fear of physical injury or is emotionally shocked by seeing their loved ones killed or injured).

305. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 (Am. Law Inst. 2012).

306. *See, e.g.*, Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789, 792 (D.C. 2011) (allowing an NIED claim past summary judgment when doctor misdiagnosed patient with HIV).

307. *See, e.g.*, Molien v. Kaiser Found. Hosps., 616 P.2d 813, 814–15, 821 (Cal. 1980) (en banc) (holding that the plaintiff stated a claim for NIED when a doctor misdiagnosed a woman with syphilis and told her to tell her husband, which caused the breakup of their marriage).

with a pastor, psychologist, or other counselor.[308] Although the special-relationship NIED claim would serve some of the same compensation goals that alienation of affection serves, it is unlikely a legal framework could be extrapolated to all cases of adulterous affairs. However, the ability of tort law to impute a negligence duty to legally recognized special relationships is an insight that tailoring should take into account.

3. *Blending IIED and NIED in the Marital Context.* Employing existing IIED/NIED frameworks and creating a statutorily or judicially imposed special-relationship tort for the marital context could solve the constitutional problems with alienation of affection and criminal conversation and still support their assumed legitimate interests. At least one scholar, Professor Corbett, has proposed a revised tort for alienation-of-affection and criminal-conversation claims[309]: "[T]he elements of the new intentional interference with marriage tort would be the existence of a valid marriage, defendant's knowledge of existence of marriage, and sexual relations between the defendant and the spouse."[310] Professor Corbett confines his tort—intentional interference with marriage—only to instances of adulterous sex.[311] The new tort would require knowledge of the marriage on the part of the offending third party, solving criminal conversation's deterrence problem of overinclusion.[312] Professor Corbett also advocates removing the alienation-of-affection element requiring "proof of alienation of love and affection."[313] Although not constitutionally mandated, removing this element with its farcically low level of required proof would save judicial resources and move what is essentially a question of loss of consortium to its proper place, "valuation of damages."[314]

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308. Greenstein, *supra* note 26, at 743–45 (discussing the case of a marital counselor who became a paramour of one of the spouses he was counseling, as well as discussing other potential claims other than IIED or NIED that courts have entertained in similar contexts).

309. Corbett, *supra* note 215, at 1053–54.

310. *Id.* at 1054. Professor Corbett also retains consent of the nonparticipating spouse as a defense to this tort. *Id.*

311. *Id.*

312. *See id.* at 1053 ("[T]he knowledge requirement ensures that the interferer has a high level of culpability or blameworthiness. Without the knowledge requirement, one could be liable for interference with marriage for having sexual relations with a married person who misrepresented his marital status.").

313. *Id.* at 1053–54.

314. *Id.* at 1054.

Reevaluating the precedential support for alienation of affection and criminal conversation could remove some of their worst attributes. First, alienation-of-affection and criminal-conversation claims continue to cite as precedent cases echoing the tort's detestable property-based common-law origins and purposes.[315] If adultery is morally reprehensible, the idea that a cuckolded spouse should be compensated principally for loss of sexual services should raise some eyebrows.[316] These historical interests do not have to be imported into the new tort.[317] Second, part of the pragmatic concern for reforming or striking these torts is the uncertain damages granted by courts in these cases.[318] Reformulating the tort as an offshoot of IIED and NIED precedent, but in the special relationship of marriage, would give litigants, judges, and juries the benefit of case law much less amenable to granting speculative damages.[319]

V. THE EVOLVING CONCEPT OF MARITAL CHOICE IN *OBERGEFELL V. HODGES*

A. Applying Alienation of Affection and Criminal Conversation To All Marriages Equally

Obergefell held that "same-sex couples may exercise the fundamental right to marry in all States."[320] To survive constitutional scrutiny, alienation of affection, criminal conversation, or any revised tort will have to be available to those in same-sex marriages.[321]

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315. *See supra* Part I.C.

316. *See* Batchelor, *supra* note 40, at 1930 ("To classify love, affection, and sexual autonomy as a property right is an outdated and unrealistic way of looking at marriage.").

317. Corbett, *supra* note 215, at 1046 ("It is not necessary that a modern tort of interference with marriage be based on anachronistic principles regarding men's property interests in their wives.").

318. *See, e.g.*, McDougal, *supra* note 6, at 185 (noting the damages in such cases are generally punitive in nature, despite the fact that the tort purports to compensate the plaintiff for an actual loss).

319. However, this reluctance may itself hinder the compensation goals. *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 530 (1998) ("The current skepticism toward compensation for emotional and relational harms is disproportionate: It discounts the importance of these injuries in the lives of tort victims and places too much emphasis on general fears of unlimited liability and concerns about difficulties of administration.").

320. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

321. This question is different from whether an action for criminal conversation can occur absent penile-vaginal intercourse, *see supra* note 39, and whether homosexual conduct can sustain an action for alienation of affections, *cf.* Blaylock v. Strecker, 724 S.W.2d 470, 471–72,

States must abandon the traditional justifications for alienation-of-affection and criminal-conversation torts in light of *Obergefell*. Alienation of affection and criminal conversation presuppose a marriage between a man and a woman.[322] Not applying the torts to same-sex marriages would constitute a substantive-due-process or equal-protection violation.[323] Thus, courts will likely have to drop protection of "traditional" marriage and familial structures as a justification for the torts.[324]

The reaction of courts following the Married Women's Property Act offers one possible avenue for states that desire to maintain the torts;[325] courts could revise or expand the theory originally behind the torts. State courts that did not abolish alienation-of-affection or criminal-conversation torts following the enactment of the Married Women's Property Act judicially revised the tort's purposes to

476 (Ark. 1987) (entertaining an appeal of an alienation-of-affections tort where the wife had a relationship with another woman). Same-sex marriage was not an option until recently in most of the states that retain the action, and courts had only applied the torts to heterosexual marriage. *Cf.* Rushing v. Barron, No. COA11-1471, 2012 N.C. App. LEXIS 972, at *5 (N.C. Ct. App. Aug. 7, 2012) (noting, in the context of a suit by a daughter against her brother and father for conspiring to alienate the affection of her mother, that "North Carolina has never recognized alienation of affection for any relationship other than that of spouses").

322. "It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners." *Obergefell*, 135 S. Ct. at 2598; Nicolas, *supra* note 39, at 114 ("[T]he initial rationales for the torts were both to vindicate the husband's property interests in his wife's services and to compensate him for the risk of 'spurious issue' that the third party's conduct introduced . . . ." (footnote omitted)).

323. It is unclear what legal rationale the Court used to strike down bans on same-sex marriage. Whether one views Justice Kennedy's opinions on the subject as magniloquence or inspiring prose, neither *U.S. v. Windsor* nor *Obergefell* are strictly grounded in substantive-due-process or equal-protection analysis alone. *See Obergefell*, 135 S. Ct. at 2590 ("Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other."); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (holding that the Defense of Marriage Act "violates basic due process and equal protection principles applicable to the Federal Government"). Whatever the exact test, restricting the torts to opposite-sex marriages would be unconstitutional. *See* Nicolas, *supra* note 39, at 125 (making the same argument in terms of criminal adultery statutes,).

324. Same-sex marriage warrants all the same protections as opposite-sex marriage. *Obergefell*, 135 S. Ct. at 2601 ("The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle."); *see also* McMillian, *supra* note 7, at 2014 ("[Given t]his near-universal consensus that the government occupies the preeminent role in the construction and sanction of the marriage . . . then it follows that the state should be empowered to protect that which it has birthed.").

325. Notably, *Obergefell* mentions laws struck down by the Court that imposed sex-based inequalities in marriage. *Obergefell*, 135 S. Ct. at 2603–04.

include "preserving marital harmony by deterring wrongful interference with it; providing compensatory damages for humiliation, disgrace, dishonor, and mental suffering; and punishing the invasion of the exclusive right to marital intercourse."[326] In this way, the courts preserved the torts by offering gender-neutral rationales for its continued existence. This framework should make the construction of a new tort based in IIED and NIED precedent more appealing, focusing the tort on compensation for the emotional harm to the nonadulterous spouse.

B. Abandoning The Torts in Favor of Less State Involvement in Marriage

Although not constitutionally required, the few remaining states with alienation-of-affection and criminal-conversation torts could avoid any judicial retooling and simply abandon the torts wholesale. Most people I spoke to when drafting this Note did not, at first, believe these torts existed.[327] When convinced of their continued vitality, many disliked the idea of the government intruding so far into matters of personal choice. But few people blink an eye at the expansive role marital status now plays in our society. In federal law, marital status can determine whether someone receives government benefits, the relative priority of assets in bankruptcy proceedings, the amount of taxes someone pays, and even criminal liability.[328] Marital status plays an even bigger role at the state level:

> States . . . throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions;

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326. Nicolas, *supra* note 39, at 114 (footnotes omitted).

327. I drafted my Note while residing in the great state of North Carolina where state courts see the most alienation-of-affection and criminal-conversation suits in the nation. That almost all the people I encountered—including many who have chosen to pursue a career in the law—did not know of these torts provides more, albeit anecdotal, evidence that these torts are not a very good deterrent.

328. *See Windsor*, 133 S. Ct. at 2694 (2013) (discussing federal laws that involve marital status); *see also Obergefell*, 135 S. Ct. at 2601 ("Valid marriage under state law is also a significant status for over a thousand provisions of federal law.").

> workers' compensation benefits; health insurance; and child custody, support, and visitation rules.[329]

Obergefell prompted an inquiry into whether this course of action has been fruitful. The current sweeping entanglement of the State with marital choice certainly is not based on the foundations of our democracy or our Constitution.[330] "In the American legal tradition, liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement."[331] Predicating criminal liability, government entitlements, and civil penalties on marital status has consumed immeasurable government resources. Courts will likely now face even more daunting legal questions as a result of state entanglement with marital choice,[332] such as what to do when state actors stop licensing marriages altogether,[333] or what to do when state officials cite their religious rights to avoid issuing marriage licenses.[334] Although many may disagree about the relative benefits of state involvement with marital matters, alienation-of-affection and criminal-conversation torts represent at least one area in which it might be wise to rethink how much the government involves itself in private family matters.

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329. *Obergefell*, 135 S. Ct. at 2601.

330. In his dissent in *Obergefell*, Justice Thomas wrote:

> [R]eceiving governmental recognition and benefits has nothing to do with any understanding of 'liberty' that the Framers would have recognized. To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference. At the founding, such conduct was understood to predate government, not to flow from it.

Id. at 2636.

331. *Id.* at 2634.

332. *See id.* at 2625 (Roberts, C.J., dissenting) ("Today's decision, for example, creates serious questions about religious liberty.").

333. *See, e.g.*, Amy Yurkanin, *Two Counties Out of Marriage Business for Good After Supreme Court Ruling*, AL.COM (June 29, 2015, 10:52 AM), http://www.al.com/news/index.ssf/2015/06/alabama_probate_office_closes.html [http://perma.cc/8FF7-KCSU] (stating two Alabama counties stopped issuing marriage licenses altogether after *Obergefell*).

334. This situation occurred when Kentucky clerk Kim Davis, who rose to national prominence when she said her faith stopped her from issuing licenses to same-sex couples. For an in-depth discussion of legal issues surrounding these objections, see Eugene Volokh, *When Does your Religion Legally Excuse You from Doing Part of Your Job?* WASH. POST: VOLOKH CONSPIRACY (Sep. 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/when-does-your-religion-legally-excuse-you-from-doing-part-of-your-job [http://perma.cc/NWG2-EG4A].

Finally, Justice Kennedy's discombobulating blend of equal protection and substantive due process[335] in *Obergefell* may signal another evolution in constitutional law by indicating that state action which infringes on these fundamental rights of personal dignity, intimacy, and marital choice should not be left to the political process when the state's justifications hinge on essentially moral objections.[336] The arguments against adultery and same-sex marriage are strikingly similar. Many Americans believe adultery and same-sex marriage harm the institution of marriage and the traditional idea of family. Many Americans find both practices morally repugnant. Those beliefs are not the problem, but they become a problem "when that sincere, personal opposition becomes enacted law and public policy . . . [and] put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[337] Same-sex couples were denied their fundamental right to marry based on these personal moral convictions when heterosexual couples faced no impediments to exercising their rights. Unmarried adulterers similarly are denied their fundamental right to intimacy and their right to intimate association while their married counterparts are beyond the reach of the State. This comparison is not meant to demean the marital rights of same-sex couples, rather it is to suggest that *Obergefell* could stand for the proposition that, when it comes to these deeply personal rights of intimacy, marital choice, and association, the State should exit.[338] "[C]onstitutional law

335. Kennedy's lack of clarity can lead to odd results, like one Tennessee judge who cited *Obergefell* as removing authority from the states to issue divorces. Michael Miller, *Tenn. Judge Refuses to Grant Straight Couple a Divorce Because … Gay Marriage*, WASH. POST (Sep. 4, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/09/04/tenn-judge-refuses-to-grant-straight-couple-a-divorce-because-of-gay-marriage [http://perma.cc/3VXZ-P3F6].

336. *See Obergefell*, 135 S. Ct. at 2602 ("[E]ach case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right." (citations omitted)); *id.* ("[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."); *id.* at 2604 ("The imposition of this disability on gays and lesbians serves to disrespect and subordinate them."); *id.* at 2605 ("There may be an initial inclination in these cases to proceed with caution—to await further legislation, litigation, and debate. . . . [T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.").

337. *Id.* at 2602.

338. *See, e.g.*, Act of July 21, 2015, Ill. Pub. Act 099-0090, art. I (eff. Jan. 1, 2016) (abolishing, *inter alia*, alienation-of-affection and criminal-conversation actions in Illinois).

appropriately exists for those situations where representative government cannot be trusted, not those where we know it can."[339]

CONCLUSION

The constitutionality of regulating adultery through tort is complicated, to say the least. Nevertheless, a tort of marital interference could serve any compensation or deterrence goals without the same constitutional pitfalls of alienation of affection and criminal conversation. If no such tort action is created, and courts accept states' interest in compensation and deterrence, alienation of affection is likely to be maintained—but it may be similarly constrained.[340] Be that as it may, there is no legitimate reason to continue criminal-conversation actions[341] because alienation of affection is a less restrictive alternative serving the same purpose.[342] Recently, the Supreme Court reformulated the very definition of marriage.[343] It is time to conform alienation of affection and criminal conversation to the Constitution and rethink government involvement in matters of personal marital choice and intimacy.

339. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 183 (1980).

340. *See supra* Part IV.

341. As has been previously stated, the lack of the marital-knowledge requirement in criminal-conversation claims renders the tort overbroad. *See* Batchelor, *supra* note 40, at 1937 ("Despite the frequency with which actions for criminal conversation are brought, it is very likely that a third party defendant might not have any idea that the partner with whom he or she has begun a sexual relationship is married or legally separated if the partner does not disclose that fact.").

342. *See, e.g.*, Norton v. Macfarlane, 818 P.2d 8, 17 (Utah 1991) ("To the extent that the tort of criminal conversation provides a cause of action for adultery when the marriage commitment is dead, it serves no useful purpose in awarding damages. If the marriage commitment of the spouses is not dead, the tort of alienation of affections provides an adequate legal remedy.").

343. *Obergefell*, 135 S. Ct. at 2607–08.